



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT BUSIA**

**CIVIL CASE NO. 117 OF 2016**

**NICHOLAS OYIOLO BALERA**

**JOSEPH BALERA WANYAMA .....PLAINTIFFS/APPLICANTS**

**- VERSUS -**

**ROMANS BULUMA OBINGO (Defending as Legal Representative of**

**JOSEPH BULUMA).....DEFENDANT/RESPONDENT**

**RULING**

1. The plaintiffs moved the court vide their application dated 1<sup>st</sup> July 2020 brought under the provisions of Order 22 rule 25 of the Civil Procedure Rules under CAP 21 seeking for orders:

**1. Spent**

**2. Spent**

**3. That this court be pleased to stay execution of its judgement pending hearing and determination of the appeal before Court of Appeal.**

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

2. The application was based on the grounds;

a. That the Applicants being dissatisfied with the award of 2 acres to the Respondent rendered by this Honourable Court filed an appeal in the Court of Appeal, Civil Appeal No. 67 of 2020.

b. That since the inception of the judgment, the Respondent has commenced erection of structures on the land he previously did not occupy.

c. That the Applicants stand to suffer great loss and prejudice if stay of execution is not granted as orders from the appeal will be rendered nugatory should the court find otherwise.

3. The 1<sup>st</sup> Applicant swore two affidavits on 1/7/2020 and 29/7/2020 respectively in support of the motion. He deposed that they have filed an appeal before the Court of Appeal against the decision of this Court delivered on 30/1/2020. That the family of the defendant emboldened by the judgment has started erecting structures on land portion he previously did not occupy hence the need for orders of stay of execution to maintain the status quo pending appeal. In the further affidavit the 1<sup>st</sup> Applicant deposed that the Respondents' brother never had a house on the suit land before. That it is true there are well established boundaries between the land occupied by the Respondent and the one the Applicants are claiming.

4. The Defendant/Respondent opposed the application vide his replying affidavit sworn on 16/7/2020 and filed on the 20<sup>th</sup> July 2020. The Respondent denied erecting any structures on land that his family did not occupy before and that he does not intend to change anything. That the plaintiffs never disputed the issue of 2 acres awarded out of the suit land Bunyala/Bulemia/2577 until when judgment was rendered. That he has never been served with the memo of appeal filed in March 2020 up to now. That there are well established boundaries separating the portion of land occupied by either side hence no need to issue the orders of stay as prayed.

5. The parties filed their rival submissions in arguing the application. The principles to be considered whether or not to grant an order of stay of execution is laid out under Order 42 rule 6(2) of the Civil Procedure Rules. The Applicants submit that they have met all the conditions set thereunder i.e. that:

i. They have an arguable appeal.

ii. The application was filed within reasonable time.

iii. The applicants will suffer substantial loss unless the orders are given.

iv. The applicants are willing to furnish security for due performance of the decree.

6. The application was indeed filed within reasonable time. On the aspect whether or not there is an arguable appeal, this court's power is limited to being satisfied that there is an appeal filed and nothing more. The number of the appeal made to the Court of appeal is already given. The remaining question is whether or not the applicants have demonstrated that they will suffer substantial loss unless the orders are granted. The Applicants submit that the Respondent has embarked on a beehive of activities on the suit property including erection of structures on the land portion they previously did not occupy in the name of executing the judgment. That this will render the appeal nugatory if successful.

7. The Respondent has denied undertaking any activities on the portion they previously did not occupy. He deposed that there is well established boundaries separating their portion of the suit land. The 1<sup>st</sup> Applicant admitted as much in paragraph 9 and 12 of his further affidavit. The Applicants did not annex evidence to show that the defendant is undertaking any activities on a portion they previously did not occupy. The judgment appealed against had awarded the plaintiffs 2 acres of suit land which this court found he was already in occupation of. In asking the court to grant stay of execution to restrain the Respondent from using the land in his possession is tantamount to making this court to review and set aside its judgment through an application of stay.

8. The Applicants have not demonstrated how the user of the disputed two acres which they also admit is occupied by the Respondent will cause them substantial loss taking into account that were not in possession. Having considered the pleadings filed and submissions rendered, the orders of stay which this court can grant and which is hereby granted is limited;

**a. to staying the transfer and registration of the 2 acres out of portion of L.R No. Bunyala/Bulemia/2577 into the name of the Defendant/Respondent.**

**b. Stay on costs pending hearing and determination of the appeal filed.**

**c. The application dated 1/7/2020 is allowed in those terms with costs ordered in the cause.**

**Dated, signed & delivered at BUSIA this 9<sup>th</sup> day of Dec., 2020.**

**A. OMOLLO**

**JUDGE**



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