



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CIVIL APPEAL NO 32 OF 2012

DAVID MWANIKI KASIMU.....APPELLANT

VERSUS

JOHN MUTHANGYA KASIMU.....1ST RESPONDENT

TOWN COUNCIL OF MWINGI.....2ND RESPONDENT

RULING

This application is brought under Section 13 (1), (4) and (7) (a) of the Environment and Land Court Act. This is unusual because that provision of the law is about the jurisdiction of the Environment and Land Court. Applications seeking stay of execution are normally brought under Order 42 (6) (2) of the Civil Procedure Rules. That notwithstanding this court proceeded to consider the application on its merit. The application is dated 29th November 2012 and was filed on 13th December under certificate of urgency. It seeks two main orders; stay of execution pending hearing and determination of this application and stay of execution pending hearing and determination of the appeal. It also seeks costs. This court had, on 21st February 2013, granted interim stay pending hearing and determination of this application.

The applicant was the plaintiff in Mwingi SRMCC No 56 of 2002. The case concerned a parcel No. 15A (suit property) situated at Mwingi Township of which the applicant claims to be the bonafide owner. The respondent filed a counterclaim stating that he is the registered owner of the suit property. The lower court dismissed the applicant's claim and granted the respondent's counterclaim.

Being a land matter, this case rightly ought to be tried by the Environmental and Land Court. This court is not seized of that jurisdiction. Since this application was already filed, this court decided to hear and determine this interlocutory application pending transfer of the matter to the right court.

The grounds relied on by the applicant are that the he stands to suffer irreparable loss if stay is not granted because the respondent is likely to demolish the structures he has erected on the suit property. He states that he has been in occupation since 1970 and has established his residential home on the plot. He has stated that his appeal has chances of success and that if stay is not granted and the building he has put up on the disputed parcel of land the appeal will be rendered nugatory. He has stated that he is willing to abide by the conditions the court is likely to put.

The respondent has opposed the application stating that it is the applicant who is occupying his plot since 2002 and that the applicant collects rent amounting to Kshs 18,000 per month. He states that in the event the court is inclined to grant stay it should order the applicant to provide security for costs in the tune of

Kshs 1,000,000.

Parties agreed to put in written submissions which I have carefully considered. The law is settled on the conditions to be met before the court can grant stay pending appeal. These conditions are set out in Order 42 (6) (2) and various decided cases. An applicant must demonstrate that substantial loss will result if stay is not granted; that the application has been made without unreasonable delay; that the appeal will be rendered nugatory and that the appeal or intended appeal is arguable and not frivolous (see **Butt v Rent Restriction Tribunal [1982] KLR 417** and **Mombasa Cashewnuts Processor (K) Ltd & Another v Nyari Investments (1988) Limited & Another [2008] eKLR**).

My view in this matter, after due consideration of the material placed before me, is that the applicant stands to suffer loss if stay is not granted, more so if the respondent were to demolish the building on the disputed parcel of land. The appeal, in my view will also be rendered nugatory. In **Mombasa Cashewnut Case** above the court considered what an arguable appeal means and stated that **“For our part, we start from the stand-point that an arguable appeal does not and cannot mean an appeal which will or must succeed. As the principle itself indicates it simply means an appeal which can be argued.....An applicant does not have to show the court a chain of arguable points; one arguable point is sufficient for purposes of an application...”**

My reading of the memorandum of appeal reveals that the applicant has an arguable case. It is my view that the applicant has satisfied the criteria for granting stay pending appeal and I make the following orders:

- i. **Stay of execution of the judgement of Mwingi SRMCC No 56 of 2002 pending the hearing and determination of this appeal is hereby granted.**
- ii. **The applicant is ordered to provide security for costs to the tune of Kshs 324,000 to be deposited in an interest earning account in the name of the Registrar of this Court within 30 days from today’s date. The amount is equivalent to 18 months rent at the rate of Kshs 18,000 from November 2012 to May 2014 within which time it is estimated that the appeal may be determined.**
- iii. **Costs will be in the cause.**
- iv. **The parties are directed to seek transfer of this case to the nearest Environment and Land Court for hearing and determination.**

S.N MUTUKU

JUDGE

Dated this 6th day of June 2013

Signed and delivered this 7th day of June 2013 in open court.