



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: KOOME, MUSINGA & GATEMBU, J.J.A)

CIVIL APPLICATION NO. 157 OF 2020

BETWEEN

THOMAS MUTERE KUSIENYA.....APPLICANT

AND

JAMIN JUMA WEKESA.....1ST RESPONDENT

PATRICK MANYANDIO WEKESA.....2ND RESPONDENT

KEPHER KHAMALA WEKESA.....3RD RESPONDENT

CHARLES WECHENJE.....4TH RESPONDENT

FREDRICK MULONNGO WEKESA.....5TH RESPONDENT

FREDRICK KENYATTA WEKESA.....6TH RESPONDENT

GEOFREY KHISA WEKESA.....7TH RESPONDENT

PHANICE OMULEYL.....8TH RESPONDENT

JUDITH MWACHI.....9TH RESPONDENT

CLEOPHAS MATEKWA.....10TH RESPONDENT

JUMA WALUBENGO.....11TH RESPONDENT

AGGREY ICHITWA.....12TH RESPONDENT

FRANCIS WEKESA.....13TH RESPONDENT

(An application for stay of execution pending the hearing and determination of an appeal from the judgment and decree of the Environment and Land Court of Kenya at Kakamega (N. A. Matheka, J.) dated 26th September, 2018

in

Kakamega ELC Case No. 65 of 2013)

RULING OF THE COURT

[1] The instant Notice of Motion, dated 29th June, 2020 is taken out by **Thomas Mutere Kusienya** (the applicant). He is seeking an order of stay of execution of the judgment delivered on 28th September, 2018 in Kakamega ELC No 65 of 2013 (N. A. Matheka J.,) In the said suit the applicant had sought in the main, an order declaring him the rightful owner of three parcels of land being **LR No Kakamega/Lugari/2079, 2076 and 2361** (suit land) which are adjacent to his own land and which he claimed to have used peacefully until February, 2013 when the respondents forcefully invaded the suit land and interfered with his right to occupation.

[2] In a kind of a preliminary objection, the respondents opposed the suit highlighting that the matter was either *sub-judice* or *res-judicata*, having been determined in:-

1. **Kakamega Misc. Award No 106 of 2000**
2. **Kakamega HCCCA No 145 of 2003**
3. **Lugari Land Dispute Tribunal No 9 of 2000.**

[3] Upon considering the matter this what the learned Judge ruled in a pertinent paragraph of the judgment:-

“On perusal of the files in the above cases I find that land parcel Kakamega/Lugari/2019 were subdivisions of land parcel Kakamega/ Lugari/101 which were the suit properties in the initial battle between the fathers of the present-day parties hereby Wekesa Sinoino Alfunzi and Marko Kusienya Sinino. The award in Lungari Land Disputes Tribunal which was adopted by the court in Misc. Award No. 106 of 2000 giving the 1st defendant’s father 63 out of 80 acres that formed part of the original land parcel Kakamega/Lugari/101. The application in that matter is coming up on the 19th September, 2018. Kakamega HCCA No. 145 of 2003 the appeal allowed the appellants/defendants herein to pursue their application in the in the Misc. Application case in the judgement dated 18th April, 2013. The plaintiff in this case confirmed that he was the administrator of the estate of one Mark Kusienya Sinino who was his father and the respondent in Kakamega HCCA No 145 of 2003 (having carried out succession vide Kakamega High Court Succession Cause No 553 of 2009).

The plaintiff then files this case on the 26th February 2013 knowing very well of the existence of the other cases namely Kakamega Misc. Award No 106 of 2000, Kakamega HCCC No 145 of 2003 and Lugari Land Dispute Tribunal No 9 of 2000, touching on the same subject matter and the same parties. For those reasons this case is res-judicata (sic) it cannot go into the merits of this case. I therefore strike out this case with costs to the defendants.”

[4] By his affidavit in support of the motion, the applicant emphasised that he is aggrieved by the aforesaid judgment and lodged an appeal on 18th December, 2018. Pending the hearing and determination of the appeal, he is apprehensive that unless an order of stay of execution is issued to preserve the suit land, the appeal will be rendered nugatory and he will suffer irreparable loss and that unless the order of stay is granted the appeal which is otherwise arguable and deserving to be heard on merit will be overtaken by events and rendered nugatory. On the other hand, he argued that the respondents will not suffer any prejudice if the orders are granted.

[5] We have deliberated on this application which was heard virtually vide ‘GO TO MEETING’ Platform pursuant to the Court of Appeal Practice Direction to mitigate the spread of COVID - 19 Pandemic. We have not seen any replying affidavit by the respondents. Notwithstanding the application is not opposed, that does not lessen the burden placed on this Court by the imperatives of the provisions of **Rule 5 (2) (b)** of this Court Rules. That is, for the application to succeed, the applicant must establish that; the appeal is arguable and not frivolous and that if the stay order sought is not granted the appeal will be rendered nugatory. See the case of **Ismael Kagunji Thande vs. Housing Finance Kenya Ltd Civil Application No. Nai. 157 of 2006** (unreported). The principles to bring to bear on whether or not to grant an order of stay of execution were set out thus:

“The jurisdiction of the Court under Rule 5 (2) (b) is not only original but also discretionary. Two principles guide the court in exercise of that jurisdiction. These principles are well settled. For an applicant to succeed, he must not only show that his appeal or intended appeal is arguable but also that unless the Court grants him an injunction or stay as the case may be, the success of that appeal will be rendered nugatory. (See also Githunguri vs. Jimba Credit Corporation Ltd. No. 2 [198] KLR 838.)”

[6] That said, the only order issued by the learned Judge was to strike the suit with costs to the respondents. In other words, this was a negative order that was not capable of execution save for the order of costs which does not seem to concern the applicant as he is concerned with the suit land. In the case of **Western College Farts And Applied Sciences vs. Oranga & Others** [1976] KLR 63 this Court whilst considering whether an order of stay can be granted in respect of a negative order stated: -

“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.”

[7] In this case we have asked ourselves the same question, what is to be stayed arising from the order where the applicant’s suit was struck out? The applicant was not ordered to do anything or refrain from doing anything. Although one may argue that the issue of whether the learned Judge was justified to strike the suit may or may not be an arguable point, the applicant has further to demonstrate how the appeal

arising from a negative order was going to be rendered nugatory.

[8] The applicant having not demonstrated how an appeal from a negative order striking out a suit will be rendered nugatory, we have come to the conclusion that the motion dated 29th June, 2020 cannot succeed and is for dismissal. We make no order as to costs since the motion was not opposed.

Dated and delivered at Nairobi this 5th day of March, 2021.

M. K. KOOME

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JUDGE OF APPEAL

D. K. MUSINGA

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb.

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR