REPUBLIC OF KENYA

High Court at Eldoret

Environmental & Land Case 1 of 2012

PETER SAMOEI.....PLAINTIFF

VS

ISAAC K. RUTO.....DEFENDANT

(Application for stay of execution pending appeal- principles to be applied – matter proceeding ex parte in the subordinate court- application to set aside rejected in subordinate court- appeal filed on ruling of application to set aside – interpretation of Order 42 Rule 6 – Comparison with Rule 5(2) of the Court of Appeal Rules – Application for stay pending appeal allowed).

R U L I N G

The application for determination is an application dated 20 November 2012 brought under the provisions of Order 42 Rule 6 and Order 51 Rule 1. It is an application for stay of execution of a judgement pending appeal.

The genesis of this application is that the Respondent filed suit via a Plaint in July 2011 with the Applicant herein being the defendant. The Plaint inter alia pleaded that the Plaintiff (Respondent in this application) is the owner of a land parcel Eldoret Municipality Langas Phase II Plot No.206. It was the contention of the Plaintiff that the Defendant, who is the area Chief of Pioneer Location, sometimes on or about 15 May 2008, brought in some Administration Police Officers to evict the Plaintiff from the suit land and that the defendant has since prevented him from utilizing the suit land. The Plaintiff sought a declaration against the Defendant that he (the Defendant) is not the legal owner of the suit land and also sought orders of permanent injunction to restrain the Defendant or his agents from further interference with the suit land. The Defendant was duly served with summons but failed to enter appearance nor file Defence. The matter thereafter proceeded for hearing ex-parte and judgement was duly entered for the Plaintiff as prayed.

Upon judgement being entered, the Plaintiff obtained an order of eviction to evict the Defendant from the suit land. It was at that point that an application dated 9 October 2012 was made by the State Law Office on behalf of the Defendant seeking to have the execution of the decree stayed and also seeking to have the ex-parte judgement set aside. The same application also sought to have the Honourable Attorney General enjoined to the suit as a party to the proceedings. It also prayed that the Defendant and the Attorney General be granted leave to file Defence out of time. The grounds upon which that application was made were that the suit land is a public utility plot owned by the Government of Kenya; that the suit land being public land , the Attorney General was the proper party to be sued; that the plaintiff has threatened to evict the Administration Police Officers from the suit premises ; that the delay in filing Defence was inadvertent and excusable; that the Defendant has a good defence to the Plaintiff's claim ; and finally that the subject matter being land, the court ought to hear and adjudicate the suit on merits.

The application of 9 October 2012 was supported by the affidavit of the Defendant who inter alia deponed

that when he was served with summonses, he forwarded the same to the Attorney General to enter appearance. That the AG sought to have the map of the area before proceeding any further; that there was a delay in obtaining the map ; that the suit land was public utility since pre-independence and the community has put up Administration Police residential houses; that the suit land was occupied by the Government and the Attorney General ought to be a party to the suit; and, that he has a good defence on merits.

This application to set aside the ex-parte judgement was heard and determined by the learned Principal Magistrate at Eldoret who dismissed the same with costs. The defendant was aggrieved by this Ruling and filed an appeal. It is in reference to that appeal that the applicant has now filed this application for stay of execution pending the hearing and determination of that appeal.

This application was canvassed before me on 10 December 2012. Mr. D.K.N. Magare, learned counsel for the applicant, urged me to allow the application. He started by arguing that the applicant has a good defence to the original suit and he ought to have been given opportunity to ventilate the same. He argued that it was wrong for the learned trial Magistrate to disallow the application to set aside the ex-parte judgement. He furrther argued that the applicant has filed an appeal with strong chances of success. To assert this point he emphasised that the applicant is a Chief, a public officer, and he is on the suit premises in that official capacity. He pointed out that it is therefore the AG who ought to have been sued and not the Chief who was sued in his individual capacity. It was his contention that the applicant stands to suffer substantial loss as he is now shouldering a burden which ought to have been shouldered by the AG. He submitted that the applicant has a good defence to the respondent's claim as the suit land is public utility. He referred me to an annexture in the supporting affidavit, a Part-Development Plan of the area indicating that Plot No.206 the suit land, is set apart for the purposes of an Administration Police Camp. He averrred that if the APs are withdrawn, the area stands to suffer a security risk. It was his position that the learned Magistrate was wrong in disallowing the application to set aside as a good defence had been demonstrated.

Mr. W. Kigen, learned counsel for the respondent, naturally urged me to dismiss the application. It was his view that the applicant does not have a good appeal. He supported the decision of the learned Magistrate and argued that the Magistrate was correct in dismissing the application to set aside. He asserted that the defendant cannot have any defence to the respondent/plaintiff's claim as the suit land belongs to the respondent. He offered that the applicant has been on the suit land and has made developments therein.

I have considered the application and the rival submissions of learned counsels for both parties. This being an application for stay pending appeal, I need only be satisfied that the provisions of Order 42 Rule 6 have been met.

Order 42 Rule 6(2) provides that :-

No order for stay of execution shall be made... unless—

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

Following the above provisions, I first need to be satisfied that substantial loss may result to the applicant and that the application has been made without unreasonable delay. The ruling appealed from was delivered on 6 November 2012. The applicant filed appeal on 19 November 2012. This application was filed on 21 November 2012. The application has therefore been filed without unreasonable delay. It has been argued that the applicant, a public servant, was wrongly sued in his individual capacity and that he now has to bear the burden of the judgement by himself. I am convinced that he stands to suffer substantial loss if the judgment herein is fully executed. It has been pointed out that there is an

Administration Police Camp on the suit land which provides security to the area. There is no doubt that if the Administration Police are evicted from the suit land, there is every possibility that the area will suffer from insecurity. It is not a requirement in the Civil Procedure Rules, for an applicant to demonstrate that he has a good case. Counsels herein went to great lengths to demonstrate that they have a good appeal (or bad appeal for the respondent). Indeed, in my view, they submitted as if they were arguing the appeal and all authorities presented to me, went to demonstrate that each has a good (or bad appeal). Probably it is time that the Rules Committee aligned the provisions of Order 42 with the principles that are applied under Rule 5(2) of the Court of Appeal Rules, 2010. The principles in the latter are settled. In the case of *Duncan Nduracha vs Fuad Mohammed & 2 Others Nairobi Court of Appeal Civil Application No. 24 of 2011 (2011) eKLR* the court stated that :-

The law as regards the principles to be applied when considering an application brought under rule 5 (2) (b) is now settled. The court in deciding such an application exercises unfettered discretionary powers which cannot be exercised capriciously nor upon the whims of the court. The applicant has to demonstrate that the intended appeal or the appeal, where one has been filed, is arguable, that is that it is not frivolous. Secondly, he has to demonstrate also that were the appeal or the intended appeal, as the case may be, to succeed, such success would be rendered nugatory by our refusal to grant the application.

It will be discerned that for an application of stay of execution pending appeal in the court of appeal, one has to first demonstrate that he has a good appeal with chances of success and secondly that the appeal may be rendered nugatory if the stay is not granted. These are not the same considerations under Order 42 Rule 6 which as I had set out earlier, only require that the applicant demonstrate that he has filed the application without unreasonable delay, that the applicant will suffer substantial loss, and an offer of security. Strictly, in determining an application under Order 42 rule 6, one need not be satisfied that the appeal is not frivolous. My concern is that there is a danger that a wholly unmeritorious appeal may end up satisfying the provisions of Order 42 Rule 6 thereby causing unnecessary hardship and delay to the successful litigant. I do not see the rationale for a different test to be applied in the Court of Appeal and a different one to the High Court or courts of the status of the High Court. It is my considered view that the test for stay pending appeal ought to be the same for all courts.

As the law stands, I need not be satisfied that the applicant has a good appeal and I will not therefore attempt to go to the merits or demerits of the appeal. However, much as I have tried, I have found it difficult to shut my eyes and not consider that there is a serious dispute as to whether the suit land is public utility or is privately owned land and it may be important that the same be preserved in the state that it is currently in, pending the hearing and determination of the appeal. Without considering the merits or demerits of the appeal, it is my view that the applicant has satisfied the provisions of Order 42 Rule 6 and is entitled to a stay of execution pending appeal.

From the above, I allow the application for stay pending appeal subject to the defendant executing a bond for the performance of the decree in the event that he fails on appeal. I allow this application. Costs to be costs in the Appeal.

DATED and DELIVERED this 19th DAY OF DECEMBER 2012

MUNYAO SILA

JUDGE ENVIRONMENT & LAND ELDORET

Delivered on 19/12/2012 in the presence of

Moss S.W. Karuga fof M/S Magare & Co Advocates for the applicant .

Ms W. Kigen for the Respondent of M/S W. Kigen & Co Advocates for the respondent.