



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELCA No. E003 OF 2021

MOHAMMED MUNYANYA.....APPELLANT

VERSUS

MICHAEL KEYA.....RESPONDENT

(Being an appeal from the judgment and decree of the Principal Magistrate's Court at Butere

(Hon. F. Makoyo, Principal Magistrate) delivered on 28th January 2021 in Butere

PMCC No. 15 of 2015 Michael Samwel Keya v Mohammed Munyanya)

RULING

1. By Notice of Motion dated 24th May 2021, the appellant seeks the following orders:

1. *[Spent]*

2. *[Spent]*

3. *[Spent]*

4. *THAT an interim order of injunction to issue against the respondent, his agents, servants, relatives, employees, and anybody acting under him or under his authority from continuing with any construction and or making any further development on the land and taking occupation of any shops and or premises that have been constructed by the respondent on the suit property MARAMA/SHINAMWINYULI/2967 pending hearing and determination of this appeal.*

5. *THAT leave be granted to the Applicant to file and serve his supplementary grounds of appeal and a supplementary record of appeal out of time and consequently the herein attached supplementary memorandum of appeal be deemed as properly filed and served.*

6. *THAT the honourable court be pleased to issue orders to the OCS Butere Police Station compelling him to enforce to be made and issued by this Honourable Court.*

7. *THAT the respondent compensates the applicant the loss he has suffered as a result of the destruction and demolition of the applicant's properties that were on the suit land and the developments he had made thereon in accordance with the valuation report to be filed before this honourable court in this instant application.*

8. *[Spent]*

9. *THAT stay of execution be issued pending hearing and determination of this appeal.*

10. *THAT the Respondent to pay the cost of this Application.*

2. The application is supported by an affidavit sworn by the appellant. He deposed that that the subordinate court did not give a grace period for him to willingly vacate the suit property. That he filed an application for stay of execution before the subordinate court and the court granted him interim stay on 3rd February 2021 pending inter parte hearing. That despite the interim orders, the respondent went ahead and evicted him, demolished his structures and destroyed his trees and crops.

3. The appellant further deposed that he filed an application dated 8th March 2021, seeking an order that the OCS assists him in enforcing the order of interim stay of execution but the subordinate court dismissed the application in a ruling delivered on 13th May 2021. He added that the respondent is constructing buildings on the suit property and has secured lease agreements with third parties who are waiting to occupy the premises. That the respondent's actions will make it impossible for him to get any redress in regard to the damaged property and will materially alter the character of the property.
4. The respondent opposed the application through a replying affidavit in which he deposed that he immediately moved into the property upon delivery of judgment and started developing it since there was no stay. That the decree has been fully executed and that he has constructed commercial and residential structures on the property which are occupied by tenants.
5. The application was canvassed through written submissions. Both sides filed submissions.
6. I have considered the application, the affidavits and the submissions. Regarding the applicant's prayers for injunction pending appeal and stay of execution pending appeal, I note from the material on record that the decree of the subordinate court was for eviction of the applicant from the suit property and a permanent injunction restraining him and his agents from *inter alia* trespassing on the property or interfering with it.
7. The applicant has stated that he has since been evicted and that the decree has been executed, even if he maintains that his eviction was unlawful. The respondent has verified the applicant's claims that the decree has in fact been executed. In the circumstances, prayers for injunction pending appeal and stay of execution pending appeal as sought at prayers 4,6 and 9 of the application are overtaken by events.
8. Prayer 5 of the application has not been contested and I do not see any prejudice which will be occasioned to the respondent by allowing it. So as to avoid any confusion, the appellant will have to file an amended memorandum of appeal as opposed to supplementary grounds of appeal.
9. Pursuant to prayer 7, the applicant seeks an order that the respondent compensates him for loss which he claims he has suffered as a result of destruction and demolition of his properties. There is no jurisdiction to grant such an order within the ambit of an application such as the one now before the court. That kind of relief should be pursued in a substantive claim.
10. I note that the appellant filed record of appeal on 15th February 2021. I will give directions with a view to expediting the hearing and determination of the appeal.

11. In the result, I make the following orders:

- a) Leave is hereby granted to the appellant to file and serve an amended memorandum of appeal within 14 (fourteen) from the date of delivery of this ruling.**
- b) Leave is hereby granted to the appellant to file and serve a supplementary record of appeal. The supplementary record of appeal that was filed alongside Notice of Motion dated 24th May 2021 is deemed as properly filed.**
- c) This appeal shall be canvassed through written submissions.**
- d) Appellant to file and serve written submissions on the appeal within 21 (twenty-one) days from the date of delivery of this ruling.**
- e) The respondent to file and serve written submissions on the appeal within 21 (twenty-one) days of service of the appellant's submissions.**
- f) Costs of Notice of Motion dated 24th May 2021 shall be in the appeal.**

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 25TH DAY OF JANUARY 2022.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

No Appearance for the Appellant

Ms Eroba holding brief for Mr Nandwa for the Respondent

Court Assistant: E. Juma