



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU
CIVIL CASE 11 OF 2012

AUGUSTINE KINYUA ITA..... PLAINTIFF

VERSUS

NDII MUBOTHI.....1ST DEFENDANT

JOHN IRERI MUBOTHI 2ND RESPONDENT

JAMES NJERU MUBOTHI3RD RESPONDENT

R U L I N G

This is the Appellant/Applicant's amended Notice of Motion dated 6th March 2012. It's brought under section 3A Civil Procedure Act Order 2 rule 6 and Order 51 rule 1,3 and 4 Civil Procedure Rules.

His main prayer is for an Order of stay of execution of the decree arising from the Judgment of Senior Principal Magistrate's Court Siakago dated 6th February 2012 in Civil case No.23 of 2009 pending the hearing and determination of the Appeal filed herein. The grounds are in the body of the application. The main one being that if the Respondents are allowed to execute the decree the Applicant and his family will be evicted and lose their home. And the loss would be irreparable. The Applicant has filed a long affidavit of 21 paragraphs. He explains that the Respondents are out to execute the decree from the Senior Principal Magistrate's Court Siakago. And infact they have taken fencing posts to the suit land and they wish to evict his mother and brother who reside there. This is in paragraph 11 – 16 of his supporting affidavit.

Mr. Gachuba for the Appellant/Applicant in his submissions reiterated his grounds in the application. He submits that pending the hearing of the Appeal the Court makes an Order for the Status Quo to be maintained. The reason being that the Respondents have never been in possession of the suit land while the Applicant and his family members have always been. In citing the case of ***KENYA SHELL LTD –VS- BENJAMIN KARUGU KIBIRU & RUTH WAIRIMU KARUGA [1982-88]1 KLR 1018*** he submits that the loss to be suffered by the Applicant are immense;

- i) He will be evicted.
- ii) He will be denied access to his home.

- iii) He will be a constructive trespasser.
- iv) He will be rendered homeless.
- v) He will lose his permanent house and entire homestead.
- vi) He will be rendered landless.
- vii) He will not be able to take care of his family in terms of feeding them.

He submits that this damage and loss can't be reversed even if the Appeal succeeded. He also referred to the case of **BUTT –VS- RENT RESTRICTION TRIBUNAL [1982] KLR 417** where Justice Madam held;

“It is in the discretion of the Court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the Court as a general rule ought to exercise its best discretion in a way so as not to prevent the Appeal, if successful from being nugatory per **BRETT L.J. in WILSON –VS- CHURCH (NO.2) 12 chD [1879] 454 at page 459**. In the same case Cotton L.J. said at page 458;

“I will state my opinion that when a party is Appealing, exercising its undoubted right of Appeal, this Court ought to see that the Appeal, if successful is not rendered nugatory”.

He further submitted that the application was not made without delay and that the Applicant was ready to comply with any Orders the Court would give.

The Respondents he stated would not suffer any prejudice if the Orders sought were granted.

The Respondent filed grounds of opposition dated 28/2/2012. He states that there would be no purpose for stay of execution of the decree herein as the Appeal has no good prospects of success. He says the trial Magistrate appreciated that the Respondent acquired a clear title and hence a legitimate claim to the suit land. He further states that the Appellant has not demonstrated that his intended Appeal will be rendered nugatory if the stay is not granted as prayed.

The 1st Respondent filed a replying affidavit sworn on 29/3/2012 opposing the application. He indicates that the Court below confirmed his position of ownership and that should remain the position. Of interest to note is paragraph (e) in which he interprets for this Court what the granting of stay by this Court would mean. I note this with a lot of exception because it amounts to intimation of a sitting Judicial Officer. It is not the practice to be telling the Court that if you give this kind of orders this is what the meaning will be. The 1st Respondent has also deponed that the Appellant/Applicant is the one trespassing on his land and there is no hardship he will suffer. The 2nd and 3rd Respondents in their replying affidavits indicated that they were wrongly sued in the lower Court.

Mr. Mungai for the Respondents in his submissions has intimated that the Applicant filed an amended application without leave of the Court. He suggests on what should be done.

He submits that the application must fail as there are no good reasons for granting the same. Mr. Mungai has also given the Court a glimpse of what the facts and pleadings in the lower Court were.

I would first of all wish to address the issue of leave to file an amended Notice of Motion. The Appellant/Applicant filed a Notice of Motion dated 10/2/2012. On 28/2/2012 both Mr. Gachuba and Mr. Mungai appeared before me for hearing of the said application when it was realized that Mr. Mungai had been served for the 2nd and 3rd Respondents when he had not been instructed to act for them. The matter was therefore adjourned to 30/3/2012 when submissions would be filed. Immediately after making these pronouncement Mr. Gachuba applied for leave to amend the Notice of Motion.

“This Court granted the Applicant **LEAVE** to file an application to amend the Notice of Motion”.

The two Counsels then entered into a consent on how they were to proceed. The bottom line of the consent being that they would file their submissions on both applications by 30/3/2012. This was their own consent which was then adopted by this Court. They were to submit on two applications.

1. For leave to amend the Notice of Motion
2. The Notice of Motion itself

Of course there is no application for leave to amend filed herein. And therefore the amended Notice of Motion filed herein has been filed without the leave of the Court.

Secondly Affidavits are never amended and Counsel should know that. I am alive to the provisions of Article 159 (2) (d) of which enjoins this Court not to place undue regard to technicalities. In this particular case I am dealing with parties who are represented by learned Counsels who are well aware of Civil Procedure. And if we give this provision a very wide meaning we shall never have order in our Courts. I therefore strike out the amended Notice of Motion and amended affidavit with costs. I will therefore deal with the Notice of Motion dated 10/2/2012. The main prayer therein is stay of execution.

A perusal of the record shows a decree filed. I have not seen a copy of the plaint, defence and counterclaim Judgment and even proceedings to appreciate what transpired in the lower Court. From the submissions before me it's clear that the registered proprietor of land parcel No. MBEERE/KIRIMA/3004 is the 1st Respondent/ Respondent.

All the parties herein state that they are in possession of the land. Had I seen the evidence that was adduced I would have been in a position to tell who among them lives on the suit land. Right now I can't.

In a case of this nature where stay is applied for in a pending Appeal the Court will look out for the following as per Order 42 rule 6(2) a & b Civil Procedure Rules.

- i. If substantial loss may result to the Applicant unless a stay order is made.
- ii. The Application has been made without undue delay.
- iii. Security for due performance of the decree

Judgment in the lower Court was made on 6th February 2012. The application herein was made on 10th February 2012. It was therefore made without undue delay.

Will the Applicant suffer substantial loss if the Order for stay is not granted?

In his supporting affidavit he says he has lived on the land and he is threatened with removal. On the other hand the 1st Respondent/Respondent says it's the Applicant who is trespassing on his land as he has the title to the said land. As earlier mentioned besides the affidavits and submissions there is nothing to confirm to this Court the evidence that was adduced before the lower Court. Besides the decree filed the Judgment of the Court is not herein annexed. I can't therefore say with certainty who is in occupation.

In the case of **ORUBA MATERNITY & NURSING HOME & OTHERS –VS- PURSHOTAM N. PATEL COURT OF APPEAL (NAIROBI) NO 133/96** it was held that in an application for stay pending Appeal a copy of the Judgment or a photocopy thereof should be included in the application.

In the grounds of Appeal the Appellant/Applicant has raised very many grounds. I cannot actually tell if these were the issues before the trial Magistrate.

The 2nd and 3rd Respondents are said to never have been parties in the plaint but were only brought in by the Appellant/Applicant in the Counterclaim. Very interesting.

The cases cited by Counsel for the Applicant are dealing with monetary decrees. The decree before me is not a monetary one.

The Appellant/Applicant has not denied the fact that the person registered as proprietor of MBEERE/KIRIMA/3004 is the 1st Respondent/Respondent. And if that be the position then the Appellant/Applicant had to satisfy this Court of the substantial loss he would incur if stay of the lower Court decree is not granted.

Before I finalize this Ruling I wish to point out that some of the submissions by Mr. Mungai for the Respondent are in such foul language which is not acceptable before any Court of Law. Let's not be carried away by the interests of our clients to the extent that we become disrespectful to the Court and to our colleagues.

I must point out that in spite of dismissing the unprocedurally amended Notice of Motion dated 6/3/2012 I decided to deal with the earlier Notice of Motion dated 10/2/2012 which to me was properly on record and had not been amended. Counsels had also filed submissions on it.

My finding from the analysis above is that the Applicant has not been able to demonstrate that he will suffer any substantial loss incapable of compensation in the event of a successful Appeal.

I therefore dismiss both the amended Notice of Motion dated 6/3/2012 and the Notice of Motion dated 10/2/2012 with costs.

DATED, SIGNED AND DELIVERED AT EMBU THIS 26TH DAY OF JUNE 2012.

**H.I. ONG'UDI
JUDGE**

In the presence of;

Mr. Gachuba for Appellant/Applicant

**Mr. Mungai for Respondent
Njue – C/c**