Mokua (Suing as the legal representative and administrator of the Estate of Mokuol Olisanda) v Mokua (Environment & Land Case 181 of 2013) [2023] KEELC 214 (KLR) (25 January 2023) (Ruling)

Neutral citation: [2023] KEELC 214 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ENVIRONMENT & LAND CASE 181 OF 2013

M SILA, J

JANUARY 25, 2023

BETWEEN

PAUL NYANGARESI MOKUA ..... PLAINTIFF

SUING AS THE LEGAL REPRESENTATIVE AND ADMINISTRATOR OF THE ESTATE OF MOKUOL OLISANDA

AND

JONES MOKUA ..... DEFENDANT

RULING

1. The application before me is that dated 26 May 2022 filed by the unsuccessful plaintiff. The substantive order sought in the application is one for stay of execution of the judgment delivered on 8 October 2019 pending hearing of an appeal to the Court of Appeal. The application is opposed by the defendant who has filed Grounds of Opposition.

2. The background is that the applicant commenced this suit vide a plaint filed on 16 April 2013 through the law firm of M/s Omariba & Company Advocates. In the plaint, the applicant contended that his late father was the true owner of the land parcel Central Kitutu/Daraja Mbili/17XX, which land parcel is registered in the name of the defendant/respondent. He inter alia sought orders for the cancellation of the respondent's title and the same to revert back to the name of his late father Mokuol Olisanda (deceased). On his part, the respondent averred that in the year 1993, he entered into an agreement with the deceased, where he exchanged his land parcel Matutu Settlement Scheme/3XX with the land parcel Central Kitutu/Daraja Mbili/17XX (the suit land) and denied that he got himself fraudulently registered as the owner of the suit land. The case was heard by Mutungi J and judgment delivered on 8 October 2019. Mutungi J was not persuaded that the applicant had proved his case and held that the respondent had demonstrated that they had entered into a land exchange with the deceased. Indeed, through the exchange, the deceased transferred his interest in the land parcel Matutu Settlement

Scheme/3XX to the applicant (as his son) and the applicant became registered as proprietor of this land parcel in the year 1993. The applicant's case was therefore dismissed with costs. Subsequently, costs were taxed at Kshs 511,495/= on 9 November 2021.

3. It will be recalled that the applicant was being represented by M/s Omariba & Company Advocates. After judgment, the applicant changed counsel to M/s Bruce Odeny & Company Advocates through a consent dated 26 May 2022. This application is thus filed through M/s Bruce Odeny & Company Advocates. The supporting affidavit is sworn by the applicant himself. He has deposed that he is aware that judgment was delivered on 8 October 2019. He has stated that being aggrieved, he preferred an appeal to the Court of Appeal, and he has annexed a copy of the Notice of Appeal. That Notice of Appeal, dated 26 May 2022, is filed by M/s Bruce Odeny & Company Advocates, and was lodged on 2 June 2022, which is close to three years after judgment. The applicant has further deposed that he believes he has an arguable appeal and has annexed a draft Memorandum of Appeal. He has continued to depose that the respondent has commenced execution for costs and he risks being arrested and committed to civil jail. He is apprehensive that if the respondent proceeds with execution he will suffer irreparable loss as his right to liberty will be affected. He is also afraid that if he pays the taxed costs he may not be able to recover the same after the appeal.

4. In the Grounds of Opposition, the respondent has inter alia averred that the judgment resulted in a negative decree as the applicant's suit was dismissed and therefore the judgment is incapable of being stayed. It is added that the applicant cannot contend that he will suffer substantial or irreparable loss by paying costs. It is urged that the application is an attempt to delay, obstruct, or defeat the payment of costs. The respondent also urges that the applicant has not met the test for stay pending appeal as outlined in Order 42 Rule 6 of the *Civil Procedure Rules*, 2010. It is stated that the judgment was rendered on 8 October 2019 and the application has been made after 2 years and 7 months which is not explained. It is also stated that so far no appeal has been filed.

5. I have considered all the above. This is an application for stay pending appeal and the operative law is found in Order 42 Rule 6 (2) which provides as follows:-

> (2) No order for stay of execution shall be made under subrule (1) unless—
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> (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
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> (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.
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> I think it is also worthy to set out sub-rule 4 which provides that :-
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> (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

6. It is generally the position that when one formally applies for an order of stay pending appeal, he will need to demonstrate that he has complied with sub-rule 4, that is, that he has at least filed a notice of appeal, if not the memorandum of appeal itself, and it is here that I opt to start.

7. The judgment herein was delivered on 8 October 2019. In his application, the applicant has annexed a notice of appeal lodged on 2 June 2022, which I have already observed is close to 3 years after the judgment. This notice of appeal cannot be considered to be a valid notice of appeal, given the provisions of Rule 75 (2) of the *Court of Appeal Rules*, which require a notice of appeal to be filed within 14 days of the judgment. My perusal of the file has revealed another notice of appeal filed on 22 October 2019, which would be one filed within time, but the said notice of appeal is filed by M/s Ochoki &

Company Advocates, which firm was never on record for the plaintiff and I wonder how such notice of appeal ever found its way into the court file as it was filed by a law firm not on record. I cannot regard this notice filed on 22 October 2019 as a valid notice of appeal as it was filed by a stranger to the proceedings. Thus, as matters stand, there is no valid notice of appeal upon which an application for stay pending appeal can be anchored. Apart from the foregoing, so far, no appeal has been filed despite a certificate of delay being issued on 22 November 2020. That certificate of delay affirms that copies of typed proceedings and the judgment were ready for collection on 2 October 2020. It is more than two years since the proceedings were ready and there has not been any effort made to file the appeal. Pursuant to Rule 82 of the *Court of Appeal Rules*, an appeal is to be filed within 60 days of the lodging of a valid notice of appeal. There is not only no valid notice of appeal, but also no appeal lodged despite the lapse of considerable time. I do not see how, in those circumstances, the applicant herein can seek to apply for a stay of execution pending appeal, for there is no appeal lodged, either formally through the filing of a memorandum of appeal or through the application of Order 42 Rule 6 (4). In essence, there is no foundation upon which an application for stay pending appeal can be based. Giving an order of stay pending appeal in such circumstances would be giving such order in a vacuum. By this alone, the application herein cannot stand and must be dismissed.

8. But even the foregoing aside, I am not satisfied that the applicant has met the test laid out in Order 42 Rule 6 (2). A reading of the said rule reveals that one needs to demonstrate that :-

   i. The application has been made without unreasonable delay.

   ii. The applicant stands to suffer substantial loss unless the order of stay is made.

   iii. There is provision of security for the due performance of the decree.

9. On delay, I observe that this application was filed on 2 June 2022 despite judgment having been delivered on 8 October 2019. This is more than 2 years later. The costs were taxed on 9 November 2021 which is more than 6 months to the filing of this application. I have perused the supporting affidavit and nowhere is this delay explained. It is my view that the application has been made after unreasonable delay and for that reason the application must fail.

10. I am also not persuaded that the applicant has demonstrated that he stands to suffer any substantial loss if the order of stay is not granted. In the judgment, there was no substantive order given to the respondent that can be stayed since all that the court did was to dismiss the applicant's case. The applicant can however argue that what he seeks to stay is execution of costs. A court can give stay of execution of costs pending appeal but I am not convinced that this is a fit case for the award of such order. If the applicant had demonstrated that he has lodged a valid notice of appeal and/or filed the substantive appeal, and had shown that the application has been filed without unreasonable delay, I could have considered whether to order deposit of the taxed costs in a joint interest earning account pending hearing of the appeal. But given that there is no appeal that can be heard, and this application has clearly been made after unreasonable delay, it would be superfluous to make such order. My impression of this application is that it is only aimed at frustrating the successful respondent from being paid costs.

11. From the foregoing, it will be seen that I do not find merit in this application and it is hereby dismissed with costs.

12. Orders accordingly.

DATED AND DELIVERED AT KISII THIS 25 DAY OF JANUARY 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII