



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT KISII**

**CASE NO. 100 OF 2011 (OS)**

**DAMON ODERO OCHIENG .....1<sup>ST</sup> PLAINTIFF**

**DANIEL ODHIAMBO OCHIENG .....2<sup>ND</sup> PLAINTIFF**

**LEONORA OPUDO OCHIENG ..... 3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**ALEX ODERO KASONGO ..... 1<sup>ST</sup> DEFENDANT**

**AGNES W. WAGANDA ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The court upon hearing the parties on their evidence delivered judgment in the suit on 27<sup>th</sup> June 2016 and decree issued as follows:-

**1. That it is declared that the defendants' right to recover a portion measuring 2.1hectares of all that parcel of land known as LR No. South Sakwa/Kogelo/197 is barred under the Limitation of Actions act, Chapter 22 Laws of Kenya.**

**2. That LR No. South Sakwa/Kogelo/197 shall be subdivided by the defendants within 90 days from the date hereof and a portion thereof measuring 2.1 hectares shall be transferred and registered in the name of the 1<sup>st</sup> plaintiff.**

**3. That in the event that the defendants fail to carry out the subdivision referred to above, the plaintiffs shall be at liberty to undertake the exercise and in that regard, the Deputy Registrar of this court shall be at liberty to execute all documents as may be necessary to effect the transfer of a portion measuring 2.1 hectares of LR No. South Sakwa/Kogelo/197 to the 1<sup>st</sup> plaintiff.**

**4. That since there is no outright winner; each party shall bear its own costs of the suit.**

2. The defendants being dissatisfied with the judgment of this court has filed a Notice of Appeal dated 6<sup>th</sup> July 2016 signifying their intention to appeal to the Court of Appeal against the decision. Following the filing of the said Notice of Appeal the defendants have filed a Notice of Motion dated 11<sup>th</sup> July 2016, the subject of this ruling. The application is made under Order 22 Rule 22, and Order 42 Rule 6, and Order 51 Rule 1 of the Civil Procedure Rules [2010]. Interalia the application seeks the following orders:-

**1. That pending the hearing and determination of this application inter partes, the court does grant the defendants/applicants an order of stay of execution of the judgment in the High Court of Kenya at Kisii in Civil Case No. 100 of 2011 (OS).**

**2. That the judgment dated 27<sup>th</sup> June 2016 be stayed pending hearing and determination of the intended appeal.**

**3. That the costs of this application be provided for.**

3. The defendants/applicants have set out the following grounds on the face of the application, in support of the application which grounds Alex Odera Kazongo the 1<sup>st</sup> defendant reiterate in the affidavit he has sworn in support of the application.

**1. That the defendants/applicants have an arguable appeal with a high probability of success.**

**2. That if the said stay of execution is not granted, the defendants/ applicants appeal will be rendered nugatory and hence it will cause them irreparable harm.**

**3. That unless this application is granted, the plaintiffs/respondents will proceed and execute the judgment to the detriment of the defendants/applicants.**

**4. That this application has been made without unreasonable and/or undue delay.**

**5. It is in the broader interest of justice and of all parties, the judgment dated 27<sup>th</sup> June 2016 be stayed.**

4. The plaintiffs/respondents filed a statement of grounds of opposition dated 21<sup>st</sup> July 2016 in opposition to the defendants' application. Interalia the plaintiffs state that the judgment and decree is incapable of being stayed as the court rendered a split decision. Further the plaintiffs state a stay order would confer undue advantage on the defendants which they could use to dispose the suit property with a view of defeating or circumventing the realization of the decree. The plaintiffs further contend the defendants have not satisfied the conditions under which an order of stay may be granted under Order 42 Rule 5 of the Civil Procedure Rules, 2010.

5. The application was argued by the parties by way of written submissions. The defendants/applicants submissions were filed on 2<sup>nd</sup> August 2016 while the plaintiffs' response submissions were filed on 13<sup>th</sup> September 2016. I have reviewed and considered the application and the statement of grounds of opposition and the parties filed submissions and on the whole the issue for determination by the court is whether the defendants/applicants have satisfied the conditions and/or criteria for grant of stay under the provisions of Order 42 Rule 6 to warrant the order of stay of execution that they seek.

6. Under 42 Rule 6 (1) the court from which an appeal is preferred **“may for sufficient cause order stay of execution of such decree or order.”** The power to order stay of execution is thus discretionary save that such discretion has to be exercised judiciously having regard to the criteria set out under Order 42 Rule 6 (2) which sets out the circumstances under which an order of stay of execution may be granted. Order 42 Rule 6 (2) provides thus:-

**(2) No order of stay of execution shall be made under subrule (1) unless-**

**(a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and**

**(b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.**

7. In the instant application by the applicants the court has to ask itself whether substantial loss may result to the applicants unless stay of execution is ordered and further satisfy itself that the application has been made without unreasonable delay. The court should also consider whether any security ought to be furnished if it determines an order of stay is merited. To determine whether substantial loss may result it is necessary to consider the effect and implications of the decree in case the same is executed. The evidence as per the record shows the defendants are the registered owners of the suit property **South Sakwa/Kogelo/197** which as per the decree the court ordered to be subdivided by the defendants and a portion measuring 2.1 hectares to be transferred and registered in the name of the 1<sup>st</sup> plaintiff. If the decree is executed, it will entail the defendants surrendering the title to effect the subdivision and transfer of the portion to the 1<sup>st</sup> plaintiff. Once the transfer of the portion is effected the 1<sup>st</sup> plaintiff would be free to deal with the portion in any manner he deemed fit. He could for instance charge the land once he gets the title, he could dispose the same and/or transfer it to third parties. If the execution takes place and the 1<sup>st</sup> plaintiff has done any of the actions mentioned above, the land would not be available to be restituted to the defendants if they were to be successful in their appeal. Their appeal would as it were be rendered nugatory.

8. It is my view therefore, that there is a likelihood of substantial loss resulting on the part of the defendants/applicants unless an order of stay of execution is granted. What I think should happen now that the 1<sup>st</sup> plaintiff has obtained a legitimate decree from a competent court, and in regard to which the defendants have preferred an appeal, as they are entitled to do, is for the court to see to it that the property is preserved until a decision on the appeal is rendered so that if the defendants are successful in the appeal the property will be intact and if they are unsuccessful, the 1<sup>st</sup> plaintiff will be able to reap the fruits of his decree through execution. Thus the defendants even though they are now the registered proprietors of the suit land, unless they are successful in their appeal their position presently is akin to that of a trustee in regard to the portion of 2.1 hectares ordered to be transferred to the plaintiff and therefore they ought not to deal with the property in any manner that may prejudice the plaintiffs interest. They for instance cannot charge or dispose or transfer the property to a third party. The court in the premises must strike a balance and in so doing ensure both the plaintiffs interests in the property are safeguarded pending the finalization of the litigation.

9. Consequently, as I have held that substantial loss may result to the applicants and I am also satisfied the instant application was brought without unreasonable delay noting that judgment was delivered on 27<sup>th</sup> June 2016 and the application filed on 12<sup>th</sup> July 2016, I am constrained to allow the defendants application and to grant an order of stay of execution on the terms that pending the hearing and determination of the intended appeal an inhibition under the provisions of Section 68 of the Land Registration Act, 2012 will be registered against land parcel **South Sakwa/ Kogelo/197** restraining the registration of any dealing with the land until the appeal is heard and determined or further order of the court. The costs of this application will abide the outcome of the intended appeal.

10. Orders accordingly.

**Ruling dated, signed and delivered at Kisii this 11<sup>th</sup> day of November, 2016.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

Mr. Mamboga for Oguttu for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs

Mr. S. M Onyango for the 1<sup>st</sup> and 2<sup>nd</sup> defendants

Mr. Ngare Court Assistant

**J. M. MUTUNGI**

**JUDGE**