REPUBLIC OF KENYA

High Court at Eldoret

41 of 2008

SELINA CHERONO ROP …..... APPELLANT/APPLICANT

VERSUS

PAUL NG'ARNG'AR …..... RESPONDENT

(Being an appeal from the Judgment delivered by Hon. A. Lorot (Senior Resident Magistrate) in Kapsabet Civil Case No. 211 of 2011 on 4th July, 2011)

RULING

This application is by way of Notice of Motion dated 23rd September, 2011 brought under Orders 51 Rule 1 and 42 Rule 6 of the Civil Procedure Rules. The Appellant/Applicant prays for the following orders:-

That there be temporary order of stay of execution of Judgment or decree herein in respect of Plot 50 x 100 or suit property namely NANDI/KOIBARAK "B"/841 and the Respondent be restrained from constructing a commercial building on the said plot.

That there be stay of execution of the judgment delivered by Kapsabet court in SRMCC. No. 211 of 2010 pending the hearing and determination of this appeal.

That costs be provided for.

The application is based on grounds that:-

1. That the Applicant is dissatisfied with the judgment delivered by this Court on 4th July, 2011.

2. That the Applicant has filed an appeal against the said judgment.

3. That the Appeal has overwhelming chances of success.

4. That the there is need to preserve the suit property namely Plot 50x100 on NANDI/KOIBARAK

"B"/841 pending the determination ofthe Appeal and if execution is done at this stage the Appeal will be rendered nugatory.

5.

The lower court declined to grant stay of execution pending appeal.

It is further supported by the affidavit of Selina Cherono Rop, the Applicant herein sworn on 12th September, 2011. She depones that the lower court Judgment was delivered on 4th July, 2011 after which the Respondent, Paul Ng'arng'ar has moved into the disputed plot and is now constructing a commercial building and that if the construction continues, the appeal will be rendered nugatory and that further if the execution continues, she will suffer irreparable loss.

In opposition, the Respondent has filed a Replying Affidavit sworn by himself on 1st August, 2012. In this Replying Affidavit, he (Respondent) depones he had sworn another affidavit on 11th May, 2012 and that this Replying Affidavit is filed pursuant to leave of court granted to file a Supplementary Affidavit.

I have perused the court record and there is no Replying Affidavit sworn or filed by the Respondent on 11th May, 2012. Proceedings do indicate however, that, on 19th June, 2012 Mr. Kiboi advocate acting for the Respondent sought leave of the court to file a Further Affidavit so as to include annexures. The said leave was granted on the same date and what appears to have been filed pursuant thereto is the Replying Affidavit sworn by the Respondent on 1st August, 2012. Be that as it may, on 25th September, 2012 Mr. Kiboi informed court that this Replying Affidavit ought to be headed as a Supplementary Affidavit.I will however rely on the Replying Affidavit on record sworn by the Respondent on 1st August, 2012 as the pleading in opposition to the application herein. Annexed to it are documents which the Respondent wishes to rely on. All the same, the annextures to this Replying Affidavit will suffice in enabling the court to arrive at a just decision.

The application was canvassed before me on 26th February, 2013 by way of oral submissions. Counsel for the Applicant submitted that the Respondent had continued to build on the parcel of land in question and if the same is allowed, the appeal would be rendered nugatory.

Counsel for the Respondent submitted that the Applicant has not demonstrated that she would suffer any loss if the application is not allowed and that the filed Memorandum of Appeal does not amount to a good arguable appeal. He also submitted that the injunction orders issued by the lower court were in favour of the Respondent. That the Magistrate had visited the suit land and confirmed that the Respondent was in occupation of the land and has effected developments thereon and that therefore the orders sought can only be granted after determination of the appeal.

I have now considered these submissions and I take the following view. The provision under which the application is brought is Order 42 Rule 6 of the Civil Procedure Rules. My attention is focused on Rule 6 (2) which spells out the conditions which a party seeking stay of execution should satisfy. The same reads as follows:- **"Rule 6 (2) No order for stay of execution shall be made under subrule (1) unless-**

(a) the court is satisfied that substantial loss may result tot 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."

As to whether the Applicant is likely to suffer substantial loss if the orders sought are not granted, I note that the Applicant did not annex to her Supporting Affidavit the Order against which the stay is sought. This places the court in an awkward position as I cannot discern merely from the prayers in the Notice of Motion that loss will be occasioned if orders are not granted. It is also not the duty of the court

at this stage to call for the lower court file for purposes of perusal so as to read the orders which the court (lower) gave or issued. In this regard, counsel for the Applicant has been of no assistance to court. It is important that an Applicant should note that a stay of execution is not granted as a matter of course. Good grounds must be laid down for consideration as to merits or demerits of the prayers made.

Be that as it may, court is substantially assisted by the annextures affixed to the Respondent's Replying Affidavit. The Defendant in the lower court suit is the Applicant herein and the Plaintiff the Respondent. In the suit which is **KAPSABET CIVIL CASE NO. 211 OF 2011 PAUL NG'ARNG'AR -VS- SELINA CHERONO ROP,** the Respondent prayed for the following orders:-

Permanent injunction to restrain the Defendant, her servants and agents from ever interfering with the Plaintiff's peaceful occupation of the suit property, being L.R. NO. NANDI/KOIBARAK 'B'/841.

Costs of the suit and any other relief the court may deem fit and just to grant.

The Plaint is marked as annexture 'PN 4'. A copy of the Judgment is marked as annexture 'PN 5'. A look at it clearly demonstrates that trial Magistrate visited the plot and noted that it is developed though not completely. He also noted that the Respondent had fully paid the purchase price save that the sub-division was awaiting the outcome of a succession cause which was not disclosed. In the result the court restituted the Plaintiff to quiet possession of the plot and further gave orders of permanent injunction restraining the Defendant, by herself or agents from interfering with the Plaintiff's quiet possession thereof.

Against this background it is evident that the Respondent had developed the plot even before the lower court suit was filed. Indeed annexture 6 (a) – (e) on the Replying Affidavit are a clear testimony of this fact. It is not effectively factual, as alluded by the Applicant that the Respondent has since the Judgment of the lower court commenced construction on the Plot. The building on the plot existed before that suit was heard. As such, no loss, implied or actual, is likely to be suffered by the Applicant if the orders granted are not issued. After all, no new construction is being undertaken by the Respondent.

Further, the Magistrate's order was one of injunction. A stay order would imply that the Applicant be allowed to also occupy buildings set up by the Respondent or she too starts new construction on the Plot. This is not possible as Magistrate heard candid evidence that the Respondent purchased the Plot and all that was pending was sub-division of the same.

The Judgment mentions a pending succession cause, which in the Memorandum of appeal is cited as **SUCCESSION CAUSE NO. 40/2010**. My candid view is that the Applicant should pursue her interest in this cause as opposed to a civil suit. The main appeal, I believe will settle this issue in a finality. Notwithstanding that the appeal is still pending, my view is that the Applicant has not demonstrated the loss she stands to suffer if orders sought are not granted.

As to whether the application has been made without unreasonable delay, it is noted that judgment of the lower court was delivered on 4th July, 2011 and application was filed on 23rd September, 2011. The delay here was of approximately less than three months which cannot be deemed as inordinate.

On whether the Applicant has given any security for the due performance of the decree, the loud answer is in the negative.

Under sub-rule (2), all the conditions set out must be satisfied wholesomely and not singly. The Applicant has failed to satisfy two of them and this application must therefore fail.

In the result, I find that the application lacks merit and the application is dismissed with costs to the Respondent.

DATED and **DELIVERED** at **ELDORET** this 16th day of April, 2013.

G. W. NGENYE – MACHARIA

JUDGE

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Miss Kiplimo Advocate for the Appellant

No appearance for Respondent