



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL CASE NO. 114 OF 2012

MARY CHEPTOO SOTE.....RESPONDENT

VERSUS

SAMSON CHERUIYOT BARNWACH.....1ST APPLICANT

DAVID KIPNGETICH CHEPSOI.....2ND APPLICANT

RULING

1. The Applicants Samson Cheruiyot Barnwach and David Kipngetich Chepsoi being dissatisfied with the ruling issued by this court, (*Hon. Justice Omondi*) on the 21st March, 2014 filed a Notice of Appeal on the 7th April 2014 to signify their intention to file an appeal against the said ruling. Immediately thereafter, on the 30th April 2014, this application was filed, and on the same day, an order to maintain status quo pending inter partes hearing of the application was issued by the court.

2. The application is brought under the provisions of Order 42 rule 6 of the Civil Procedure Rules and seeks an order of stay of execution of the decree for the eviction of the Applicants from all that parcel of land known as **Kampi ya Moto/Kampi ya Moto Block 1/27** pending the hearing and determination of the appeal. It is based on grounds as appears on the face of the application and the supporting affidavit of Samson Cheruiyot Barnwach the 1st Applicant/Defendant sworn on the 30th April, 2014. The application is opposed and both parties have filed written submissions.

3. Brief facts giving rise to the application are that the Plaintiff in this suit had filed an earlier suit vide Nakuru CMCC No. 585 of 2008 – same parties, issues and prayers. Upon service on the Defendants, they filed a defence. The matter was fixed for hearing severally but hearing did take off.

Eventually on the 3rd April, 2013 the Plaintiff withdrew the suit. In the meantime, the Plaintiff had filed this present suit by her plaint dated the 3rd April 2012 which suit is in all fours similar to the withdrawn suit save for the court, the earlier one having been filed in the Chief Magistrate's Court, Nakuru.

The Plaintiffs then obtained an ex parte Judgment and decree for the eviction of the Applicants from the suit property above referred to. Faced with an eminent eviction the Applicants applied for an order to set aside the ex-parte judgment issued on the 12th February, 2013 and the decree issued on the 12th March, 2013. On the premises that they had not been served with the summons to enter appearance – hence the ex parte Judgment and Decree.

The court upon hearing the application dismissed the same in a ruling delivered on the 21st March, 2014. This is the ruling that the Applicants appealed from. The effect of the ruling was that the Applicants do deliver vacant possession of the land parcel to the Plaintiff failing which they would be evicted therefrom.

4. The Applicants urge this court to stay execution of the courts ruling issued on the 21st March, 2014 pending the hearing and determination of the appeal, and a draft Memorandum of Appeal has been annexed to the affidavit in support of the application where substantial issues of law and fact have been raised.

The Applicant states that he has made substantial investments in the land in issue and that they would suffer irreparable loss if evicted from the suit property where they have occupied for over 15 years and that would render the appeal nugatory.

5. In his submissions, Mr. Githui Advocate for the Applicants urged the court to grant the order of stay of execution. It is his submission that the court has residual jurisdiction to issue orders of stay pending appeal upon the Applicant demonstrating that it has an arguable appeal with high chances of success, that an order of stay will not prejudice the Respondent and that the Applicant are willing and ready to offer security for the due performance of the decree.

It is urged for the Applicants that the appeal has merit as can be seen from the draft memorandum of appeal where the main issue raised was total want of service of the plaint upon the Applicants, being serious matters of law and fact.

6. The decree of the court seeks to evict the Applicants from the suit property where they have been in occupation for over 15 years, and where substantial developments have been undertaken. It is averred that the decree-holder has never occupied the suit land, and that an order of stay would thus not prejudice her in any way pending the hearing of the appeal but the reverse would cause the Applicants to suffer irreparable loss and render the appeal nugatory.

The Applicants have indicated that they are ready to abide by such terms as the court may direct.

7. The Respondent has opposed the application by her replying affidavit and submissions drawn by her Advocate Ms. Omwenyo, which she terms as bad in law. In her submissions it is stated that the property in issues is **not Kampi ya Moto/Kampi ya Moto Block 1/27, but property known as Kampi ya Moto Block 1/1031, 1033 and 1034 (Morop)**, hence prayers sought are for a different property unrelated to this case. It is further stated that given the circumstances of this matter, the Applicants have no defence that raises any triable issues.

It is also argued that the Applicants filed a Notice of Appeal only but the Memorandum of Appeal is yet to be filed and that the Notice of Appeal is irregularly on record as leave to file the same was not obtained as required by Order 43(2) of the Civil Procedure Rules, hence it is null and void.

8. I have considered the respective submissions by both counsel. The issues for determination in my view are -

(1) Whether the Notice of Appeal filed by the Applicant is legally and regularly on record.

(2) Whether the Applicant has satisfied the legal principles for the grant of an order of stay of execution.

9. The ruling subject of the appeal was delivered on the 21st March 2014. The Notice of Appeal was filed on the 7th April, 2014 which was within the stipulated period of 30 days as provided under the Court of Appeal Rules. The ruling appealed from was premised upon the application to set aside an ex-parte judgment filed under Order 42 rule 6 of the Civil Procedure Rules, 2010. Order 43(1)(g) Civil Procedure Code provides for appeal from orders that lie as of right, and among them is orders of setting aside

judgment in default of appearance, as is the case in this matter.

As such, the appeal against the said ruling or order lies as of right, and it is therefore legally and procedurally properly on record.

10. The Respondent submitted that the property known as **Kampi ya Moto/Kampi ya Moto Block 1/27** is unrelated to the property known as **Kampi ya Moto Block 1/1031, 1033 and 1034** which is the subject property in this matter, and has urged that the court would be misguided to issue an order on a property not subject of this matter.

I have looked at the affidavit in support of the application herein sworn by the Applicant Samson Cheruiyot Barnwach. At paragraph 3 of the said affidavit, it is deponed that property known as **Kampi ya Moto/Kampi ya Moto Block 1/27** was subdivided to several subdivisions being **1031, 1032 and 1034**. Without interrogating the matter for its merits, I find that the above property after sub-division gave rise to the three sub-divisions, subject of the suit herein, hence the two are one and the same, subject of these proceedings.

11. This application is brought under Order 42 rule 6 of the Civil Procedure Code. Under the said order the court has discretion to grant an order of stay of execution if substantial loss may result to the Applicant, and the application is brought without unreasonable delay.

In the case of **Butt -vs- Rent Restriction Tribunal (1982) KLR 417** the court held that the granting of a stay of execution is governed by the question to be decided being whether the substantial loss may result unless the stay is granted, whether the application is made without delay and whether the Applicant has given security.

12. The Applicant has in his submissions and supporting affidavit demonstrated that this is a matter where the courts discretion ought to be exercised. Just as in the case of **Kirisu Kimwele -vs- Benjamin Mulei Musaki Civil Case No. 65 "B" of 2012**, the court was persuaded that an order of stay was appropriate where the Applicant had been in occupation and possession of the suit property for 50 years thus a denial of stay of execution would have caused the Applicant loss by rendering them destitute and the appeal would have been rendered nugatory.

13. This court is satisfied that the Applicant has met the legal threshold for the granting an order for stay of execution pending appeal. The court finds that the Respondent will not be prejudiced if the order is granted. She has never been in occupation of the suit premises, nor has she developed the same. However for the suit property and its subdivisions to be preserved pending the hearing and determination of the intended appeal, a further order shall issue that the Applicants and the Respondents shall maintain the order of status quo as earlier issued by this court, and further that non shall interfere with the property adversely by committing any acts of wasting, damaging, alienating, selling, transferring, removal or disposition of the said property.

14. The upshot of the above is that the application dated the 30th April, 2014 is allowed in the following terms:

1. That there be a stay of execution of the ruling of the court issued on the 21st March 2014 and the decree of eviction of the Defendants Applicants from the land parcel known as Kampi ya Moto/Kampi ya Moto Block 1/27, and its subdivisions being 1031, 1032 and 1034.

2. That status quo as obtained as at the date of the courts ruling issued on the 21st March 2014 be maintained, and further that both parties, and each one of them are restrained by this court from adversely interfering with the suit property above described and its subdivisions by committing any acts of wasting, damaging, alienating, selling, transferring, removal or disposition pending the hearing and determination of the intended appeal.

3. That costs of the application shall abide the outcome of the appeal.

Delivered, dated and signed at Nakuru this 20th day of March 2015

JANET MULWA

JUDGE

Ruling read in open court in the presence of:

Ms. Otieno for Applicants

Ms. Omwenyo for Respondents

Omondi - Court clerk