



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL CASE NO. 68 OF 2007**

SIMON ROYSON NJOROGE.....PLAINTIFF

**VERSUS**

JAMES WATHIGO KIGO.....DEFENDANT

**RULING**

This Ruling relates to a Notice of Motion dated 7<sup>th</sup> November 2011 and filed on 8<sup>th</sup> November 2011. It was a composite application for several orders-

- (a) a stay of execution of the judgment of this court made on 28<sup>th</sup> October 2011 pending the hearing and determination of the Applicants' appeal.
- (b) an order of injunction to restrain the Defendant, his agent and/or servants from interfering with land parcel Title Number Nyandarua/Mawingu Salient/883 pending the hearing and determination of the appeal.
- (c) an order for costs.

The Motion was based upon the grounds on the face thereof and the Applicant's Supporting Affidavit sworn on 7<sup>th</sup> November 2011 the Further Supporting Affidavit sworn and filed on 11<sup>th</sup> November 2011, and the Supplementary Affidavit sworn and filed on 23<sup>rd</sup> November 2011.

The Motion was opposed by the Replying Affidavit of James Wathigo Kigo, the Respondent sworn on 18<sup>th</sup> November 2011, and filed on 21<sup>st</sup> November 2011.

The Applicants' case is that he has filed a Notice of Appeal which he said has high chances of success, and unless the order of stay is granted his appeal would be rendered worthless. The Applicant submitted that the Respondent is interfering with the land, the subject of the litigation herein, that he is sub-dividing and selling the land to unsuspecting buyers, that the Respondent is quarrying building stones for sale, and that he would suffer irreparable loss and damage if these activities were not stopped.

On her part, Miss Mureithi who argued in opposition on behalf of the Respondent submitted that the Applicant had not come to court with clean hands, both in his Supporting, Further and Supplementary Affidavits, that there is no quarrying being carried out on the land, that there was no sub-division on the subject land, that the Defendant has not since 1970s sub-divided his land or carried out any quarrying thereon.

Counsel submitted that the photographs attached to the Affidavit are dated 29.03.2001 and 30.03.2001 respectively, and are outdated, and are the same matters which were raised in the suit and which the court

had adjudicated and determined upon. Counsel urged the court to dismiss the application.

In his reply to the submissions by Miss Mureithi on behalf of the Respondent, the applicant submitted that he was not asking the court to reverse its decision. The Applicants submitted that all the people destroying the land were agents of the Respondent, and that there was no third party, and these persons were all acting under the instructions of the Respondent, that the photographs show recent fencing which was being done as the case progressed in court by purchasers from the Defendant, and that the land sold so far was about 4 acres, @ shs 300,000/= and amounting to a total of Ksh 1,200,000/=.

The Applicant pleaded, these purchasers have no documents in support of their claims to purchase the land and that they were being defrauded of their money, and that this had to stop.

For all these reasons the Applicant prayed that his application be allowed.

I have considered these respective arguments, and will commence with those of the Applicant. The allegations of fraudulent sales of the land to unsuspecting members of the public by the Respondent is indeed a serious matter which deserves to be reported by the Applicant to authorities responsible for crime detection and prevention and to maintenance of peace and order. There was no evidence by the Applicant to prove his assertions.

On the Applicants' two-pronged prayers for an injunction and a stay of execution, I will again commence with the prayer for injunction. The principles for grant of injunction are settled under our law -

- (1) the Applicant must establish a **prima facie** case with a probability of success,
- (2) that the applicant will suffer irreparable loss and damage which cannot be compensated by way of damages,
- (3) when the court is unsure, the application is determined on the balance of convenience.

The battle over the suit land has been protracted between the Applicant and the Respondent. It spans a period of over thirty-seven (37) years (*from 24<sup>th</sup> August 1974 when the Defendant was allocated the suit land, to 28<sup>th</sup> October 2011 when the court determined that part of the suit land belonged to the Defendant*). It has also been subject of criminal prosecution against the Defendant, and thanks to his determination and doggedness he has resisted every effort by the Applicant to deprive him of part of the suit land. On the basis of my findings in the judgment of 28/10/2011, the Applicant has not established a prima facie case with any probability of success. In light of the acrimonious litigation and prosecution of the Respondent, I doubt that the Applicant would offer any compensation to the Respondent. The balance of conveniences in all the circumstances lies with the Respondent.

The Applicant being a lay person, did not cite the provisions of Order 42, rule 6(1) and (2) of the Civil Procedure Rules. It is permissible these days under Section IA of the Civil Procedure Act (*Cap. 21, Laws of Kenya*) (*the oxygen law*), to access the courts without undue technicalities of the rules, and the law. The courts are however bound to determine claims on the basis of the law, substantive or procedural. The law relating to stay of execution is set out in Order 42 rule 6(1) and (2) of the said Rules. For a stay of execution to be granted, an applicant must satisfy the conditions of rule 2 aforesaid. These are -

- (1) the application for stay must be made without unreasonable delay from the date of the decree or order to be stayed;
- (2) the applicant must show that he will suffer substantial loss if the orders of stay is not granted, and
- (3) the applicant offers such security as the court may order to bind him to satisfy any ultimate orders the court may find binding upon him.

In this case, the orders to be stayed were made on 28.10.2011. The application for stay was made on 8<sup>th</sup> November 2011 that is some ten (10) days following the judgment. The Applicant did indeed act with speed. The Applicant also lodged a Notice of Appeal dated 1<sup>st</sup> November 2011, on 2<sup>nd</sup> November 2011. Notice of Appeal is not however a ground for stay of execution under rule 6(1) of Order 42 aforesaid.

The orders of the court made on 28.10.2012 were for sub-division of the suit land into equal portions between the Applicant and Respondent. The applicant is still retaining the title, and the Respondent has taken no action yet towards execution. The Applicant as owner of half of the suit land will suffer no loss at all.

The Applicant will be loath to offer any security to the Respondent, and has consequently offered none.

In summary therefore, the Applicant has not fulfilled any of the conditions as set out in the foregoing paragraphs of this Ruling for the grant of either an injunction or stay of execution. For those reasons, the Applicant's Notice of Motion dated 7<sup>th</sup> November 2011 and filed on 8<sup>th</sup> November 2011 is dismissed with costs to the Respondent.

There shall be orders accordingly.

**Dated, signed and delivered at Nakuru this 24<sup>th</sup> day of February, 2012**

**M. J. ANYARA EMUKULE**  
**JUDGE**