



REPUBLIC OF KENYA

High Court at Nakuru

Petition 16 of 2011

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS

UNDER ARTICLES 26,28,29,40,43,47,50,53,54, & 57 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ARTICLES 19,20,21,22,23,24 & 25 OF THE CONSTITUTION OF KENYA

AND RULE 11 (PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL)

PRACTICE AND PROCEDURE RULES AND ALL OTHER ENABLING POWERS AND PROVISIONS OF THE LAW)

AND

IN THE MATTER OF ARTICLES 3,5,17,25 AND 26 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

AND

IN THE MATTER OF ARTICLES 19,27 AND 37 OF THE INTERNATIONAL CONVENTION OF THE RIGHTS OF THE CHILD

BETWEEN

1. HASSAN HUSSEIN MOHAMED
2. LESIAN OLE SEBELE
3. ISAAC LEGUYO
4. FRANCIS EKIBOR
5. SAMUEL LENGULE
6. SARAH NJUKE (SUING ON THEIR OWN

BEHALF AND ON BEHALF OF LEIKIJI COMMUNITY.....PETITIONER

VERSUS

NIGEL WELBY TRENT.....1ST RESPONDENT

CHRISTOPHER FRANCIS TRENT.....2ND RESPONDENT

THE HON ATTORNEY GENERAL.....3RD RESPONDENT

THE COMMISSIONER OF POLICE.....4TH RESPONDENT

RULING

The Notice of Motion dated 10/10/2012, is brought pursuant to **Order 42(6) and (7)** of the **Civil Procedure Rules 2010**, and **Section 3A** of the **Civil Procedure Act**.

The applicants seek an order of stay of eviction pending the hearing of an intended appeal. They filed a Notice of Appeal filed on 19/7/2012.

The grounds which the application is premised upon are found in the body of the application and a supporting affidavit sworn by Hassan Hussein Mohammed on 10/10/2012. He deponed that this court delivered its ruling on 10/7/2012, ordering the applicants to vacate the suit land within 90 days. Being aggrieved by that decision, the applicants filed a notice of appeal on 16/7/2012. They also requested the court to supply them with the certified copies of typed proceedings. However due to delay in typing of the proceedings, the applicants aver that the remaining days from the 90 days allowed by the court are not sufficient to enable them to vacate the suit land; that the applicants risk forced eviction by the respondents and therefore request that the court grants the relief sought.

The respondents opposed the application for stay. The 1st respondent, Nigel Welby Trent swore a replying affidavit on 26/10/2011 in which he stated that the applicant did not offer any security for the due performance of the decree to warrant the orders sought; that there was unreasonable delay in bringing this application which in itself is the applicants effort to frustrate the respondents from ever occupying the land; that the respondents offered an alternative land to the applicants for resettlement but the applicants have not demonstrated any efforts made to occupy the said land. He therefore prays for the application be dismissed for want of merit.

By dint of Order 42 Rule 6 of the Civil Procedure Rules, the principles to be considered by a trial court on an application for stay pending appeal from its decision are as follows:-

- a) There insufficient cause to grant the order of stay;**
- b) The court must be satisfied that substantial loss may result to the applicants unless the Order is granted;**
- c) The application must have been made without unreasonable delay;**
- d) The application must give such security for the due performance of such decree or order as may ultimately be binding on them; and**

The court rendered its judgment on 10/7/2012. This application was filed on 11/10/2013, 3 months after the judgment was read. The reason given for filing this application after time for filing the application had lapsed is that the applicant had sought certified copies of proceedings from the court. I have seen annexure HHM3, a letter addressed to the Deputy Registrar, Nakuru High Court applying for copies of proceedings for purposes of filing an appeal. The applicant had a typed copy of the judgment. In my view, nothing stopped the applicants from filing their application within the requisite time. There was inordinate delay in filing their application and no good explanation was given for it.

The dispute herein involves land. The applicants are said to be in possession of the disputed land which they have occupied over a long period of time to the exclusion of the respondents who claim to be the rightful owners of the land and in whose favour the court gave its ruling. Whereas the applicants have a right to enforce their right of appeal, yet the respondents too have a right to enjoy the fruits of their judgment. In this case, the respondents have the right to take possession of their land. In the submissions of the applicants' counsel, he stated that the applicants cannot be able to move from the land immediately because they have schools on the land; they will need to relocate to the new site; they have to get teachers for the school and that they would suffer substantial loss if an order of stay is not granted. I have taken into account the history of this matter in that the applicants have filed case after case, with every case being dismissed and they move yet to another forum. In considering this application the court must carefully consider the delicate balance between the competing rights of the parties so that justice is not only done but is seen to be done. Taking all the above into consideration and the fact that the respondents have been kept out of their land for over 30 years, in my view, the respondents will suffer more loss than the applicants will.

The applicants have not offered any security. I appreciate that the matter involves land but the applicants have to demonstrate that this is not a mere delaying tactic but that they are serious with pursuing their rights on appeal. Taking into account the history of this case this may yet be another delaying tactic because if the court grant a stay it is unknown for how long the appeal will take.

In the end, I am of the view that an order of stay is not merited. All that this court can do is allow the applicants 45 more days from today to move out of the land. The application is dismissed and the applicants will bear the costs.

DATED and DELIVERED this 28th day of March, 2013.

R.P.V. WENDOH

JUDGE

PRESENT:

Mr. Mwendwa for the Petitioner/applicant

Mr. Kariuki holding brief for Mwangi for the Respondent

Kennedy - Court Clerk