



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION
PETITION NO. 103 OF 2012

MOHANSONS (KENYA) LIMITED..... PETITIONER

VERSUS

THE REGISTRAR OF TITLES..... 1ST RESPONDENT

MARY MURTAZZA ONDATTO..... 2ND RESPONDENT

THE ATTORNEY GENERAL 3RD RESPONDENT

EQUITORIAL COMMERCIAL BANK..... INTERESTED PARTY

RULING

1. By a Notice of Motion dated 19th June, 2017 brought under Rule 32(3) Constitution of Kenya (Protection of Rights and Fundamental Freedom) Practice & Procedure Rules, 2012, Order 42 Rule 6 of the Civil Procedure Rules, 2010, the 2nd Respondent seeks the following orders:

a) Spent.

b) **THAT** this Honourable court be pleased to issue a temporary stay of execution of the Ruling of Honourable Justice Edward M. Muriithi issued on 6th June, 2017 pending the hearing and determination of this application interparties.

c) **THAT** this Honourable court be pleased to issue a stay of execution of the ruling delivered by Honourable Edward M. Muriithi, on 6th June, 2017 pending the hearing and determination of the intended appeal.

d) **THAT** in the alternative, this Honourable court should order that the status quo be maintained i.e. the 2nd Respondent/Applicant do remain in occupation of the premises on plot no. L.R No. MN/1/2149 Beach Road Nyali, registered as CR No. 14642 pending the hearing and determination of the intended appeal.

e) **THAT** the costs of this application be in the cause.

The application was supported by the grounds set out therein and those in the affidavit of **MARIA MURTAZZA ONDATTO** sworn on 19th June, 2017.

2. The 2nd Respondent/ Applicant alleges that the ruling of Honourable Justice Edward M. Muriithi delivered on 6th June, 2017 directed that the 2nd Respondent vacate the suit property pending the hearing and determination of the petition.

3. The Applicant alleges that she was dissatisfied with the Ruling and has filed a Notice of Appeal in the Court of Appeal. The Applicant further claims that if the said Ruling is effected, the 2nd Respondent will relinquish her possession of the suit property and the petitioner and/or the interested party may dispose of the suit property to third parties.

4. The applicant alleges that if the ruling is effected she may not have any remedy in law if the intended appeal is successful as opposed to the Petitioner who can claim mesne profits for the duration the Applicant remains in possession of the suit property.

5. It is the Applicant's case that the intended appeal is arguable and has high chances of success thus it is fair for the subject matter of the suit to be preserved pending appeal.

Response

6. The Petitioner opposed the application by way of a replying affidavit and a further affidavit sworn by **SANDEEP SINGH KANDHARI** on 28th June, 2017 and 29th June, 2017 respectively.

7. The Deponent, making reference to the affidavit of **CYRIL M. ONDATTO** filed on 9th May, 2011, alleges that the Applicant has not been in occupation of the suit property. The deponent further alleges that the Applicant forced her way into the suit property in 2011 and has been a trespasser ever since despite the court order issued on 1st November, 2012.

8. The Deponent contends that the appeal will not be rendered nugatory since the applicant has been a continuous trespasser and has not shown that the Petitioner's title has been vitiated.

9. It is the Petitioner's/ Respondent's case that the intended appeal will be frivolous, vexatious and an abuse of the court's process.

Submissions

10. The application came up for hearing on 18th July, 2017 when both parties agreed to canvass the application by way of written submissions. The Applicant filed her written submissions on 29th August, 2017 while the Petitioner/Respondent filed its submissions on 20th September, 2107.

11. Mr. Adhoch, learned Counsel for the Applicant submitted that Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules, 2010 clothes this court with the discretion and power to grant stay of execution pending the lodging, hearing and determination of this appeal provided that the applicant satisfies the court that she will suffer substantial loss unless the order is made subject to provision of security as the court may order.

12. Counsel contended that the intended appeal was arguable as the ruling to be appealed had not considered queries raised by the Applicant about how the Petitioner allegedly acquired the suit property. Counsel submitted that the appeal raises serious concerns of fraud and illegality in the manner of acquisition and registration of the suit property which were not considered as the learned Judge only considered affidavit evidence.

13. Mr. Adhoch submitted that the Applicant will suffer substantial loss if stay of execution is not granted. In detailing substantial loss, Counsel stated that the Applicant will lose her home; the Applicant may not have recourse if she were to be adjudged as the rightful owner of the property as the Petitioner may have disposed of the property to a third party and the expense and inconvenience of recovering the property from a third party would be very costly.

14. Mr. Adhoch submitted that with the inclusion of the overriding objective to the Civil Procedure Act and the Appellate Jurisdiction Act, courts are enjoined to give effect to substantive justice and to weigh the relative hardships of the parties. Counsel argue that it is in the interest of substantive justice that the status quo be maintained by staying execution of the ruling pending appeal to avoid subjecting the applicant to substantial loss and hardship.

15. Mr. Adhoch submitted that while one of the conditions for grant of stay of execution pending appeal under Order 42 Rule 6 is that a party seeking stay should provide security, this condition, Counsel contended, has changed with the evolution and development of the law and this change has been informed by the realization that there is need to allow access to justice without any impediments as enumerated by Article 48 of the Constitution. Counsel submitted that the discretion to order provision of security should be exercised in a manner that will not burden the Applicant.

16. Mr. Adhoch submitted that this application has been made timeously without any reasonable delay as it was made twelve (12) days after delivery of the ruling.

17. Mr. Khagram, learned Counsel for the Petitioner, agreed with the principles stated by the Applicant for the grant of stay of execution pending appeal adding only that such an application should be made without undue delay. Counsel however, submitted that the instant application does not meet the set principles.

18. Mr. Khagram submitted that there is no evidence that the Applicant will suffer substantial loss if stay is not granted. Counsel contended that the Applicant must establish other factors which show that execution will create a state of affairs that will irreparably affect the very essential core of the Applicant if successful in the appeal.

19. Mr. Khagram submitted that the Applicant would not be rendered homeless as she alleges and referred the court to the affidavit of the Applicant sworn on 27th November, 2012 in which counsel indicated the Applicant had averred that she was not occupying the house due to its state of repair. Counsel averred that the Applicant never occupied the suit property and has always been a trespasser and further that the Petitioner's title has never been vitiated.

20. Mr. Khagram submitted that it is the Petitioner who will suffer loss if the orders sought are granted as he will be denied the full benefits affirmed by this court as the legal proprietor of the property.

21. In relation to the intended appeal being arguable, Counsel submitted that this court had not been supplied with the proceedings before Justice Edward M. Muriithi in support and in opposition of the application. Therefore it may not be easy to meaningfully comment on the success of the appeal.

Analysis and Determination

22. I have carefully considered the application and the submissions thereto. The only issue that arises for determination is whether a stay of execution should be issued staying the Ruling of Honourable Edward M. Muriithi, of 6th June, 2017, or in the alternative whether an order of maintenance of status quo should be issued.

23. Order 42 Rule 6 provides for stay of execution. It states:

6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) 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.

(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

24. The requirements for stay of execution are three fold; the applicant must prove that he or she will suffer substantial loss if the order is not issued; the application is brought without unreasonable delay and the applicant must satisfy any security ordered by the court.

25. The Applicant herein filed the instant application on 19th June, 2017. The Ruling against which the stay is sought was delivered on 6th June, 2017. I find that there was no unreasonable delay in filing this application.

26. The Applicant has claimed that if the orders sought are not granted, she will be evicted and/or lose her home, and if successful in the Petition, she may not have any remedy in law as the Petitioner may have disposed the suit property to a third party. Further, the Applicant contends that if the orders are granted and the Petitioner is successful in the Petition, the Petitioner can claim mesne profits for the period the Applicant would have been in occupation. It is also the Applicant's case that the intended appeal raises arguable grounds.

27. The Respondent/Petitioner, on the other hand, while referring to the Petitioner's affidavit sworn on 31st October, 2012 argued that the Applicant has always been a trespasser in the suit land as she has never occupied or owned the suit property. Therefore, the appeal cannot be rendered nugatory. While dismissing the arguability of the intended appeal, the Petitioner/Respondent claimed that this court had not been supplied with the proceedings in this matter in order to understand the position taken by the learned Judge, and so this court cannot decipher the success of the appeal.

28. This court cannot go into the merits of the intended appeal and can only peruse the grounds on the draft memorandum of appeal annexed to the affidavit of the Applicant sworn on 19th June, 2017 to see whether there are arguable grounds. This was the position taken by the Court of Appeal in the case of **Housing Finance Company of Kenya versus Sharok Kher Mohamed Ali Hirji & Another [2015] eKLR** where the court stated:

“We cannot over emphasize that at this stage we are not required to go into the merits of the case as tempting as it may be or consider whether the issues will be successful in favour of the appellant, lest we embarrass the trial judge.”

A keen perusal of the draft Memorandum of Appeal shows that indeed the Applicant has raised several arguable grounds of appeal including applicability of Article 40 of the Constitution, section 26(1) (b) of the Land Act and Section 23(1) of the Registration of Titles Act in relation to a Title allegedly acquired fraudulently; whether a conservatory order can be issued where there is no evidence of registered ownership and principles governing issuance of conservatory orders.

29. Turning to the issue of substantial loss, the Applicant's claim is that she will be rendered homeless and if she were to succeed in the appeal, she may not have a remedy in law as the Petitioner/Respondent may have sold the suit property to a third party. The issue in contention in this suit is the ownership of the suit land with both the Applicant and the Petitioner laying claim to the land. Further, the Interested Party herein also has an interest in the suit property as it claims to have a charge over the property. According to the Ruling delivered on 6th June 2017 one of the orders that was issued was:

“3. For avoidance of doubt, the Interested Party is at liberty to exercise its statutory power of sale over the property under

the Charge thereon as well as any sale in execution of any decree issued by any Court of competent jurisdiction.”

30. If the Interested Party does execute its statutory power over the suit property and goes ahead to sell the suit property to a third party, then substantial loss may be occasioned on the Applicant if she succeeds in the appeal and later on in the main suit. The Applicant would then have to institute proceedings against the third party which would be tedious and financially draining. Justice would be served for all parties if the ruling in issue is stayed pending the hearing and determination of the appeal.

31. For the foregoing reasons the application dated 19th June, 2017 is allowed. Orders are issued as follows:

a) An Order of stay of execution be and is hereby issued against the ruling delivered by Honourable Edward M. Muriithi, on 6th June, 2017 pending the hearing and determination of the intended appeal.

b) Costs be in the cause.

Dated, Signed and Delivered in Mombasa this 20th day of March, 2018.

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. Ondego for Petitioner/Respondent

Mr. Odera for Interested Party

Mr. Adhoch for 1st Respondent

Mr. Kaunda Court Assistant