



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

ELCA NO. 119 OF 2013

GRACE NJERI MUNENE..... APPELLANT

VERSUS

WILFRED MURIUKI MURIITHIRESPONDENT

RULING

By her application filed herein on 21st September, 2012, the appellant/applicant seeks the following orders:-

1. *Spent.*
2. *That the Court do issue a stay of execution of the judgment delivered on 28th February 2012 pending the hearing of Kerugoya Civil Appeal No. 119 of 2013 (formerly Embu Civil Appeal No. 21 of 2012.*
3. *That the Court do issue a temporary injunction restraining the respondent by himself, his agents, servants or employees from entering or otherwise interfering with Plot No. 39A Kagumo town until the hearing and determination of the appeal.*
4. *That costs be provided for.*

The application is based on the grounds that the judgment sought to be appealed from was delivered on 28th February 2012 and the applicant has filed this appeal yet the respondent is engaged in acts that interfere with the applicants quiet enjoyment of the suit property. In her affidavit in support of the said application, the applicant depones that the respondent has invaded the suit property and fenced the same and therefore she stands to suffer substantial loss and damage should the respondent continue with those acts of destruction.

The application is opposed and in his replying affidavit, the

respondent states that he has entered the suit property as of right following the Court decree and all he has done is fence it and that infact it is the applicant who is destroying his fence.

Submissions have been filed by both Mr. Magee Advocate for the applicant and Ms Mukuha Advocate for the respondent.

I have considered the application, the rival affidavits of the parties and annextures as well as the submissions of counsels.

Although the application as drawn bears the number of the case in the subordinate Court, that error did not prejudice the respondent but counsels should be careful about their pleadings.

The applicant seeks two substantive remedies being for stay of execution and injunction pending appeal.

The granting of an order for stay of execution pending appeal by the High Court is governed by **Order 42 Rule 6 of the Civil Procedure Rules** and it is granted by the Court as a discretionary remedy on sufficient cause being established by the applicant. The applicant must satisfy the Court that:-

- a. ***Substantial loss may result unless the order is granted.***
- b. ***The application has been made without un-reasonable delay, and***
- c. ***Such security as the Court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given.***

The Court of Appeal in the case of **MUKUMA VS ABUOGA 1988 K.L.R 645** reinforced the above principles. See also **SILVERSTEIN VS CHESONI 2002 1 K.L.R 867.**

With regard to the issue of security, it is a good practice for the applicant, as a matter of good faith, to indicate willingness to abide by such order as the Court may require or better still offer or propose such security. The central issue however in an application such as this is that the applicant must show what substantial loss he will suffer if stay is not granted. **Platt Ag. J. A** (as he then was) addressed that issue in the case of **KENYA SHELL LTD VS KIBIRU 1986 K.L.R 410 at page 416** in the following terms:-

“It is usually a good rule to see if Order XLI Rule 4 of

the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented”

The applicant must therefore demonstrate what damages or substantial loss he will suffer if stay is not granted. In paragraph 10 of her supporting affidavit, the applicant has deposed as follows:-

“That I stand to suffer substantial loss and damage should the respondent continue with his acts of destruction”

This is a bare allegation that does not describe what loss or damage she will suffer.

The applicant also deposes that her appeal has high chances of success. Unfortunately, that is not a ground for an application under **Order 42 Rule 6 of the Civil Procedure Rules.**

The applicant is also required to file the application ***“without un-reasonable delay”***. The judgment being appealed from was delivered on 28th February 2012 and the appeal filed on 23rd March, 2012. This application was however filed on 21st September 2012 some six (6) months later. No explanation is given for that delay which I consider to be un-reasonable in the circumstances.

The application for stay of execution pending appeal is therefore devoid of merit and is rejected.

On the application for injunction, the respondent is now in occupation of the property in dispute following an order issued by the Court. Prima facie therefore, the respondent is entitled to occupy the property in dispute until the findings of the trial Court are set aside. Whereas a person exercising his undoubted right of appeal should not have the same being rendered nugatory in the case of success, it is equally important that a successful litigant should not be deprived of the fruits of his judgment otherwise than

for sufficient cause. It must be remembered that in an application of this nature, the Court is not concerned about the merits or otherwise of the pending appeal. It is not suggested that the subject of this dispute is in danger of being alienated to a third party. If anything, the applicant in her supporting affidavit dated 8th August 2013 pleaded that the respondent was depositing building materials on the property with the intention of commencing construction. He would obviously be the loser if this appeal

were to succeed.

Considering all the above, I find that the applicant's Notice of Motion filed herein on 21st September, 2012 is devoid of merit. The same is accordingly dismissed with costs.

B.N. OLAO

JUDGE

13TH NOVEMBER, 2015

13/11/2015

Before

B.N. Olao – Judge

Gichia – CC

Ms Kimotho for Appellant – present

Respondent – present

COURT: Ruling dated, delivered and signed in open Court this 13th November, 2015.

B.N. OLAO

JUDGE

13TH NOVEMBER, 2015