



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: OKWENGU, KIAGE & SICHALE, J.J.A.)

CIVIL APPEAL (APPLICATION) NO. 205 OF 2019

BETWEEN

LUKAS ORENDE OPAILE.....APPELLANT/APPLICANT

AND

PENINA LYNET OLUMATIA.....1STRESPONDENT

PROTUS OMBAKA SHITUBI.....2ND RESPONDENT

(Application for stay of execution pending the hearing and determination of the

appeal from the ruling and orders of the Environment and Land Court

at Kakamega (N.A.Matheka, J.) dated 26th June 2019

in

ELC NO. 477 OF 2014)

RULING OF THE COURT

By the motion dated 2nd February, 2021 brought under **Rule 5(2)(b)** of this **Court's Rules**, the applicant **Lucas Orende Opaile** seeks an order of stay of execution of the ruling issued against him by the Environment and Land Court at Kakamega pending the hearing and determination of his appeal against the same. By that decision the court declined to set aside its orders made following an *ex parte* hearing held on 15th October 2018.

The application is founded on grounds that; the applicant has an arguable appeal with good prospects of success for reasons that the learned judge erred in law by applying principles of review under **Order 45** when the application before court was majorly under **Order 12 rule 7** seeking to set aside *ex parte* proceedings; the appeal will be rendered nugatory if stay is not granted for reasons that the respondent has sought services of the County Survey Office, Kakamega, to subdivide the suit property and obtain fresh titles in her name with the possibility of selling the property to unsuspecting third parties.

In an affidavit sworn on 2nd February 2021 in support of the Motion, the applicant deposes that hearing in **Kakamega ELC No. 477 of 2014** was set for 15th October 2018 upon consent of Counsel for parties. However, on the said date of the hearing, the applicant and his counsel were absent and the matter proceeded *ex-parte*. The trial court thereafter reserved 13th November 2018 as the date for mention for submissions and directed counsel for the plaintiff to serve the applicant.

The applicant further avers that on 13th November 2018, the day reserved for mention for submissions, counsel for the applicant at the time, **Charles Kweyu**, informed the court that there was a pending application before it dated 10th November 2018 for setting aside the *ex-parte* proceedings. The court directed the applicant's advocate to take a date at the registry for hearing of the application and serve. However, the applicant's counsel died on the following day, 14th November 2018, before taking a date for the application to set aside *ex-parte* proceedings. The trial court on its part proceeded to render judgment in the matter on 26th February 2019. The application for setting aside *ex parte* proceedings was later canvassed by way of written submissions with the court dismissing the application on 26th June 2019.

The 1st respondent opposed the application through submissions dated 25th February 2021 and drawn by **Elizabeth Chungo & Co. Advocates**. Noteworthy is that there is no replying affidavit on record from the 1st respondent. Counsel contends that this application lacks merit, is frivolous and a waste of the Court's time. Counsel further submits that before the institution of **Kakamega ELC No. 477 of 2014**, and during its subsistence, the 1st respondent was in possession and use of the suit property with the consent of the applicant and the 2nd respondent. Counsel therefore urges the Court to dismiss the application with costs.

We have given due consideration to the application, the applicant's affidavit, the contending submissions and the law. It is common ground that a stay of execution lies at the discretion of the Court, to be exercised on a case by case basis, with a view to attaining the ends of justice. The discretion is exercised judiciously and judicially on sound principles, not arbitrarily or whimsically. The principles that govern the matter are notorious: the applicant must satisfy the Court both that he has an arguable appeal, which means one that raises a *bona fide* point worthy of consideration, though it need not necessarily succeed; and that if the stay is not granted the appeal would be rendered nugatory, which is another way of saying useless or of no effect, due to harm having been suffered in the intervening period.

Having looked at the memorandum of appeal and the nine grounds contained therein, we have no difficulty finding that the appeal is an arguable one. To pick but one point, the argument that the learned Judge misdirected herself as to the principles applicable in setting aside *ex parte* proceedings is certainly a matter to be explored on appeal, whether or not it will succeed.

On whether the appeal would be rendered nugatory, we note the applicant's contention, as evinced by the letter dated 23rd December 2020 from **Geoffrey Edasi** (for County Surveyor, Kakamega) that the 1st respondent has sought the services of that office to implement the impugned court order against L.R No. EAST WANGA/ISONGO/3812 & 3813, the subject of the appeal.

We are persuaded that taking all the circumstances of this case into consideration, it would be in the interests of justice that orders do issue to preserve the subject matter and that the *status quo ante* the impugned ruling be preserved pending the hearing and determination of the appeal. The application is accordingly allowed. We direct that the appeal be processed and fast-tracked for hearing on priority.

The costs shall abide the outcome of the appeal.

Dated and delivered at Nairobi this 19th day of March, 2021.

HANNAH OKWENGU

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR