



REPUBLIC OF KENYA

High Court at Eldoret

Civil Appeal 66 of 2008

SAMUEL NYABIBA NYAKERI APPELLANT

VERSUS

PETER OKIABERA OMWENGA RESPONDENT

***(Being an appeal from the Judgment of Hon. A. B. Mongare (RM) in Eldoret Chief Magistrate's Court
Civil Case No.1454 of 2004 dated and delivered on 19th May, 2008)***

RULING

The Appellant has filed the Notice of Motion dated 20th November, 2008 seeking the following main orders:-

- That court be pleased to stay execution of Judgment in **ELDORET CHIEF MAGISTRATE'S CIVIL CASE NO. 1454 OF 2004** delivered on 19th May, 2008 pending hearing and determination of the appeal herein.
- Costs of the application be provided for.

It is based on the following grounds:-

- (a) The Applicant being aggrieved by the Judgment on the lower court filed an appeal on 11th June, 2008.
- (b) An application for stay was filed but was dismissed with costs on 10th November, 2008.
- (c) That ruling was delivered without notice to the parties.
- (d) There is an eminent risk of evicting the Appellant from the suit premises.
- (e) An order for stay is necessary to maintain the status quo until the determination of the appeal.

It is also supported by the affidavit of Samuel Nyabiba Nyakeri, the Applicant herein sworn on 20th November 2008. He has deponed in addition to the above grounds that his advocate filed an application for stay of execution of the Judgment of the lower court on the same date the Judgment was delivered; that ruling was delivered without notice on 10th November, 2008 dismissing the application; that the Respondent is in the process of formalizing his eviction from the suit land and that the appeal has

high chances of success.

The Respondent has filed a Replying Affidavit sworn by himself on 17th December, 2008 in opposition to the application. He depones that the application is brought in bad faith and lacks merit in that himself and the Appellant exchanged lands in which he took over his (Appellant) plot at Langas in Eldoret in exchange of a Plot at Matunda Trading Centre. That the Appellant later changed his mind and began the process of having him vacate the land; that it is the Appellant who filed a case in the lower court seeking orders to have him (Respondent) vacate the land at Langas, Eldoret; that the Appellant is therefore the author of the situation he finds himself in; that he should be allowed to take possession of his land at Matunda and that it would be unjust and unequitable to allow the status quo to prevail.

In response, the Applicant has filed a Further Affidavit drawn by himself on 3rd February, 2009. He depones that it is true himself and the respondent exchanged land but that the Respondent failed to take possession of his Plot and instead is seeking to occupy another Plot which was not subject of the exchange agreement. That it is the latter Plot which is occupied by tenants and any eviction from thereon would cause him substantial loss which the Appellant would not be in a position to compensate him for.

During the hearing, Counsel for both parties made oral submissions Mr. Samba appeared for the Applicants while Mr. Momanyi for the Respondent. Mr. Samba submitted that the appeal is arguable; that if the land at Langas is transferred into the names of the Respondent, the Appellant stands to lose immensely as there would be no possibility of recovering it. He submitted that the Respondent is not able to demonstrate that he would be in a position to compensate the Appellant if the appeal succeeds and that if the appeal fails, the land would still be transferred to the Respondent. He submitted that since the Respondent occupies the land at Langas and continues to collect rent from the Matunda Plot, the latter would easily cover for costs of the suit.

Mr. Momanyi on the other hand submitted that in an application of this nature, Court does not look into the merits of an appeal; that the Appellant stands to suffer no loss as the lower court only ordered that parties go back to their original land before the exchange agreement. He further submitted that this application was filed six (6) months after the decree, by which time the decree had been partially enforced; that the Appellant has not offered any security; that equity must apply in that the Appellant cannot seek to retain both plots and that it is unconstitutional to touch on issues of the financial ability of the Respondent.

This application was filed before the amendment of both the Civil Procedure Act and the Rules. Currently Order 41 and 50 of the Civil Procedure Rules under which the application was filed deal with appointment of receivers and time respectively. The applicable provision in an application of this nature is Order 42 Rule 6 thereof. My onerous duty in the instance, is to determine whether the Applicant has met or will meet all the requirements of the said Rule 6 of Order 42. Before I look into this it is important to give a brief background on the matter.

The Appellant herein was the Plaintiff and the Respondent the Defendant in **ELDORET CHIEF MAGISTRATE'S CIVIL CASE NO. 1454 OF 2004**. The Respondent owned a Plot situated at Matunda Trading Centre also known as **NZOIA SISAL/MOISBRIDGE BLOCK 1/3406** and the Appellant a **PLOT IN LANGAS WITHIN ELDORET MUNICIPALITY**. Both agreed to exchange the two Plots so that the Appellant owned the Matunda Plot while the Respondent owned the Langas Plot. Each party subsequently occupied its respective Plot as per the exchange agreement made on 13th February, 1994.

After some time, the Appellant changed his mind which gave rise to the lower court's suit. The main prayer by the Appellant in the suit before the lower court was for a declaration that he is the sole owner of the commercial Plot at Matunda on the strength of the exchange agreement and for a permanent injunction restraining the Respondent from interfering with the said Plot. Suffice it to say status as at the time of filing the appeal was that the Respondent had taken possession of the Matunda Plot and started collecting rent. He was assisted in taking possession by court bailiffs and OCS Matunda. The effect of the Subordinate Court's Judgment was to restore the parties to the positions they were before the exchange agreement. He had therefore proceeded with eviction at the Matunda Plot and assumed ownership and

began to manage the property. Hence any stay of execution orders would effectively only affect the transfer of the property and not the possession.

I now analyse the merits of this application with above status in mind. Order 42 Rule 6 of the Civil Procedure Rules provides:-

“6(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) 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.”

My interpretation of this rule is that a party seeking a stay must satisfy all the conditions in the rule. Under paragraph 2(a) court must be satisfied that substantial loss may result to the Applicant unless the order is made and that the application has been made without delay. As for the loss, it is factual that when each party moved into the plots they had exchanged with, they began to develop them. If the reversal were to continue, it is true, no assurance can be given of repossessing back what he has put so much energy and resources into. I say this, though, bearing in mind that the decree has already been partially executed.

On delay it is submitted that the application was filed after six (6) months of delivery of the Judgment. Notwithstanding the changed status I would not consider this duration as comprising inordinate delay.

Under paragraph 2 (1) (b) court may order the deposit of such security for the due performance of the decree. Under this head, Counsel for the Applicant submitted that in the event the appeal fails, the property given to the Respondent would still be available for transfer to him. He also submitted that, while the Respondent occupies the Langas land, he continues to collect rent from the Matunda. That therefore rents from the latter plot would caution against the costs. My take on this is different. Security

offered in due performance of a decree should be different from the subject matter. In this regard, while both parties would not lose their original Plots if the appeal fails, security is deposited to caution the party who holds the decree. In this regard monetary decree would suffice to provide for not only costs, but also loss for any developments the Respondent may have effected on the Plot at Langas. Surprisingly, the Appellant has not offered any security as the law requires. I am minded that these three (3) requirements must be satisfied in unison and not singly. Having said this, it is obvious that the Appellant has not met the requirements of the law and so this application must fail.

I must add that, as rightly submitted by Mr. Momanyi, advocate for the Respondent, the Appellant is the author of the situation he finds himself in. He is the person who changed his mind, and any dispute arising therefrom would best be resolved by way of mediation.

In the upshot I find that the application lacks merit and I dismiss it with costs to the Respondent.

DATED and **DELIVERED** at **ELDORET** this 27th day of February, 2013.

G. W. NGENYE – MACHARIA
JUDGE

No appearance for the Appellant/Applicant

Mr. Momanyi for the Respondent