



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CIVIL APPEAL NO. NO. 57 OF 2013

VINCENT MACHARIA KOGI..... PLAINTIFF/APPLICANT

-VERSUS-

PETER MUCHIRA MBITI.....DEFENDANT/RESPONDENT

RULING

1. The applicant **Vincent Macharia Kogi** filed an application dated 31st May, 2017 seeking stay of execution pending the hearing and determination of the Appeal. That the status quo pertaining to **Kabare/Kiritine/89** as at 9th March, 2011 be maintained and the respondents be restrained from evicting the applicant and his family.

2. In his affidavit the applicant depones that the respondent has started to execute the orders which he is challenging before this Court and has since destroyed part of the family's properties. That the delay in prosecuting the appeal was due to the fact that when the file was transferred from Embu to this Court his advocate was not informed and it took time to trace the file.

3. The respondent Peter Muchira Mbiti opposed the application and filed a replying affidavit. He depones that the application is vexatious and an abuse of Court process and has been overtaken by events. That the applicant has failed to disclose that he had filed a similar application on 4th November, 2010 which was heard interpartes and was dismissed with costs. The applicant did not appeal against the ruling. That by 4th November, 2010 the land parcel **Kabare/Kiritine/89** had already been sub-divided into new parcels and given numbers **2147, 2148, 2149, 2150** and **2151** and already transmitted to the beneficiaries. There is therefore nothing to stay.

4. I have considered the application. The parties agreed that the Court looks at the affidavits and give its ruling. The issue before the Court is stay of execution pending appeal. Stay is governed by **Order 42 Civil Procedure Rules. Order 42 Rule 6** provides:

“No order for stay of execution shall be made under subrule (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.”

There are conditions a party who seeks an order of stay needs to satisfy the Court:

(a) Substantial loss may result to the applicant unless the order is made,

(b) The application has been made without unreasonable delay, and

(c) Such security as the court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.

(a) Substantial Loss

The applicant has the onus to prove that substantial loss would occur unless the Court orders a stay. It must show that the loss would be irreparable and substantial such that the orders the Court may eventually grant would be an academic exercise. The Court has to balance the rights of both parties, that is the applicant's right to appeal and the respondent's rights to reap the fruits of his success in the judgment. The Court of Appeal has in binding decisions dealt with the issue of substantial loss. In the case of **Charles Wahome Gethi - V- Angela Wairimu Gethi [2008] eKLR** the Court of Appeal held the following view on the issue of substantial loss:-

“The applicant does not claim that the respondent intends to sell the portion of land in dispute and that it will not be in existence by the time the appeal is determined.....In the circumstances of this case, the applicant would suffer substantial loss rendering the appeal, if successful nugatory only if the suit land is disposed of before the appeal is determined. The applicant does not claim that the suit land would be disposed of. The applicant has not in our view, established that unless stay is granted, he will suffer substantial loss and that the appeal, if successful would be rendered nugatory.”

The applicant is stating that he is likely to be evicted from the suit land and some of his properties have been destroyed. In the case of **James Wangalwa & Another V Agnes Naliaka Cheseto [2012] eKLR** the Court held the following view on the issue of substantial loss;

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of Silverstein N. Chesoni [2002] 1KLR 867, and also in the case of Mukuma V Abuoga quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5 (2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:

“.....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.”

5. The applicant in his appeal is stating that his family would have to shift from where they have always settled on the land parcel which would be economically unfair. It is however stated that all beneficiaries lived on the homestead and all of them have been affected by the sub-division and have to move to their respective portions. It is not only the applicant who will be affected but all the beneficiaries. The land parcel has been sub-divided and new numbers issued. There are five portions out of the sub-division of **Kabare/Kiritine/89**.

6. It is expected that the execution of the judgment affects all parties who were living on the land. This is succession cause and sub-division and relocating of the parties cannot be helped as the parties become different units.

7. The Land Parcel No. **Kabare/Kiritine/89** no longer exists. It would be in vain for this Court to order status on this land parcel as it does not exist. Court orders are not made in vain. The applicant failed to disclose that the land parcel does not exist. A process that is meant to enforce Court orders is a lawful process. It is not only the applicant who is affected but all the beneficiaries. There is nothing to stay as the land parcel No. **Kabare/Kiritine/89** has been sub-divided and transmitted to the beneficiaries. The applicant has failed to prove that he will suffer substantial loss.

8. The appellant is required to provide security. It is the Court which orders security if it allows an application for stay. In this case though the appellant has not stated that he is ready to provide security, no security would be ordered since the prayer for stay is not proved.

9. The Court has to consider the question whether there was undue delay. From the record, the judgment was delivered on 10th February, 2011 and the appellant filed a Memorandum of Appeal on 9th March, 2011. The appeal was filed within the time provided. The applicant filed an application dated 4th November, 2010 but it was dismissed on 10th February, 2011. No appeal was preferred. This application is seeking similar order orders. It is therefore true to say that the application has been overtaken by events. There is nothing to stay. The applicant has not proved that he will suffer substantial loss. The process of sub-division and transmission has been done. This is what applicant was seeking to stay. It has been overtaken by events. An order of stay will not serve any purpose. I find that the application is without merits and is dismissed with costs.

Dated and delivered at Kerugoya this 25th day of January, 2018.

L. W. GITARI

JUDGE

Ruling read out in open Court, Mr. Maina Kagio for Respondent, No appearance for the Applicant. Court assistant Naomi Murage this 25th day of January, 2018.

L. W. GITARI

JUDGE

25.01.2018