No. 195

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL CASE NO. 90 OF 2007

BELDINA MOKAYA.....PLAINTIFF

-VERSUS-

ROBERT OMBASO NYARERU.....1ST DEFENDANT

GUSII COUNTY COUNCIL.....2ND DEFENDANT

RULING

This suit though filed in 2007, has been the subject of various applications such that one is left wondering whether the parties are really keen to have the same prosecuted and determined. The plaintiff is the registered proprietor of the land parcel **Kisii Town/Block III/491**, ***"the suit premises",*** having been allocated the same by the Commissioner of Lands who later executed a certificate of lease in her favour.

In or about July, 2007, the defendants allegedly trespassed on the suit premises, claiming that the same belonged to the 2nd defendant. Whilst thereon, they erected a structure and also commenced rearing animals without the permission and consent of the plaintiff. Effectively by their actions, the defendants prevented the plaintiff from occupying and or developing the suit premises thereby causing her substantial loss and damage.

In their defence, the defendants denied the alleged trespass. The 2nd defendant infact pleaded that it was the legal owner of the suit premises and had authorized the 1st defendant to occupy it. They jointly averred that the plaintiff was a trespasser who had grabbed the suit premises and got herself registered as the proprietor in a fraudulent, illegal and dubious manner.

Upon filing the suit, the plaintiff also sought and obtained a temporary order of injunction on 11th

July, 2008 against the defendants jointly and severally. However, despite the order aforesaid, the defendants continued with their acts of trespass complained of. Consequently, the plaintiff went back to court again, this time by way of contempt proceedings and successfully prosecuted the same. On 1st April, 2009, the 2nd defendant as well as its clerk were found guilty of contempt of court and sentenced to a fine of Kshs. 50,000/= and. 100,000/= respectively.

Subsequent thereto the defendants filed an application seeking leave to amend their statement of defence, which application was heard and dismissed on 2nd November, 2009. Prior to this however, the plaintiff had filed an application for summary judgment on 23rd September, 2008. This application is also the subject of this ruling.

That notwithstanding, the defendant filed yet another application dated 12th April, 2010, seeking stay of proceedings, pending the hearing and determination of the appeal filed against the ruling by **Muchelule J.** declining to grant leave to the defendants to amend their defence. It would appear that simultaneously with the filing of Notice of appeal, the defendants also filed **Civil Application No. 3 of 2010** in the court of appeal. That application came up for hearing interpartes and on 23rd June, 2010, it was allowed. Consequently, the Notice of appeal filed by the defendants was deemed as filed and served within time.

The two applications dated 23rd September, 2008 for summary judgment and 12th April, 2010 for stay of proceedings respectively came before me for mention on 25th June, 2010. **Mr. Ochwang'i** and **Mr. Bigogo**, learned counsel appeared for the plaintiff and defendants respectively. They sought directions as to how the two applications should be canvassed. I directed that the two applications be canvassed simultaneously on 15th July, 2010. On this date however, parties agreed to canvass the two applications by way of written submissions. They subsequently filed and exchanged written submissions which I have carefully read and considered.

Since the application for stay of proceedings is in a way critical and has a direct bearing to the application for summary judgment, I propose to deal with it first. For if I allow it then there will be no need to deal with the application for summary judgment.

The application dated 12th April, 2010 sought in the main 2 prayers. First, that ***"pending the hearing and determination of the appeal and court of appeal Civil Application No. Nai 3 of 2010, this court be pleased to grant an order of stay of proceedings" and secondly, that "the costs of the application do abide the outcome of the said court of appeal proceedings"***. The grounds in support of the application were that the defendants had already lodged a Notice of appeal and also a Notice of Motion under rule 3A, B, 4, 41, 42 (1 & 2) and 72 of the **Appellate Jurisdiction Act**. The defendants and not the plaintiff would suffer substantial loss and or prejudice if the proceedings in this court are not stayed. Since the defendants have exercised their undoubted right of appeal, they should be afforded opportunity to ventilate their grievances in the highest court in the land. If the proceedings are not stayed, the appeal and application already lodged in the court of appeal will be rendered nugatory. Finally, that it was in the interest of justice that the application be allowed.

In support of the application**, Bigogo Onderi,** learned counsel for the defendants swore an affidavit in which he merely elaborated on the grounds aforesaid.

That application was met with grounds of opposition from the plaintiff. She pleaded that the application was mischievous, misconceived and otherwise bad in law, that the court had no jurisdiction to entertain the same and in any event the application was premature, inept and contrary to the provisions of Order XLI rule 4 (4) of the **Civil procedure rules**. There was unreasonable delay in making the application which delay has not been explained or at all. That the application was calculated to delay, circumvent and or defeat the hearing of the scheduled motion for summary judgment. Finally, the plaintiff took the view that the application did not satisfy and or establish sufficient cause and or basis, to warrant the orders sought.

It is conceded by both parties that the civil application number 3 of 2010 in the court of appeal came up for hearing and it was allowed. Accordingly, the Notice of appeal filed in the court of appeal is proper. Therefore the 1st limb of the Notice of motion has been rendered superfluous. In other words, the 1st limb of the 1st of prayer in the instant application has since been overtaken by events and does not fall for consideration. What we are then concerned with is whether there should be stay of proceedings pending the hearing and determination of the intended appeal. However before such prayer can be granted, the defendants have to establish sufficient cause. The case for the plaintiff is that to the extent

that the defendants are not the registered proprietors as opposed to the plaintiff who is, they have no claim, whatsoever, to the suit premises. The defendants' response is that if the stay of proceedings is not granted, the intended appeal will be rendered an academic exercise and definitely nugatory.

The defendants have filed a Notice of appeal which is as good as filing an appeal itself for purposes of this application. In so doing the defendants have demonstrated their desire to exercise their undoubted right of appeal. That is sufficient cause why this application for stay of proceedings should be allowed. That will accord them an opportunity to ventilate their grievances in the highest court in the land.

Will the defendant's suffer any prejudice if stay of proceedings is not granted. The answer should be pretty obvious. The defendants risk their appeal being rendered an academic exercise or nugatory if the proceedings in this suit are not stayed. For instance, if the application for summary judgment was heard and determined in favour of the plaintiff, that will signal the death knell for the case of the defendant in this court. So that if the defendants were successful in their appeal and they were allowed to amend their plaint as contemplated, it will be an exercise in futility. The case would have been heard and determined. That would be prejudicial to the defendants. I cannot however say the same of the plaintiff. The suit premises will still remain registered in her name save for her quiet and peaceful enjoyment of the same as a proprietor. This is an inconvenience, the plaintiff can bear with for a while.

What the defendants are seeking is a discretionary relief pending the determination of the appeal. For the court to exercise its discretion in their favour, they must show among other things, that their conduct before and after the filing of the application is not blame worthy, beyond reproach and whether they had filed the instant application with immediate dispatch. As already stated this suit was filed on 9th August, 2007. Thereafter the court was inundated with several applications which were heard and determined, including the ruling dismissing the application for leave to amend the statement of defence. That ruling was delivered on 2nd November, 2009. However, it was not until 12th April, 2010 that the defendants lodged the instant application. That was a delay of about 6 months which is inordinate and unexplained. Ordinarily, that would have been sufficient ground to deny the defendants the exercise by this court of its discretion in their favour. However, and as already indicated elsewhere in this ruling, the court of appeal has allowed the defendants to appeal against the refusal by **Muchelule J** to allow the defendants leave to amend their defence. It will be absurd if I was to refuse the application and then the court of appeal proceeds to hear and allow the appeal.

On the whole therefore, I am satisfied that the application is merited. Accordingly I allow it in terms that pending the hearing and final determination of the appeal there shall be a stay of proceedings in this suit. The costs of the application shall go to the plaintiff in any event in view of the inordinate and unexplained delay in filing of the instant application by the defendants.

In view of my holding in this application, it is not necessary to determine the fate of the application dated 23rd September, 2008 for summary judgment. That will be for another day depending on the outcome of the intended appeal.

Ruling dated, signed and **delivered** at Kisii this 16th day of September, 2010.

ASIKE-MAKHANDIA

JUDGE