



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ELCA 14 OF 2021

ROBERT MWISANI LUMADEDE.....1ST APPELLANT

MARGARET IKUTWA OTERA.....2ND APPELLANT

VERSUS

PHILEMON OMWENGA ARONI.....RESPONDENT

RULING

INTRODUCTION

1. This ruling is in respect to the Appellants Notice of Motion application dated 31st May, 2021. The said application is expressed to be brought under Sections 1A, 1B, 3A and 6 of the Civil Procedure Act.

2. The application is filed under Certificate of Urgency and seeks the following orders:

i. Spent

ii. THAT pending judgment on case in High Court ELC 10 of 2019 there be stay of execution of the decree issued by the subordinate court in Nakuru ELC 73 of 2019 between Philemon Omwenga Aroni (Plaintiff) Vs Robert Lumadede and Margaret Ikutwa Otera. (sic)

iii. THAT in the alternative pending the interparty (sic) hearing of this case ELC 10 OF 2019 this court issues an order of injunction under Order 42 rule 6 of the Civil Procedure Rules restraining the Plaintiff, his agents, servants or any person acting on his behalf from selling leasing, disposing off or any manner vested right over the parcel of land known as Kalenjin Enterprises Ltd (farm number 1201) plot number 908 old number 817/818 new number, 899 old number 816/817 new number to a third party.

iv. THAT an order of inhabitation (sic) be registered against the title to the parcel of land known as Kalenjin Enterprise Ltd (plot number 1201) 817/816 on support of the original map of 1984/86 restraining Plaintiff servants, agent or any person acting at his behest from registering any disposition in respect of the said parcel of land that cost of this application be in the cause.

3. The application is based on the grounds on its face, which are for the most part difficult to comprehend and supported by the affidavit sworn by the 1st Appellant. The Supporting affidavit is sworn on the 31st of May, 2021.

FACTUAL BACKGROUND

4. The Respondent filed a Complaint dated 29th March, 2019 before the Chief Magistrate's Court Nakuru in CM ELC NO. 73 of 2019. The Respondent sought an order of permanent injunction against the Appellants, its servants and or agents from trespassing, preventing and/or stopping the Respondent from carrying out development or in any way interfering with the Respondent's parcels of land known as NAKURU MUNICIPALITY BLOCK 29/1479 (RONDA) and NAKURU MUNICIPALITY BLOCK 29 1478 (RONDA).

5. The trial court delivered its judgment on 21st May, 2021 which judgment was in favour of the Respondent.

6. The Appellants being aggrieved by the said judgment approached this court by way of appeal and also filed the instant application which seeks orders of stay of execution from the judgment of the subordinate court.

APPELLANT'S CONTENTION

7. The Appellant contends that this application was filed to stay execution of decree issued by the subordinate court in Nakuru ELC 73 of 2019 and in the alternative pending inter parties hearing of ELC 10 of 2019 this court issues an order of injunction restraining the Respondent from selling, leasing disposing off or in any manner vesting the rights over the suit properties.

8. It is his contention that the Learned Magistrate erred by dismissing the Appellants defence adding that if the court had carefully considered his documentary evidence, it would have found that the Respondent was not a member of the Kalenjin Enterprises Limited and that since the register is illegal, it meant that the Respondent's title was fraudulently obtained making the judgement delivered unfair.

9. The Appellant further contends that the Respondent should prove how he obtained the title deed and the authenticity of documents leading to issuance of the said title deed that is the share certificate, green card, survey receipt and the allotment sheet. He contends that his position in the farm is already known as provided for in the High Court ELC 10 of 2019 and in SPMC 1341 of 1994. He avers that the Learned Resident Magistrate while delivering his judgment failed to take into consideration the requirements provided for in the Company Law Act (sic).

10. The Appellant contends that the Learned Magistrate erred by not considering the 2nd Appellant and director as a witness and proceeded to make his judgment in disregard of both their testimonies. He deposed that they have stayed in the suit property for over 48 years to date and that the learned Magistrate disregarded the duration stayed in dismissing the Appellants case.

11. It has taken a lot of pain to summarise and make sense of the Applicant/Appellant's contention. For the most part it is unintelligible but the theme of it seems to be that he is seeking orders of stay pending Appeal.

RESPONDENT'S RESPONSE.

12. In response to the application, the Respondent filed grounds of opposition dated 20th September, 2021 wherein he raised 7 grounds as follows:

1. That the application is bad in law, misconceived, incompetent and an abuse of the court process and is hinged on air.

2. That the application and appeal itself are both dead on arrival, judgment in lower court matter having been entered on 21st May, 2021 and the Notice of Appeal filed on 9th July, 2021 (48 days later) and against statutory timelines for filing of Civil Appeals.

3. That the purported Appeal itself being dead on arrival, the Honourable Court cannot issue orders in vain and stay execution of decree pending nothing.

4. That the application is not maintainable and is unknown in law.

5. That the Appellant did not have a counter claim as against the Respondent in this matter in the lower court matter CMCC ELC 73 of 2019 and thus cannot purport to now seek orders of injunction against the Respondent.

6. The application is an afterthought choreographed to wade off costs.

7. That the application is without any basis at all and should be dismissed with costs to the Respondent.

SUBMISSIONS

13. On the 24th January, 2022, the application proceeded, in open court, by way of oral submissions.

14. The Appellant/Applicant, Mr. Lumadede appeared in person and submitted that he is seeking orders of stay of execution. He stated that he wanted this Honourable Court to give orders to the Respondent to bring all the documents in his possession adding that Kalenjii Enterprises Limited allocated land to him and the respondent.

15. He also stated that the documents he wanted brought to court were:

- a. Share Certificate.
- b. Green Card.
- c. Survey receipt of 1985.
- d. Allotment Sheet.

16. He further stated that he wanted the one Shem Murungwa to appear in court and give evidence.

RESPONDENT'S SUBMISSIONS.

17. Mr. Okiro appeared for the Respondent. In opposition to the application, he stated that there is no competent Appeal before the court. He explained that the notice of Appeal is dated 9th July, 2021 and judgment was entered on the 21st May, 2021. He added that this was 48 days late and that the Respondent did not obtain leave to Appeal out of time.

18. It was also submitted that the application seeks a stay for a suit described as No. 10 of 2019. Counsel explained that both the Appellant and the Respondent are not parties to the suit and cannot be bound by the decision therein.

19. Counsel for the Respondent submitted that land parcel subject of the decree are Nakuru Municipality Block 29/1478 and Nakuru Municipality Block 29/1479.

20. It is also submitted that the orders of injunction should not issue against the Respondent because the Respondent has title and further that the Applicant did not file a counter claim.

21. Counsel for the Respondent also submitted that Kalenjii Enterprises Limited was not a party in the matter that was concluded in the Subordinate Court.

22. He ended his submission by praying that the application be dismissed adding that they also filed grounds of opposition to the application and wishes to rely on them.

APPLICANT'S RESPONSE.

23. Mr. Lumadede stated that the response by the Respondent is mischievous adding that his counterclaim is captured in the affidavit.

24. The Applicant stated that the notice of Appeal is dated 4th June, 2021 and that it's the application that is dated 17th June, 2021 adding that the notice of Appeal is therefore filed 23 days after judgment.

25. My. Lumadede reiterated that it is not true that the Appeal was filed out of time.

26. This marked the end of submissions by the Applicant.

ISSUES FOR DETERMINATION.

27. The issues for determination are:

a. Whether there is an Appeal properly on record.

b. Whether the Applicant/Appellant has met the criteria for grant of orders of stay pending Appeal.

c. Whether suit ELC 10 OF 2019 can be stayed or an injunction issued against the Plaintiff(s) therein.

d. Who shall bear costs of the application"

ANALYSIS AND DETERMINATION.

28. I have considered the application, the affidavits in support of the application, the grounds of opposition to the application and the oral submissions by both parties.

29. I must confess that I have agonized over this application mostly for the reason that the Appellant/Applicant, a layman, appeared in person might not have fully appreciated the criteria for grant of orders of stay of execution pending Appeal.

30. I have also noted that the application is anchored on the wrong provisions of the law. I am inclined to invoke Article 159 of the Constitution of Kenya 2010 and proceed to make a determination based on the substance of the application.

31. What is clear, however, is that the Appellant/Applicant is desirous of appealing against the decision in Nakuru CMCC ELC 73 OF 2019.

32. The grounds of opposition filed by the Respondent are largely on the point that there is no appeal properly on record. This is for the reason that it has been filed out of time without obtaining leave of the court.

Whether there is an appeal properly on record

33. The first question for determination is whether there is an Appeal properly on record. If I find in the negative, there will be no need to make a determination on the other questions.

34. The respondent in his grounds of opposition states:

The application and Appeal itself are both dead on arrival judgment in the lower court matter having been entered on 21st May, 2021 and the notice of Appeal filed on 9 July, 2021 (A WHOLE 48 DAYS LATER) and against statutory timelines for filing Civil Appeal.

35. In this case, the Judgement of the Subordinate Court was delivered on 21st May, 2021. There is a memorandum of Appeal bearing a court stamp. The date on the stamp is 18th June, 2021. This is a period of 28 days from the date the impugned judgment was delivered. There is no doubt that the Memorandum of Appeal was filed within time.

36. The Respondent seemed to have missed this document and only gave relevance to a document titled " Notice of Appeal" bearing a court stamp for 9th July, 2021. This is the document that the Respondent states has been filed 48 days late and without leave of the court. It forms the basis for his prayer that the application be dismissed with costs to the Respondent.

37. It is evident that there is a misapprehension of facts on the part of the Respondent.

38. I find that there is a competent Appeal before this Honourable Court. I will therefore proceed to make a determination on the other questions.

Whether the Applicant/Appellant has met the criteria for grant of orders of stay pending Appeal.

39. I am reminded of the purpose of stay of execution pending Appeal. The decision in *RWW Vs EKW [2019] eKLR* is particularly insightful. It is stated that:

“The purpose of an application for stay of execution pending an Appeal is to preserve the subject matter in dispute so that the rights of the Appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

40. Another decision that speaks to the purpose for grant of an order of stay pending Appeal is *Cotton L J in Wilson Vs Church (No 2) (1879) 12ChD 454 at page 458*. Hancox JA stated,

“I will state my opinion that when a party is appealing, exercising his undoubted right of Appeal, this court ought to see that the Appeal, if successful, is not rendered nugatory.”

As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed Appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause.”

41. In *Absalom Dova Vs Tarbo Transporters [2013] eKLR* it was stated:

“The discretionary relief of stay of execution pending Appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his Appeal which includes the prospects that the Appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation...”

42. The principles guiding the grant of a stay of execution pending Appeal are well settled. These principles are provided under Order 42 rule 6(2) of the *Civil Procedure Rules* which states as follows:

No order for stay of execution shall be made under sub rule (1) unless—

(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

(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.

43. In *Victory Construction Vs BM (a minor suing through next friend one PMM) [2019] eKLR*, the Learned Judge stated that the Court in deciding whether or not to grant a stay of execution, the overriding objective stipulated in sections 1A and 1B of the *Civil Procedure Act*, should also be taken into consideration. He stated that the Court is no longer limited to the provisions of Order 42 Rule 6 adding that the courts are now enjoined to give effect to the overriding objectives of the Act and Rules in the exercise of its powers under the *Civil Procedure Act* or in the interpretation of any of its provisions.

44. Section 1A of the *Civil Procedure Act* provides that

1) The overriding objective of the Act and the Rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of Civil Disputes governed by this Act

2) “the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in sub section 1”

45. Section 1B of the Civil Procedure Act explains some of the aims of the overriding objectives as:

a) the just determination of the proceedings;

b) the efficient disposal of the business of the Court;

c) the efficient use of the available judicial and administrative resources;

d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties and

e) the use of suitable technology.

46. In **Vishram Ravji Halai Vs Thornton & Turpin Civil Application No. 15 of 1990 [1990] KLR 365**, the Court of Appeal held that whereas the Court of Appeal’s power to grant a stay pending Appeal is unfettered, the High Court’s jurisdiction to do so under Order 41 rule 6 of the Civil Procedure Rules is fettered by three conditions namely, establishment of a **sufficient cause**, **satisfaction of substantial loss** and the **furnishing of security**. Further the application must be made **without unreasonable delay**.

47. In **Butt vs. Rent Restriction Tribunal [1979]**, the Court of Appeal gave pointers on what ought to be considered in determining whether to grant or refuse stay of execution pending Appeal. The court stated thus:

i. The power of the court to grant or refuse an application for a stay of execution is a discretionary, and the discretion should be exercised in such a way as not to prevent an Appeal.

ii. The general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an Appeal may not be rendered nugatory should the Appeal court reverse the judge’s discretion.

iii. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the Applicant at the end of the proceedings.

iv. Finally, the court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.

48. Both the Applicant/Appellant and Respondent failed to address their minds to these principles. They did not also address the court on them. It has been left to me to look through the application and supporting documents to come to a determination on whether the criteria for grant of orders of stay pending appeal have been met.

49. What is clear, however, is that the Appellant/Applicant is desirous of appealing against the decision in Naivasha CMCC No. 82 OF 2018. He has filed a Memorandum of Appeal and the present application which, in the cause title, he describes an application for stay pending Appeal.

50. On the first criterion as set out in Order 42 Rule 6 (2) i.e. the Applicant/Appellant should bring his application without unreasonable delay. I am satisfied that there was no delay. The judgement was delivered on 21st May, 2021 and this application was filed on 31st May, 2021.

51. The second criterion is that the Applicant/Appellant must demonstrate that he is bound to suffer substantial loss if orders of stay

of execution are not granted. The question that follows is what comprises substantial loss. In **Silverstein Vs Chesoni (2002)1 KLR 867** it was held that

The issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory”

52. The decree herein, is for orders of permanent injunction against the Appellants, its servants prohibiting them from carrying out development or in any way interfering with the Respondent’s parcels of land known as NAKURU MUNICIPALITY BLOCK 29/1479 (RONDA) and NAKURU MUNICIPALITY BLOCK 29 1478 (RONDA).

53. From the affidavit in support of this application; I am able to deduce that the Respondent has documents of title pertaining to the suit properties. The Appellant/Applicant in his supporting affidavit states that he has been in occupation for 48 years. This averment has not been countered by the Respondent. In the circumstances its logical to deduce that he faces eviction if orders of stay are not granted. It would invariably occasion him substantial loss, rendering his Appeal nugatory.

54. The third criterion is that the Applicant must furnish security for the due performance of the decree. I am reminded that the court has a delicate task of balancing the interests of both the Appellant and the Respondent. The Appellant who seeks to preserve the status quo pending the hearing of the Appeal so that his Appeal is not rendered nugatory and the interest of the Respondent who is seeking to enjoy the fruits of his judgement.

55. The Court of Appeal in **Nduhiu Gitahi and Another Vs Anna Wambui Warugongo [1988] 2 KAR 621**, while citing the decision of **Sir John Donaldson M. R. in Rosengrens Vs Safe Deposit Centers Limited [1984] 3 ALLER 198** stated:

“The process of giving security is one, which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantee and payment into court are but two of them. So long as it is adequate, then the form of it is a matter, which is immaterial. In an application for stay pending Appeal the court is faced with a situation where judgment has been given. It is subject to Appeal. It may be affirmed, or it may be set aside. The court is concerned with preserving the rights of both parties pending that Appeal. It is not the function of the court to disadvantage the Defendant while giving no legitimate advantage to the Plaintiffs. It is the duty of the court to hold the ring even-handedly without prejudicing the issue pending the Appeal. For that purpose, it matters not whether the Plaintiffs are secured in one way rather than another. It would be easier for the Defendants or if for any reason they would prefer to provide security by a bank guarantee rather than cash. There is absolutely no reason in principle why they should not do so...The aim of the court in this case was to make sure, in an even-handed manner, that the Appeal would not be prejudiced and that the decretal sum would be available if required. The Respondent is not entitled, for instance, to make life difficult for the Applicant, so as to tempt him into settling the Appeal. Nor will either party lose if the sum is actually paid with interest at court rates...”

56. In **Gianfranco Manenthi & another Vs Africa Merchant Assurance Company Ltd [2019] eKLR**, the court observed:

“... the Applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of Appeal from money decree of the lower court for an order of stay must satisfy this condition on security.

Whether suit ELC 10 OF 2019 can be stayed or an injunction issued against the Plaintiff(s) therein.

57. I note that the suit referenced in the application is before the Environment and Land Court. The Respondents in his oral submissions stated that ELC No. 10 of 2019 is not related to this suit and asked the court to call for the file and confirm this position.

58. In **Nation Media Group Limited Vs Kamlesh Mansukhlal Damji Pattni & 2 others [2013]eKLR**, The Learned Judge of the High Court while faced with a situation where in which the Court was approached to issue orders capable of being issued by another division of the High Court stated as follows:

It must be emphasised, as it has been emphasised in numerous cases before, that this Division is simply a division of the High

Court. It does not have powers superior to those exercised by other Divisions of the High Court. Consequently, any power that a Court in this division has to deal with constitutional issues is the same power that another division of the High Court which is seized of the Applicant's Appeal has.

59. In the same breath, I am of the view that the orders of injunction and stay of proceedings that the Appellant/ Applicant is seeking in respect of ELC 10 of 2019 can be granted by the Environment and Land Court before which the suit is listed for hearing. Any of the three Learned Judges sitting at the Environment and Land Court in Nakuru are capable of interrogating the suit and applications filed and making appropriate orders.

60. For the above reasons, I decline to grant the orders of stay of proceedings and/or injunction.

Who should bear the cost of this application"

61. On the question of costs of the application, the general rule is that costs shall follow the event in accordance with the provisions of Section 27 of the Civil Procedure Act (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. This was the holding in **Hussein Janmohamed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**.

CONCLUSION AND DISPOSITION.

62. It is not lost on me, therefore, that the power to grant or refuse an application for stay of execution pending Appeal is discretionary and that while at it, I should balance the competing interests of both the Appellant and the Respondent; focusing on their reconciliation.

63. Keeping this in mind and taking into consideration the submissions of parties, the provisions of section 1A and 1B of the Civil procedure Act, Order 42 Rule 6 of the Civil Procedure Rules and judicial decisions cited in preceding paragraphs. I now make the following orders:

a) There shall be an order a stay of execution of the Judgement and order made in Nakuru Chief Magistrates Court Case No.73 of 2019 on 21 May, 2021 by Honourable Benjamin Limo pending the hearing and determination of the Applicant's Appeal.

b) The Appellant shall furnish security of Kshs. 100, 000 for performance of the decree. The said amount shall be deposited in court within 60 days.

c) That in the event of failure to comply with the order in (b) above, the order in (a) shall stand vacated.

d) The cost of this application shall be in the Appeal.

64. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 24TH DAY OF MARCH, 2022.

L. A. OMOLLO

JUDGE

In the presence of: -

No appearance for the Appellant/Applicant.

Mr. Okiro for the Respondent.

Court Assistant; Jeniffer



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