



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC APPEAL NO. 6 OF 2021

TIMOTHY KISINA KITHOKOIAPPELLANT/APPLICANT

VERSUS

ELIJAH KITELE.....1ST DEFENDANT/RESPONDENT

SIMON NGUGI2ND DEFENDANT/RESPONDENT

RULING

1. Vide a Notice of Motion application dated 14th June 2021 brought under Sections 3A, 3B, 6 and 63 (e) of the Civil Procedure Act, Order 42 Rule 6(6) and Order 51 Rule 1 of the Civil Procedure Rules, the Plaintiff/Applicant sought for the following prayers;

(i) Spent

(ii) **That there be a stay of proceedings, ruling and order given by Hon. B. Kasavuli PM on 3rd June 2021 in Chief Magistrate Mavoko ELC No. E001/2021 pending the hearing and determination of the lodged appeal.**

(iii) Spent

(iv) **That pending the hearing and determination of the Appeal herein, this Honourable Court do and hereby restrain the Respondents either by themselves, their servants and/or agents or otherwise from entering, remaining, leasing, changing, pledging, disposing off in any way, transferring, constructing any structures on and dealing with and/or interfering with the Appellant's quiet possession of the suit property herein known as Title No. I.R. 223672, whose Land Reference is 337/2633.**

(v) **That an order as to costs for this application be provided for.**

2. The Application is premised on the grounds on its face as well as the affidavit of Timothy Kisina Kithokoi where he deposed that the Appellant is the registered proprietor of all that property known as IR 223672, Land Reference No. 337/2633. (hereinafter referred to as the suit property). Further that the Appellant filed Mavoko CM ELC No. E001 of 2021 on 14th January 2021 and also sought for injunction but by the court's ruling dated 3rd June 2021, the court dismissed his application; that the Appellant opines that the dismissal was wrongful as the court failed to consider the evidence presented in the application and also failed to address Sections 25 and 26 of the Land Registration Act in so far as the Appellant's rights as a registered proprietor were concerned.

3. The Appellant further averred that he is in actual possession of the suit property; that due to the ruling, the Respondents have threatened to trespass on the suit property with intention of constructing thereon; that if stay of execution is not granted, the object of the application and appeal will be rendered nugatory; that the Appellant is ready, willing and able to furnish security as the court may order and that the application has been made without unreasonable delay.

4. The application is opposed. The 1st Respondent, **ELIJAH KITELE**, filed a Replying Affidavit sworn on 28th June 2021 where he deposed that the application is misconceived, frivolous, vexatious and amounts to an abuse of the court process and aimed at prematurely evicting the Respondents; that if the orders sought are granted, the court will have dealt with the substantive appeal; that the Appellant is not in occupation of the suit property; that there is no evidence that the Appellant will suffer irreparable loss and that the Appellant has not demonstrated a prima facie case.

5. In a rejoinder, the Appellant/Applicant filed a Supplementary Affidavit sworn on 8th July 2021 where he deposed that the suit property was acquired in 2009 from Mavoko Housing Cooperative Society Limited; that the Applicant has a valid certificate of lease; that the Applicant has also an authenticated deed plan thereof; that the 1st Respondent's deed plan is suspect for lack of authentication; that a title deed is a prima facie proof of ownership; that the applicant has shops on the suit property, which are occupied by tenants and therefore the

tenants risk eviction if injunctive orders are not granted; that the Applicant has proof of transfer from Mavoko Housing Cooperative Society; that the prayers herein are meant to preserve the suit property and that the balance of convenience tilts in favour of the Appellant/Applicant; that proceedings in the lower court should be stayed to avoid parallel decisions in the event the Appellant succeeds in the appeal.

6. The application was canvassed by way of written submissions. The Appellant/Applicant filed his submissions on 9th July 2021 while the 1st Respondent filed his submissions on 12th August 2021.

APPLICANT'S SUBMISSIONS

7. The Applicant's counsel submitted that the prayers sought in the application are intended at preserving the suit property and therefore the balance of convenience tilts in the Appellant's favour. Counsel contended that the Appellant/Applicant had proved that he was in occupation of the suit property and has therefore demonstrated irreparable harm as he has intrinsic attachment to the suit property which he has fenced and built on. Counsel argued that the Appellant's tenants may be evicted and therefore he had demonstrated that if the injunction is not granted, he stands to suffer irreparable injury. Counsel further contended that the Appellant had established a prima facie case that proceedings in the lower court should be stayed to avoid parallel decisions were the Appellant to succeed in this appeal. Counsel relied on the cases of *A. B & Another vs. R. B. [2016] eKLR* as well as *Kenya Electricity Transmission Company Limited vs. Kibutu Limited [2019] eKLR*.

1ST RESPONDENT'S SUBMISSIONS

8. Counsel for the 1st Respondent submitted that the prayers for stay of proceedings and injunction lacks merit. Counsel argued that paragraphs 5, 6 and 7 of the plaint clearly showed that the Appellant had not done any development on the suit property, and therefore the Appellant's contention that he was in possession was not correct. Counsel further contended that the Appellant's title was subject to police investigations and therefore could not be taken as prima facie evidence of ownership. Counsel relied on the case of *E.L.C Machakos Case No. 169 of 2016 P. M. Kyule & Another vs. Michael Musyoka & 2 Others* to argue that the lower court did not make any conclusive findings.

9. Counsel further submitted that the new evidence in the supplementary affidavit contradicted the contents of the plaint as the Appellant was not in possession of the suit property as stated in the plaint. Counsel argued that the transfer produced by the Appellant was not signed by the chargor and neither was it attested or signed by the Land Registrar. Counsel argued that the Appellant's annexure showing shops on the suit property was new evidence as the same was not produced in the lower court and therefore the Appellant cannot attack the lower court decision by placing reliance on new evidence. Counsel also pointed out that the Appellant's allegation that there were tenants on the suit property who had business premises thereon for decades is a matter that was not mentioned before the lower court and therefore there was no error by the lower court in its decision.

10. It was the 1st Respondent's contention that granting the prayers sought would amount to determining the substantive appeal and therefore the same should await the determination of the appeal. Counsel argued that the balance of convenience does not favour the grant of injunction.

ANALYSIS AND DETERMINATION

11. I have considered the application, the reply as well as rival submissions. In my considered view, two issues arise for determination namely;

- (a) Whether this court ought to grant stay of proceedings in the lower court pending hearing of this appeal, and;
- (b) Whether the Appellant has met the threshold for grant of temporary injunction pending appeal.

12. The law on stay of proceedings pending appeal is provided for in Section 6 of the Civil Procedure Act to the effect that where an issue is directly and substantially in issue in proceedings between the same parties, another court ought to stay its proceedings in respect of such suit.

13. In the case of *Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000*, the court held as follows;

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.

14. Similarly, in the case of *Christopher Ndolo Mutuku & Another vs. CFC Stanbic Bank Ltd [2015] eKLR*, the court held as follows;

“What matters in an application for stay of proceedings pending appeal is the overall impression the court makes out of the total sum of the circumstances of each which should arouse almost a compulsion that the proceedings should be stayed in the interest of justice.”

15. The Halsbury's Law of England 4th Edition Vol. 37 pages 330 and 332 states that;

“The stay of proceedings is a serious, grave, and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court’s general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.”

This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.

“It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the Plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case.”

16. It is therefore clear that in determining whether or not to grant an order for stay of proceedings, the court must bear in mind the general rule that once a suit is filed, proceedings ought to continue without interruption until the suit is determined. This is premised on the right of every person to a fair trial which includes the right to have the trial begin and conclude without unreasonable delay as enshrined in Article 50(2) (e) of the Constitution as well as the principle that justice delayed is justice denied, being a cardinal principle that guides courts in the exercise of judicial authority. It is against this background that orders for stay of proceedings ought to be sparingly granted and only in exceptional circumstances that demonstrate that there are compelling reasons and it would go against all that is deemed just and fair to proceed with the suit. The threshold for such proof is beyond reasonable doubt.

17. In the instant application, the applicant has argued that the justification for grant of stay of proceedings is that it is to avoid having parallel decisions on the same matter, which may be the case in the event he succeeds in the appeal. I note that the appeal is against an order of the lower court refusing to grant temporary injunction. The suit in the lower court is yet to be determined. In the appeal herein, this court is called upon to determine whether the court erred in rejecting the application for temporary injunction. This court will not be determining whether or not the Applicant proved their case in the lower court. Therefore the argument that there will be parallel decisions is not justified as the lower court is now *factus officio* in so far as the orders of temporary injunction are concerned. It is therefore my considered view that there is no justification for staying the lower court proceedings.

18. On the question as to whether the Applicant has met the threshold for grant of temporary injunction, pending appeal, this court has discretion to grant the said orders under Order 42 Rule 6(6) of the Civil Procedure Rules which provides as follows;

“Notwithstanding anything contained in Subrule (1) of this Rule, the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.

19. Principles for grant of temporary injunction pending appeal are now well settled. In the case of *Patricia Njeri & 3 Others vs. National Museum of Kenya [2004] eKLR*, the court stated as follows;

- (a) **“an order of injunction pending appeal is a discretionary which will be exercised against an applicant whose appeal is frivolous.**
- (b) **the discretion should be refused where it would inflict greater hardship that it would avoid.**
- (c) **the applicant must show that to refuse the injunction would render the appeal nugatory.**
- (d) **the court should also be guided by the principles in *Giella vs. Cassman Brown [1973] EA 358.*”**

20. Similarly, in the case of *Madhupaper International Limited vs. Kerr [1985] eKLR*, the court held that it would be wrong to grant a temporary injunction pending appeal where the appeal is frivolous or where the injunction would inflict greater injustice than it would avoid.

21. In the case of *Kenya Commercial Bank Limited vs. Nicholas Ombija [2009] eKLR*, the court held that an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court.

22. In this case, the Appellant submitted that since he has a title in respect of the suit property, he has established a prima facie case with chances of success. I must point out that at this stage, this court does not consider what was considered by the lower court, as that will be done at the main hearing of this appeal. The role of this court at this stage is to consider whether the Appellant has demonstrated having an arguable appeal. In short, the question before court now is not whether the Applicant has demonstrated a prima facie case of what was expected of him in the lower court, but whether his grounds of appeal raise an arguable case in light of the lower court’s decision viewed against the evidence presented by the Appellant in that court. This clarity is important especially considering that the 1st Respondent has argued that the evidence in the supplementary affidavit was never presented before the lower court. And I agree with the 1st Respondent’s contention that the correctness of the lower court decision is measured against the evidence produced in that court.

23. Having considered the evidence before this court, I note that the Applicant only attached the ruling of the lower court on the supporting affidavit filed with the application. However, on filing the supplementary affidavit he attached the order made in the lower court, the certificate of title, the deed plan, photographs showing possession, a letter from Mavoko Housing Society and a transfer instrument. The Applicant did not attach the application which is subject to this appeal and therefore this court is unable to verify the nature of evidence

presented before the lower court upon which that court's decision was premised. In the premises, the Applicant has failed to demonstrate he has an arguable appeal.

24. The question of irreparable injury is a matter of evidence. The Applicant has argued that his tenants are on the suit premises and therefore being in possession of the suit property, he stands to suffer irreparable injury if the temporary injunction sought is not granted. If that were the case, then the Applicant ought to have been forthright from the very beginning. The 1st Respondent has argued that the evidence in the supplementary affidavit was not before the lower court. As the aspect of possession is highly contested, and in the absence of the evidence presented before the lower court, I am not satisfied that the Applicant stands to suffer irreparable injury.

25. On the question as to which party in whose favour the balance of convenience tilts, I note that the Applicant has argued that he has documents of ownership of the suit property and therefore he should be granted the orders. The 1st Respondent has argued that the certificate of title relied upon has been challenged in the lower court as having been founded on fraud. In my considered view, no material has been placed before this court to demonstrate that the balance of convenience tilts in favour of grant of the temporary injunction sought.

26. In the premises, I find and hold that the Notice of Motion application dated 14th June 2021 lacks merit and the same is dismissed with costs.

27. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 16TH DAY OF FEBRUARY 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

IN THE PRESENCE Of:

MR. AUNGA FOR THE APPELLANT/APPLICANT

MR. MASIKA FOR THE RESPONDENT

MS JOSEPHINE MISIGO – COURT ASSISTANT