



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

HCCA NO. 32 'B' OF 2019

NJOKA NGERETHA.....APPLICANT/APPELLANT

VERSUS

AGNES CIAMBAKA NGERETHA.....RESPONDENT

(Being an Appeal from the decision of the Senior Resident Magistrate Hon. M. Sudi

dated the 29th day of October 2019 in Chuka Succession Cause No. 10 of 2017.)

R U L I N G

The applicant has filed the application dated 5th November 2020 seeking orders that there be stay of execution of the Judgment delivered on 29th October 2019 in the **Senior Principal Magistrate's Court at Chuka Succession Cause No.10/2017** and all other consequential orders pending the hearing of this application and the appeal.

He further seeks orders that an order of injunction be issued restraining the respondent from evicting the applicant and his household, destroying structures, crops, cutting trees, transferring, selling or in any other interfering with the applicant's occupation of Land Parcel No.L.R No. Karingani/Mugirirwa/1650 and 1651 pending the hearing and determination of the appeal.

The application is based on the grounds that unless Judgment is stayed, he will be evicted from the land and the land may be sold or wasted rendering the appeal nugatory. That the appeal is arguable for the reasons that the trial magistrate failed to appreciate that the applicant has lived on the suit land since 1951 and had obtained the title deed. He further avers that the trial magistrate failed to appreciate that he has extensively developed the land, that the trial magistrate failed to appreciate that the applicant had taken full possession of the land and failed to recognize that the suit was bad in law for being time barred. It also averred that the balance of convenience tilts in favour of the applicant.

1. This application was not opposed as the respondent did not file a replying affidavit. Today he has not attended court.

I have considered the application. I have also perused the proceedings and the Judgment of the trial magistrate. The record of the lower court shows that the applicant had filed a protest where he had claimed that he was evicted from Land Parcel No. Karingani/Mugirirwa/1650 and the land was sold and is now registered under the name Wilfred Kinyua Njoka, Esther Makandi in joint proprietorship. The trial magistrate dismissed the protest and proceeded to distribute land parcel No. Karingani/Mugirirwa/1651 to Japheth Njoka.

2. The Land Parcel No. Karingani/Mugirirwa/1650 is not registered in the name of the applicant. It is trite that injunction cannot issue against a registered proprietor. The registered proprietors were not parties in the proceedings before the trial magistrate. As for Land Parcel No. Karingani/Mugirirwa/1651, it was allocated to Japheth Njoka who I believe is the Applicant. For the court to put an injunction, the applicant must show that he has a *prima facie* case with chances of success. The applicant must also show that if the injunction is not granted, he is likely to suffer irreparable loss. Where court is in doubt, it will determine the case on a balance of convenience. This was the holding in the leading authority on the principles of granting injunctions, that is the case of **Griella-v- Cassman Brown Co. Ltd (1973) E.A 358** where it was held that in order to grant the injunction as prayed, the court must be satisfied that:

“ (a) The applicant had established a prima facie case with probability of success.

(b) The applicant stood to suffer irreparable loss which could not be compensated by an award of damages.

(c) If the court is in doubt, the application would be determined on a balance of convenience.

With reference to a *prima facie* case, Lord Diplock in the case of *American Cyanamid-v- Ethicon Limited (1975) AC 396*, stated as follows:-

“ If there is no prima facie case the point essential to entitle the plaintiff to complain of the defendants proposed activities, that is the end of any claim to interlocutory relief.”

In order for the applicant to establish a *prima facie* case, he must show that he owns the suit property or he has a valid claim over it which would defeat a 3rd party claim over it. I find that this the applicant has not established. In his Memorandum of Appeal he has raised the issue that he was evicted. An injunction will not issue to restrain that which has already been done. It is issued to prevent acts of waste or other activities which may lead to irreparable loss or harm.

On the balance of probabilities, the applicant was allocated Land Parcel No.1651 and so this court would be acting in vain by issuing injunctive orders against the applicant. The applicant has failed to establish the principle for the grant of injunction.

The applicant seeks an order for stay of execution. **Order 42 rule 6** of the **Civil Procedure Rules** sets out the ground that the court will consider when granting orders for stay of execution. The rules lays down the principles guiding the grant of stay of execution as follows:

Rule 6 (2)

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.

The Court of Appeal in the case of *Vishram Raiji Halai-v- Thornton & Turpin Civil Appeal No. Nairobi 15/1990* - *KRR 365* held that these three conditions fetters the jurisdiction of this court to grant injunction, that is to say, establishment of a sufficient cause, satisfying the court that substantial loss may result and furnishing of security.

An applicant seeking court's discretion to order stay of execution must establish the above grounds. It is trite law that court's discretion must be exercised fairly and judiciously.

3. On substantial loss the applicant must establish that there are factors and circumstances which show that the applicant will not only suffer loss but that such loss will be irreparable and render the appeal nugatory in the event that the appeal succeeds. The consideration is whether if stay is not ordered and the appeal succeeds, it will negate the very essential core of the applicant as the successful party in the appeal.

This would be a situation where the subject matter is land and it is sold in execution of the decree and it then dawn on the successful party in the appeal that he cannot reap the fruits of the Judgment. This entails substantial loss as the appeal becomes an exercise in futility and is rendered nugatory.

In this case the applicant has not demonstrated that the appeal will be rendered nugatory or that he will suffer substantial loss. Ground one on the Memorandum of Appeal shows that he has been evicted and the land was sold to 3rd parties. There is nothing to stay.

On the ground that a party must furnish security, I am alive to the fact it is the court which order the security that would be appropriate in the circumstances of the case. The party must also depone that he is willing to provide security. The applicant has not offered to provide security.

Finally, this application I was brought with considerable delay. The Judgment sought to be stayed was delivered on 29th October 2019. This application is dated 5th November 2020 and was filed in court on 9th November 2020. The delay in filing the appeal is for a period of one year. The delay of one year for a party seeking orders of stay and injunctive orders in an appeal is no doubt inordinate and demonstrates a possibility that he is not likely to suffer substantial loss after all. Though the application is not opposed, that fact does not affect the duty of this court to determine the merits of the application.

4. It is my finding that this application is without merits. I dismiss it with no orders as to costs as it was not opposed.

Dated, signed and delivered at Chuka this 17th day of December, 2020.

L.W. GITARI

JUDGE

17/12/2020

The ruling has been read out in open court.

L.W. GITARI

JUDGE

17/12/2020