REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA IN BUSIA

ENVIRONMENT AND LAND COURT

ELC NO. 123 OF 2013 (FORMERLY HCCC NO. 73 OF 2011)

LIVINGSTONE OMURAYI MWANDIA.....PLAINTIFF

= VERSUS =

EVARISTUS ANINDO OPONDO.....1ST DEFENDANT

LAURIAN W. OTIENO.....2ND DEFENDANT

DAVID ONYANGO.....3RD DEFENDANT

R U L I N G

1. On 24/7/2017, the Applicant **– EVARISTUS ANINDO OPONDO –** filed a motion on notice dated 20/7/2017. That is the application under consideration now and it was filed against the Respondent **– LIVINGSTONE OMURAYI MWANDIA**. Various post – judgement orders are sought. The Applicant was the Defendant in the suit herein which was tried and concluded in favour of the Respondent, who was Plaintiff. The Applicant felt aggrieved by the outcome and decided to appeal. The Orders sought in this application are meant to preserve the status quo obtaining before judgement.

2. The application is brought under Section 3A of Civil Procedure Act (cap 21), Order 42 Rule 6, order 40 Rules 1, 2, 3, 4 and 8 of Civil Procedure Rules and all other enabling law. The court first entertained the application exparte and granted prayer 2, which sought a stay of execution to run until hearing and determination of the application. The application has seven (7) prayers in all but most of them – particularly prayers 1, 2, 4, 5 and 6 – were meant for consideration at the exparte stage. The prayers for consideration now are 3 and 7, which were formulated thus:

> Prayer 3: That the honourable court be pleased to grant a stay of execution of the decree herein pending the hearing and determination of the intended appeal.
>
> Prayer 7: That the costs of this application be provided for.

3. In support of the application, the Applicant posited that the intended appeal has good chances of success; that he is willing to furnish security; that the Respondent has already destroyed the existing fence despite the fact that no decree has yet been extracted and that by doing so, the Respondent is taking the law into his hands and he may occasion great damage. According to the Applicant the Respondent has also cut mature trees and destroyed crops on the land. The Applicant's position is that the Respondent will suffer no prejudice if the application is allowed.

4. The respondent responded to the application vide grounds of opposition filed on 2/10/2017. To the Respondent, the application is an abuse of the court process. It seeks, said he, to reinstate the status quo to the pre-judgement period which, to him, is impossible as that status has already changed. The Respondent opined that as judgement is already delivered, the Applicant has ceased to be the registered owner of the disputed portion of land and is now a stranger. The orders sought are said to be in vain and would be in violation of the rights of the registered owner.

5. The application was canvassed by way of written submissions. The Applicant's submissions were filed on 1/12/2017. According to the Applicant, the averment by the Respondent that it is not possible to maintain status quo as it was before judgment is untenable in law. The argument also that the application is overtaken by events is also said to be "pure brinkmanship". The court was asked to allow the application.

6. The Respondents submissions were filed on 7/12/2017. It was submitted, *interalia*, that "courts find it desirable to first consider the nature of the order intended to be stayed and whether the decree has been satisfied" before considering whether the Applicant has an arguable

appeal and/or if the appeal will be rendered nugatory if it ultimately succeeds. In this case, the Applicant is faulted for not demonstrating the worthiness of the orders being sought in light of the principles applicable in an application for stay.

7. Further, the Respondent submitted that there is nothing to stay. And this is so because the Respondent is said to have moved to the disputed portion of the land and taken possession. The court was asked to dismiss the application.

8. I have considered the application, the response made and the rival submissions. I expected the Applicant to address the court on the law applicable and thereafter demonstrate the suitability of his application in light of that law. If one looks at Order 42 Rule 6(2) (a) and (b) of Civil Procedure Rules, an Applicant should satisfy the court that he stands to suffer substantial loss and the application itself should be made without unreasonable delay. In addition, the Applicant should be able to offer security for satisfaction of the decree in case he loses the appeal. Further, the Applicant has to show that he has an arguable appeal which, if successful, might be rendered nugatory if the order of stay is not granted.

9. In this matter, the subject matter is a portion of land. The Respondent is said to have already taken possession when judgement was issued in his favour. To my mind, the Applicant can still re-possess and own the portion if he succeeds in his appeal. And if one consider the issue of substantial loss, I seem to understand that the photographs availed by the Applicant were meant to show such loss. But the photographs show something that has already taken place, not something that is likely to occur. A reading of Order 42 Rule 6 (2) (a) of Civil Procedure Rules shows that what is envisaged is not loss that has already occurred but substantial loss that "may result to the Applicant unless the order is made …"

10. More fundamentally, the Applicant has to show that the intended appeal is arguable. Where an application for stay is made before the court to which the appeal is already preferred, this is not much of a problem because the record of appeal is already with that court. But where, as in this case, the only record available is a mere notice expressing intention to appeal, the Applicants is under a more serious or heavier duty to demonstrate to the court, even if only in passing, the nature of the intended appeal. And this becomes all the more necessary because the court that issued the judgement still carries the convictions of the correctness of its judgment. It behoves the Applicant to know that such court has the disadvantage of not having the record of appeal.

11. The Applicant never addressed the court on this issue. As things stand, the court does not know whether the Applicant has an arguable appeal. And even if that had been shown, the Applicant still had another duty to show that his appeal would be rendered nugatory if the order of stay is not granted. Again there was no word at all from the Applicant on this.

12. From all the foregoing, it is apparent that the Applicant was rather casual in the manner he handled his application. He fell short of demonstrating compliance with the requirements necessary for an order of stay to be granted. I therefore find the application herein unmeritorious and dismiss it with costs.

Dated, signed and delivered at Busia this 25th day of September, 2018.

A. K. KANIARU

JUDGE

<u>In the Presence of</u>:

Plaintiff: ……..……..……..……..…..……

1st Defendant: ……..……...……..……..……...

2nd Defendant: ……..……...……..……..……..

3rd Defendant: ……..……...……..……..……..

Counsel of Plaintiff: ……..……...……..……

Counsel of Defendants: ……..……..……..…..……