



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 27 OF 2017

RUFUS MURIITHI NYAGA.....APPELLANT/APPLICANT

V E R S U S

REBECCA MAGWI NJERU.....RESPONDENT

R U L I N G

1. The applicant Rufus Muriithi Nyaga filed his application dated 13/07/2017 under certificate of urgency seeking for injunction against the respondent Rebecca Magwi Njeru from evicting him or disturbing his quiet possession of L.R. Kyeni/Mufu/9237, 9238, 9239 and 9240 pending hearing and determination of the appeal. The application also prayed for *status quo* to be maintained pending the disposal of the appeal.
2. Upon being served with the application and the order of the court, the respondent filed her application dated 16/10/2017 seeking to set aside the order of *status quo* in favour of the applicant. The second prayer was that pending the hearing and determination of the appeal, the respondent be allowed access to L.R. 9237, 9238, 9239 and 9240 to till and carryout subsistence farming.
3. The court directed that the two applications be heard together. By consent parties agreed to dispose of the application by way of written submissions. The counsels for the parties filed the submissions containing their arguments. Messrs Wangoko & Gitonga advocates represented the applicant Rufus M. Nyaga while the firm of J.K.N. Kamunyori & Co. represented the respondent. For the purpose of the two applications, Rufus M. Nyaga will be referred to as the applicant while Rebecca Njeru will be referred to as the respondent.
4. The applicant in the application dated 13/07/2017 deposes that he was dissatisfied with the judgment of the Senior Principal Magistrate Runyenjes delivered on 13/04/2017 and has therefore appealed against it. The effects of the judgment was that the applicant's summons for annulment of grant dated 19/10/2016 in Runyenjes Succession Cause No. 205 of 2017 was dismissed. The grant had been issued and confirmed in favour of the respondent who is a daughter of the deceased. The only asset of the deceased L.R. Kyeni/Mufu/1055 was distributed among the children of the deceased. The applicant laid his claim on the basis that in his capacity as the grandson, he was a rightful heir to the estate. The applicant faulted the magistrate for misdirecting herself in dismissing his claim.
5. The respondent in her replying affidavit, the summons for revocation of grant was dismissed after full hearing. The applicant then forcefully took over possession of the disputed parcels of land and now wants the court to legitimize his claim. It is further argued that the applicant has no claim over the deceased's land for he is a grandson.
6. It was further stated that the land parcels in question resulted from sub-division of L.R. Kyeni/Mufu/1055. In other words, the estate of the deceased has already been distributed to the rightful beneficiaries. The applicant lived on his father's land but moved to the deceased's land by force. He demolished his former home on his family land. The applicant did not comply with the *status quo* orders which he obtained for he has now planted permanent crops on the land and has dug a water well.
7. The respondent in her application dated 16/10/2017 states that she was not served with the application dated 13/07/2017 which led to the issue of the *status quo*. She was not heard before the order was granted.
8. It is further stated that the applicant was directed to have the appeal admitted within 30 days but failed to comply with the court's direction. He has also defied the orders for maintenance of the *status quo* given in his favour.
9. The applicant without giving details denied that he is in violation of the court's order for maintaining *status quo*. He further argues that the appeal has been admitted and that his advocate is in the process of preparing the record of appeal.
10. I have perused the submissions of the parties. The respondent's application seeking review of the orders issued on 17/07/2017 has been described as vexatious, frivolous and an abuse of the court process. The respondent has not complied with the requirements of Order 45 of the Civil Procedure Rules, 2010. For this reason, the applicant argues that his application ought to be dismissed.

11. The background acts in issue of the order of *status quo* on 17/07/2017 need to be explained herein to save the time of the court in delving into arguments on lack of service of the application and on whether the application passes the test for review.

12. The application dated 13/07/2017 was filed under certificate of urgency. It sought for two sets of prayers. Firstly, that injunctive orders do issue against the respondent and maintaining of *status quo* in respect of L.R. Kyeni/Mufu/9237, 9238, 9239 and 9240 pending the hearing of the application inter parties. The second set of orders sought was for similar orders pending the hearing and determination of the appeal.

13. On perusal of the application the court certified it urgent and directed that the parties maintain status quo pending the hearing and determination of the appeal. The applicant was directed to have the appeal admitted within 30 days.

14. The purpose of these orders were to maintain the status of the disputed parcels for the interests of both parties pending the hearing of the appeal. The directions for the applicant to cause the appeal to be admitted within 30 days from the date of the order was aimed at fast-tracking the appeal in the interests of justice for both parties.

15. This being the position, the court need to interrogate some of the arguments contained in the submissions. The issues arising herein is whether the parties have complied with the orders and directions of the court. The applicant has been accused of planting some sort of permanent crops and digging a water well. Although he denied it in his affidavit, the court is convinced that the respondent's averments are true in that they have been explained and cannot be dislodged by the mere denial by the applicant.

16. The applicant neglected to have the appeal admitted within 30 days as directed by the court. The appeal was admitted on 21/09/2017 which was more than 60 days from the date of the order. Its admitted by the applicant, it was at th instance of the court that the appeal was admitted. This was in the course of the normal processing of cases in the registry. The applicant has not to this date filed the record of appeal as admitted in his affidavit.

17. It is important to note that the court exercised caution in giving only orders *status quo* as opposed to granting an injunction without hearing the parties. The *status quo* order suffices even on temporary basis pending hearing of an application inter parties if is deemed fit in the circumstances.

18. Had the appellant complied with the court's directions, the appeal would have been heard and determined by now. His failure to comply is a demonstration of causing delay in the determining the appeal. He is the person benefiting from the delay for he is occupying the land, illegally so because there is a valid grant distributing the estate. The applicant's claim of being a heir in the estate was dismissed. It is against that order that he is appealing against. The fact that he has filed an appeal does not give him a right to occupy the land. He did not obtain any stay of the grant pending appeal. He occupied the land and then came to court seeking injunctive orders against the beneficiaries.

19. It is not in doubt that the original parcel has been sub- divided and the respective parcels registered in the names of the beneficiaries. Apart from the respondent, the applicant has not joined the interested parties in this appeal. He is represented by a counsel who knows the law. Any orders given in the appeal cannot be enforced against non-parties.

20. I am of the considered opinion that the applicant has failed to comply with this court's orders and directions. He has also blatantly taken over land of the respondent and her siblings without any colour of right. He ought to have filed this appeal and awaited its outcome. This action amounts to deliberate breach of the law. The applicant does not deserve the orders issued to him on 17/07/2017.

21. The respondent has good cause to seek the setting aside of the said orders. I find her application merited.

22. For the foregoing reasons, I hereby allow the respondent's application dated 13/10/2017 in terms of prayer 2. For avoidance of duplication of the court's orders, I decline to grant prayer 3 of the application.

23. In effect the orders issued on 17/07/2017 stand vacated.

24. Costs to be in the cause.

25. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 26TH DAY OF FEBRUARY, 2018.

F. MUCHEMI

JUDGE

In the presence of:-

Mr. Kamunyori for respondent