



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI

Civil Appeal 30 of 2009

KAZUNGU NGARIAPPELLANT

VERSUS

ESTHER RITA MWELU KYENDO.....1ST RESPONDENT
FRANK SEEHUBER2ND RESPONDENT

R U L I N G

The Notice of Motion application is dated 29-6-07 made under Order XLI Rule 4(2) and L Rule 1 and section 3A and 63(e) of the Civil Procedure Act. It seeks for an order of stay of execution of the judgment of Hon. Mr. Nduna (SRM) delivered on 25th June 2009, in SRMCC No. 88 of 2007 pending hearing and determination of the appeal.

It is based on grounds that:

- (1) The respondent filed a civil suit at Kilifi Law Courts being SRMCC No. 88 of 2007 against the appeal on 2nd February 2007.
- (2) The said suit was heard by Hon. Nduna (SRM) and judgment delivered on 25-6-09 in favour of the respondents
- (3) The appellant was aggrieved by the judgment and filed appeal which has very high chances of success.
- (4) The respondents are now in the process of having the decree and warrants of execution signed with the intentions of demolishing the appellant's houses and evicting the said appellant from the suit premises and this would cause a lot of prejudice and irreparable loss and damage to the appellant and render the appeal nugatory.
- (5) The orders sought herein, if granted, shall not prejudice the respondents in any way whatsoever.

The application is supported by the affidavit sworn by Kazungu Ngari in which he reiterates what is stated on the face of the application and deposed that the trial magistrate disregarded his evidence.

He further states that on the disputed land stands six (6) houses which houses at least 20 members of his family, twenty two (22) mature coconut trees, one mango tree and a borehole used by his entire family for day to day water use and if execution of the lower court is not stayed then the loss for his entire family and himself shall be colossal and irreparable.

Further that the houses and/or homes are the only place they know as their residence and even their source of water.

The application is opposed, and in a replying affidavit sworn by Esther Rita Mwelu Kyendo (1st respondent) on behalf of herself and 2nd respondent, she depones that applicant has not come to court with clean hands and so does not deserve the orders he seeks.

She states that prior to the sub-divisions of the Title Number Kilifi/Mtwapa 1083 and 1084, appellant's title NO. Kilifi/Mtwapa/1006, on 28th March 1994, he applied to sub-divide the latter into two parcels and appointed a licenced surveyor by name Edward M. Kiguri and duly prepared a mutation form indicating how he would wish to have the same sub-divided which sketch was enforced by the surveyor as evidenced by exhibit ERMK 1. Subsequent to the subdivision, appellant sold title No. Kilifi/Mtwapa 1084 measuring 0.3 hectare to Judith Aoko Okola, who subsequently sold to the respondents as evidenced by copies of the application for consent to transfer, (the consent and title Deed are marked ERMK 2. The respondents discovered that appellant had encroached into and trespassed upon a portion of their land and they made an application to have the issue determined by the District Land Registration Kilifi as per ERMK3.

On 16th February 2006, the surveyor established that appellant had encroached on the respondent's plot by 0.0877 hectares and thereafter appellant sought for time to pull down the two temporary structures which had been constructed on the respondent's portion. It was agreed that appellant would do so within three months. That notwithstanding, appellant did not pull down the structures within the agreed period and this led to respondents filing SRMCC 88 of 2007 against him.

Pending hearing of the matter, the court issued injunctive orders against the appellant – which he defied and constructed four ore temporary structures.

As regards the alleged borehole, respondents depone that the claims by appellant are false, as the borehole is on plot No. 1083 and not on plot No. 1984.

Further that there re only a few people residing in the temporary structures who can easily shift to their rightful land without any inconvenience.

Respondent urges this court to dismiss the application.

Appellant filed a further affidavit insisting that he has come to court with clean hands and that it is the respondent who is misleading the court by not disclosing that the boundary dispute had been solved in earlier proceedings conducted by the Land Registrar and ruling delivered on 22-12-05, as per KN4 annexed and that the proceedings conducted by the Land Registrar were null and void ab initio as he did not have jurisdiction. He maintains that the temporary structures are actually houses which were built long before the first proceedings by the Registrar and not otherwise.

At the hearing of the application Mr. Lewa for the applicant submitted that if stay is not granted, the appellant and his family may be evicted and he has sought to rely on **Mukuma v Abwoga (1988) KLR pg 645** which held:

- (1) Where a party is exercising his undoubted right of appeal, the Court ought to see that the appeal is not

rendered nugatory by preserving the status quo until the appeal is heard.

- (2) The granting of a stay of execution in the High Court is governed by Order XLI Rule 4(2), the questions to be decided being whether substantial loss may result unless the stay is granted, whether the application is made without delay and whether the applicant has given security. He also urged the court to consider the case of **Zakayo Makumi v Maina Githanja HCC MSc. NO. 1066 of 1998** that:

“it is common knowledge that in matters of eviction, the issue of reinstatement is easier said than done and in most cases the preservation of the status quo is the best cause of action...”

Mr. Lewa further submitted that the application has been made without unreasonable delay – judgment was delivered on 25-6-09 and the application was filed on 29-6-09 and the application was filed on 29-6-09 – so applicant acted swiftly. It is also indicated that the applicant is ready to comply with any reasonable condition that the court may make. He urges the court to strike out the further affidavit filed irregularly.

Mr. Tindika for the respondent submitted that no substantial loss will be suffered by the appellant and that these stay proceedings have simply been commenced so as to frustrate the respondents from enjoying their property and that should not be allowed.

He urges the court not to strike out the further affidavit the registrar thought it has been filed without leave of the court, saying, once document is on record, it should be considered by the court. He also refers this court to a photo which has been annexed to the affidavit saying the borehole is actually on the portion belonging to the appellant – the dividing line being fence fixed on the premises with poles and the houses are temporary makuti structures.

Mr. Tindika's contention is that it is the respondents who have suffered loss of not enjoying his piece of land since 2006, and by granting stay, the court will only be adding more suffering to the applicant – he refers to the case of **I. T. Inamdar and others v Postal Corporation of Kenya HCCC 1629/00** which addressed conditions which must be met before orders of stay can be granted. It is further pointed out that no security has been offered for the court to consider and so conditions of Order XLI Rule 4(2) have not been satisfied.

On this point he cites the case of **Loice Ruguru Kimani v Nelson Ndege Gatimu HCCC 16 of 2004** saying it is the applicant who has an obligation to make offers on security.

Also referred to is the case of **Hall Equatorial Ltd v Olympic Front Processors HCCC 5400 of 1991** Mr. Lewa's reply is that the applicant has expressed a willingness to abide by any condition which the court may impose and the substantial loss relates to losing, the houses in which they live.

Under Order 41 Rule 4, an applicant is required to demonstrate to the court that substantial loss will result if the order sought is not granted, and that the application has been filed without delay. The applicant is also required to satisfy the court that he is willing and able to give such security for due performance of the decree. Have any of these conditions been satisfied by the appellant/applicant

The orders by Mr. Nduna were a permanent injunction restraining appellant from entering, occupying or dealing with the land. It also gave the respondents liberty to remove and pull down the offending structures. These offending structures are what appellant says are houses where members of his family live. Whether they are of a temporary nature, or made of cheap material being makuti and clay – it is what the appellant's family call home. It is not denied that some of the appellant's family members live in or occupy those so called structures. Certainly pulling down of these structures would

result in substantial great loss and damage to the appellant's family. I am satisfied that substantial loss may result to the appellant which can only be prevented by preserving the status quo i.e unless the orders of stay are granted.

Secondly, this application has been made without delay at all, in fact it was filed within four days after delivery of the judgment while it is true that the applicant has not made an offer as to security for costs, he has expressed a willingness to abide by any reasonable conditions which the court may set. In as much as the **Loise Ruguru Case** refers to an obligation by the applicant to make the offer, then leave it for the court to decide whether that is good security – that must be considered in the light of the cited case in that applicant therein seemed to suggest that she did not have anything.

Thirdly, **Hall Equatorial Ltd Case** seems to recognize the expressed willingness to give security as an aspect worth taking into account as opposed to saying, “I have nothing to offer” and this works in appellant's favour. I will therefore grant orders of stay pending appeal on condition that:

- (a) The applicant SHALL NOT erect any more structures or carry out developments, or till the disputed portion, until the appeal is heard and determined.
- (b) The applicant shall take steps to have the appeal listed or hearing within sixty (60) days from this date.
- (c) Costs of this application shall be borne by applicant

Delivered and dated this 20th day of **April 2010** at Malindi.

H. A. Omondi
JUDGE