



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: OKWENGU, WARSAME & J. MOHAMMED J.J.A)**

**CIVIL APPLICATION NO. 153 OF 2020**

**BETWEEN**

**PROTUS ODUOR MALALA.....APPLICANT**

**AND**

**WANYANGU LIVINGSTONE ONJALA.....RESPONDENT**

(An application for stay of execution of the Judgment and Decree of the

Environment and Land Court at Kakamega (**N. A. Matheka, J.**)

delivered on 25th November, 2020

*in*

***ELC Appeal Cause No. 10 of 2020***

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**RULING OF THE COURT**

1. The applicant has moved this Court under Rule 5(2)(b) of the Court Rules for orders of stay of execution of the Judgment and Decree in Kakamega Environment and Land Court (ELC) (**N. Matheka J**), in Appeal Cause No. 10 of 2020 made on 25th November, 2020, pending the hearing and determination of an intended appeal to this Court against the Judgment.
2. In the judgment subject of the intended appeal, the learned Judge (**N. Matheka J**), dismissed a first appeal that had been filed by the applicant herein, seeking to set aside the judgment of the Senior Principal Magistrate's court at Mumias, in which the magistrate's court allowed the respondent's action and issued orders of permanent injunction restraining the applicant from trespassing onto land parcel No. N/Wanga/Namamali/665. The learned Judge found that there was an inadvertent mistake which she corrected in the number of the land parcel as the dispute concerned LR. No. N/Wanga/Namamali/1598(suit property), which is a subdivision of LR. No. Wanga/Namamali/665.
3. The applicant is aggrieved by the judgment of the ELC, hence his appeal before us. He contends that he has established his home on the suit property, from which he stands to be evicted if the orders upheld by the ELC stay in place. The applicant maintains that his intended appeal which raises arguable issues, will be rendered nugatory if an order of stay of execution is not granted, and that he will also suffer substantial harm as he has extensively developed the suit property
4. The respondent did not file any reply to the applicant's motion nor did he file any written submissions. The applicant filed their written submissions on 13th January, 2021.
5. The matter was listed for hearing on 26th January 2021, through the GoToMeeting virtual platform, but none of the parties joined the virtual platform, even though a hearing notice was effected on the advocates for the parties on the 11th January 2021, and a link forwarded to them. A letter was received from the applicant's advocate opting not to attend the virtual hearing and urging the Court to determine the matter on the basis of the submissions that they had filed.
6. The applicant has annexed a notice of appeal dated 4th December, 2020 as well a draft memorandum of appeal, indicating that it intends to raise two main grounds. That is, that the learned Judge failed as a first appellate court to evaluate afresh the evidence that was adduced in the trial court, and secondly, that the learned judge failed to determine an issue raised, that is whether a refund of Kshs. 100,000 was in respect to

sale of the suit property or succession proceedings in the estate of the late Okumu Wambundo Watsabina.

7. In his submissions, the applicant urges the Court to exercise its discretion in his favour, as the intended appeal is arguable and the intended appeal will also be rendered nugatory, if the stay is not granted, as the respondent holds a decree calling for his eviction

8. This being an application for stay of proceedings, the applicant has to satisfy the twin requirements of Rule 5(2)(b) of the Court of Appeal Rules. As restated in **Stanley Kangethe Kinyanjui vs Tony Ketter & 5 others** [2013] eKLR, the requirements are that the applicants have an arguable appeal, and that the intended appeal if successful, would be rendered nugatory if the order of stay that is sought is not granted.

9. Before we consider the merit of the motion, it is necessary to determine whether the court can grant the orders sought by the applicant. Rule 5(2)(b) of this Court's Rules, gives this Court discretionary powers where an appeal has been lodged, to **"order a stay of execution, an injunction or a stay of any further proceedings, on such terms as it may think just"**. In the instant case, the learned Judge dismissed the applicant's appeal with no orders as to costs. This means that the decision of the learned Judge was not a positive order capable of execution.

10. In the case of **Devani and 4 Others v Joseph Ngindari (Civil Application No. NAI 136 of 2004 (unreported))** which was cited in **George Ole Sangui & 12 Others v Kedong Ranch Limited** [2015] eKLR, an application was made under Rule 5(2)(b) of the Rules for interim stay of execution of a High Court order/decreed which had dismissed judicial review proceedings under Order 53 of the Civil Procedure Rules. This Court dismissing the application for interim stay of execution stated in that decision as follows:

*"By dismissing the judicial review application, the superior court did not thereby grant any positive order in favour of the respondents which is capable of execution. If the order sought is granted, it will have the indirect effect of reviving the dismissed application. This Court cannot undo at this stage what the superior court has done.*

*It can only do so after hearing the appeal. It seems to us that the application for stay of execution of the dismissal order was not brought in error. It was designed to achieve that result which regrettably is impracticable."*

11. In his motion, the substantive order sought by the applicant was as follows: **"that pending the determination of the intended appeal this honourable court be pleased to stay the execution of the judgment and/or decree by Kakamega ELC Appeal Cause No. 10 of 2020"**.

12. The ELC not having made any positive order, it is evident that there was no decree capable of execution, and thus there is nothing for this Court to stay. We echo what was stated by this Court in **Western College of Arts and Applied Sciences Vs Oranga & Others [1976] KLR 63**:

*"But what is there to be executed under the judgment, the subject of the intended appeal the High Court has merely dismissed the suit with costs. An execution can only be in respect of costs....."*

*The High Court has not ordered any of the parties to do anything or to refrain from doing anything or to pay any sum. There is nothing arising out of the High Court Judgment for this court in an application for stay to enforce or restrain by injunction."*

13. In effect, what the applicant is seeking is to stay the execution of the decree of the trial court that will take effect as a result of the dismissal of his appeal by the ELC. Nevertheless, that cannot be achieved through the orders sought by the applicant but can only be achieved by an order restraining the respondent from evicting the applicant from the suit property, which order the applicant has not sought/prayed.

14. We come to the conclusion that the applicant's motion is incompetent as without any positive orders, there is nothing to be stayed. The prayers sought even if granted would be no more than hot air, and a court of law cannot grant orders in vain. The motion is accordingly dismissed. As the respondent did not file any reply or attend Court, we make no orders as to costs.

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

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**M. WARSAME**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**