



REPUBLIC OF KENYA

High Court at Eldoret

Civil Appeal 186 of 2011

MARINDICH BIWOTT 1ST APPELLANT

KIPKOSGEI BIWOTT 2ND APPELLANT

VERSUS

JACOB KIRWA KEMBOI RESPONDENT

RULING

The Notice of Motion is dated 12th November, 2012 and is brought under Order 42, Rule 2 of the Civil Procedure Rules and Section 63 (e) of the Civil Procedure Act, Cap 21, Laws of Kenya. The Appellants, Marindich Biwott and Kipkosgei Biwott are the Applicants. They seek two main orders:-

1. That a stay of execution do issue against Court's Judgment in Eldoret CMCC No. 990 of 2005 pending the hearing and determination of the appeal.
2. That in the alternative and without prejudice to No. 1 above, the court do order that the status quo prevailing over land parcel No. Uasin Gishu Mafuta/205 be preserved pending the hearing and determination of this appeal.

It is premised on grounds that the Respondent entered into negotiations with third parties to dispose of the land, the appeal is likely to be rendered nugatory if the status quo is disrupted and that it is in the interest of justice that orders sought be granted.

It is further supported by the affidavit of the 2nd Applicant (Appellant) sworn on 12th November, 2012. He depones inter alia, that the Respondent is the registered owner of the suit land and that he has been informed by a village elder one, Mr. Mafuta that the Respondent is intent on selling the land to a third party. That if the land is sold the appeal will be rendered nugatory.

The application is opposed by way of a Replying Affidavit sworn by the Respondent on 13th November, 2012. In summary he depones that the allegations that he has visited the suit land with an intention of selling it are based on rumours and speculation. He further argues that it is the Applicant who uprooted some posts and fence with the help of the said village elder, Mafuta. He urges Court to dismiss the application.

Both parties were represented and the respective Counsel made oral submissions before me emphasizing on the points deponed in the Supporting and Replying Affidavits respectively. I have considered the respective submissions and my analysis of the prayers sought is as follows.

He who alleges must prove. This application seeks a stay of execution against terms which the Applicant did not present before the Court. It is common procedure that the order/decreed of the Judgment in the subordinate Court ought to have been annexed to the Supporting Affidavit. The Court would then ascertain the terms of the Judgment as deposed in the said Supporting Affidavit. Without the decree Court can only guess what the suit was all about from the Memorandum of Appeal.

Be that as it may, it is not in contention, as I discern from the averments contained in respective affidavits that the subject matter of this appeal is land which currently is registered in the name of the Respondent. The Applicants fear that he is likely to dispose of this land. They have not tendered the least iota of evidence to demonstrate that the Respondent is about to dispose of the land to third parties. Indeed they have gone ahead to name one, Mr. Mafuta, a village elder who has given them information that the land is about to be sold off to third parties. They allege that the third parties have been visiting the land with a view of an intention of selling it. Nothing was easier for the Respondent than to have the said Mr. Mafuta swear an affidavit to state what he knows of the intended sale. His failure to do so makes me conclude, as rightly submitted by Counsel for the Respondent, that such a contention is based on pure rumours and is speculative.

In the alternative any documentary evidence should have been exhibited as prove of the intended sale. None was and I conclude that Court cannot rely on mere rumours and hearsay.

On point of law the substantive provision under which this application is brought is Order 42 Rule 2 of the Civil Procedure Rules which reads:-

“Where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such time as the court may order, and the court need not consider whether to reject the appeal summarily under section 79B of the Act until such certified copy is filed.

My understanding of this rule is that it applies at the time the appeal is being considered for admission. That is to say that Court need not reject an appeal summarily under S. 79 B merely because a certified copy of decree or order has been filed alongside a Memorandum of Appeal. This application is not ventilating issues on why the appeal should be admitted or summarily rejected.

Already an appeal is pending and so the most appropriate rule applicable is Rule 6 (1) and 2 (1) of Order 42. In particular Rule 2 (1) provides for the conditions a party seeking a stay must adhere to before the stay is granted which are:-

- (1) Court must be satisfied that substantial loss may result to the applicant unless the order is granted.
- (2) That the application has been made without unreasonable delay.
- (3) That the applicant is able to furnish such security for due performance of such decree or order as the Court may order.

So then have the Applicants herein satisfied the above conditions?

With respect to point No. 1 above if it is true as they allege that the suit land is about to be sold they stand to lose substantially. However I have already found that they have not furnished any evidence of whatever nature that the Respondent is about to dispose of this land. On this ground the application lacks merit.

On point No. 2 – as to whether the application has been made without undue delay, the point is well mitigated in the ruling of Honourable Justice Azangalala dated 8th November, 2011 in **HIGH COURT CIVIL MISCELLANEOUS APPLICATION NO. 473 OF 2009 – MARINDICH BIWOTT & KIPKOSGEI BIWOTT -VS- JACOB KIRWA** – which is attached to the Memorandum of Appeal in this appeal. The Applicants had sought leave of the Court to file this appeal out of time, which leave was

granted. The Memorandum of Appeal was filed on 18th November, 2011, only ten (10) days after the ruling was delivered. The Memorandum of appeal is prove that there exists an appeal. In my view the period of ten (10) days cannot be said to be inexcusable or inordinate delay. Hence this would be good point to mitigate why a stay of execution should be granted.

On point No. 3 – one must ask what the purpose of the security would be. Again I can only fetch such purpose from the Memorandum of Appeal, as Applicants failed to attach a copy of the decree to this application. The learned Magistrate found that no fraud was proved and so he upheld that the title to land remains with the Respondent. The suit had been dismissed with costs and the Appellants are already evicted from the suit land. Hence the best security at this juncture would be for costs. Again the Applicants have not offered any such security which mitigates against their plea for an order of stay of execution.

Rule 6 (2) of Order 42 is explicit, that the above conditions do not operate in isolation but a party seeking an order of stay must fulfill all of them in unison. The Applicants have only fulfilled one of them and so this application must fail.

Moreover S. 63 of the C.P.A. must be interpreted vis a vis the provisions of Order 42 Rule 6 (1) and (2). In the upshot, I hold that the interlocutory orders sought are unmerited and if granted would not serve ends of justice. I accordingly dismiss the application with costs to the Respondent.

DATED and DELIVERED at ELDORET this 11th day of December, 2012.

**G. W. NGENYE - MACHARIA
JUDGE**

In the presence of:

No appearance for the Appellants

No appearance for the Respondent