



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
ENVIRONMENT AND LAND COURT
AT MALINDI
CIVIL APPEAL NO. 10 OF 2013

KAZUNGU KARISA NGARI.....APPELLANT

=VERSUS=

JOHN OTIM OMARA.....RESPONDENT

R U L I N G

Introduction

1. The Application before me is the one dated 19th September 2013 in which the Appellant is seeking for the following orders:
 - (a) **That pending the hearing and determination of the Appeal herein, there be a stay of execution of the Judgment of the Honourable trial court delivered on the 16th May 2013 and the orders issued on the 22nd August 2013 in SRMCC No.352 of 2011 (Kilifi)- John Otim Omara -vs-Kazungu Karisa Ngari**
 - (b) **That the costs of this Application be provided for**
2. The Application is premised on the grounds that the Appellant has filed an Appeal against the Judgment of the trial court delivered on 16th May 2013; that the appeal is arguable and has high chances of success and that the Respondent may move the trial court to have the Appellant evicted from the suit plot before the Appeal is heard and determined.

The Appellant's/Applicant's case

3. The Appellant's Application is supported by his affidavit in which he has deponed that on 16th May 2013, the lower court delivered its Judgment and ordered the District Surveyor, Kilifi to prepare and file in court a report in respect to Kilifi/Mtwapa/1688 within 14 days.
4. The trial court made its final orders on 22nd August 2013 requiring the Appellant to hand over vacant possession within 45 days; that he has filed an Appeal which is pending and that he is likely to be evicted from the suit property before the said Appeal is heard and determined.
5. The Appellant finally deponed that according to the surveyor's report, there are six houses on the

suit property which are occupied by his family together with a well which serves his family. Consequently, it was deponed, the Appellant's entire family stands to be left out if the orders of the trial court are effected.

Respondent's case

6. The Respondent filed his Replying Affidavit on 1st October 2013 and deponed that the Application has been brought after unreasonable delay; that the Appellant sold to him the subject parcel of land Kilifi/Mtwapa/1688 in the year 2001 whereafter a title deed was issued to him.
7. According to the Respondent, the Appellant remained in possession of one acre after the suit property was excised from Plot Number 1083 and consequently, he shall not be rendered landless because parcel of land number Kilifi/Mtwapa/1687 is registered in his name; that he is being denied the use of the plot and that in the event this court grants to the Appellant a stay of execution, then Kshs.1,000,000 should be deposited as security.
8. The parties filed written submissions which I have considered.

Analysis and findings

9. An order of stay of execution pending the hearing of an appeal can only be made by the court where it is shown that substantial loss may result to the Applicant unless the order is made; the Application has been made without unreasonable delay and such security as the court may order for the due performance of the decree or order has been given by the Appellant.
10. It is not in dispute that the Appellant sold a portion of his land to the Respondent. The trial Magistrate found as a fact that the title that was subsequently issued to the Respondent after the sale is indefeasible and therefore the Appellant has to give way.
11. Although the Appellant did admit during trial that he sold a portion of his land to the Respondent, he disputed the fact that that is the same land that the Respondent is claiming to be his. Furthermore, the Appellant claims that the land that the Respondent is claiming is where he has built his six houses and sunken a well.
12. It is true that in the event the Appellant is evicted from the suit property, he is likely to suffer substantial loss because that is where he is staying with his family. The Appellant has also sunk a well which is the source of water for his family. That fact was not disputed by the Respondent.
13. The Application before me was filed on 13th September 2013, one month after the trial court made its final order. In the circumstances, a delay of one month cannot be said to be unreasonable.
14. The Respondent has not offered any security for due performance of the decree that may be issued against him in the event that the Application does not succeed. Even where the Applicant has not offered security, the court can impose on the Applicant the conditions that he must meet before the order of stay of execution can be issued. In the circumstances, and considering that the Appellant has six semi-permanent houses on the suit premises, I direct that the Appellant deposits in court Kshs.50,000 within 30 days from the date of this Ruling for the due performance of the decree in the event that his Appeal does not succeed.
15. For the reasons I have given above, I allow the Appellant's Application dated 19th September 2013 on condition that he deposits Kshs.50,000 in court within 30 days from the date of this Ruling.

Dated and Delivered in Malindi this 19th Day of **December 2013**

O. A. Angote

Judge