



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
REGISTERED TRUSTEES,
KISII SPORTS CLUB PLAINTIFF/APPLICANT
VERSUS
REGISTERED TRUSTEES LUTHERAN
CHURCH OF KENYA DEFENDANT/RESPONDENT

RULING:

On 5th March, 2009 this court dismissed the plaintiff's application dated 2nd October, 2008 which was seeking a restraining order against the defendant from trespassing on a parcel of land known as **KISII MUNICIPALITY/BLOCK II/207**, hereinafter referred to as "**the suit property**". In the said ruling it was established that the defendant is the proprietor of a leasehold interest comprised in a land parcel known as **KISII TOWN/BLOCK II/132**. It was further established that the defendant acquired its certificate of lease over the said property on **30th June 1981** whereas the plaintiff acquired its certificate of lease on **4th September, 2003**. The plaintiff's contention is that the defendant's parcel of land is part of its property which is used as a Golf Course. In the said ruling the court held, *inter alia*, that:

"However, with issuance of a certificate of lease on 4th September, 2003, which clearly and officially delineated the boundaries of the Golf Course, the plaintiffs can no longer claim any parcel of land that may have been originally part of the Golf Course before the date of the lease. The plaintiffs' title over the suit property commenced on 4th September, 2003 and they lack capacity to interfere with any other parcel of land that was not officially leased to them."

The plaintiff was dissatisfied with the aforesaid ruling and has exercised her constitutional right of appeal, having filed a notice of appeal to the Court of Appeal. The plaintiff filed an application by way of a chamber summons brought under Order XLI Rule 4 (1) of the Civil Procedure Rules. She sought stay of execution of the ruling delivered on 5th March 2009. The application was supported by an affidavit sworn by Dr. Peter N. Omboga, one of the plaintiff's trustees. He stated that the appeal will be rendered nugatory if execution of the aforesaid orders were to proceed. He added that the subject matter of the dispute, the defendant's parcel of land, measures 0.20 Hectares and was part of the plaintiff's Golf Course. The suit property measures 16.61 Hectares or thereabout. The deponent further deposed that if the defendant constructed a pastor's house on her land, as she intend to, the plaintiff would suffer "substantial and irreparable loss". He therefore urged that the status quo be maintained until the intended appeal is heard and determined.

The defendant filed a replying affidavit which was sworn by Francis N. Onderi, one of the trustees. He denied that the defendant's parcel of land is part of the plaintiff's parcel of land and

added that the plaintiff would not suffer any loss at all if the defendant proceeded to develop the same. He further deposed that the plaintiff's application was bad in law in that it had been brought by way of a chamber summons instead of a motion. He went on to state that the defendant was greatly prejudiced by the plaintiff's interference with her property. He confirmed that the defendant intends to develop a pastor's residence on the disputed parcel of land.

Mr. Masese for the plaintiff and Mrs. Asati for the defendant made brief submissions which I have taken into consideration.

It was not denied by Mr. Masese that the plaintiff's application was wrongly brought by way of chamber summons instead of a notice of motion. Notwithstanding that procedural mistake, I will proceed to consider the application on its merits. Under Order XLI Rule 4 (4), an appeal to the Court of Appeal is deemed to have been filed when under the rules of that court notice of appeal has been given. The plaintiff, having filed a notice of appeal, is deemed to have filed an appeal to the Court of Appeal. The principles for grant of an order of stay of execution pending appeal are well settled. Sufficient cause must be shown by the applicant. The applicant should also satisfy the court that substantial loss is likely to result unless the order sought is granted. The applicant must also show that the application has been made without unreasonable delay. If the court is inclined to grant the order of stay, it may require the applicant to provide such security as may be deemed appropriate.

In this case, the applicant is contending that the respondent's parcel of land is part of the Golf Course and if stay of execution is not granted she will suffer substantial and irreparable loss. However, there is *prima facie* evidence that the respondent's parcel of land, though currently being used by the applicant, is not part of the suit property. In the ruling delivered on 5th March 2009 that issue was appropriately dealt with by this court on the basis of the certificates of lease in respect of the two properties. The court, having dismissed the applicant's application for injunction, there is no order that is capable of execution by the respondents. A negative order cannot be executed.

I am also not satisfied that substantial loss has been demonstrated by the applicant. If the respondent proceeds to develop her property and the applicant succeeds in her appeal, it is the respondent who will stand to suffer substantial loss because she may be forced to pull down any developments thereon.

It is not in dispute that the applicant has been in occupation of the respondent's property over a considerable period of time but that does not, in my view, grant the applicant any right to continue being in unlawful occupation of the same pending hearing and determination of the appeal.

The applicant has all along been aware of the respondent's title over the land and has never instituted any legal proceedings to challenge the same.

For the aforesaid reasons I dismiss the applicant's application for stay of execution. The respondent will have costs of the same.

DATED, SIGNED AND DELIVERED AT KISII THIS 24TH DAY OF MARCH, 2009.

D. MUSINGA

JUDGE.

24/4/2009

Before D. Musinga, J.

Mobisa – cc

Mr. Sagwe HB for Mr. Masese for the Plaintiff/Applicant

Mrs. Asati for the Defendant/Respondent

Court: Ruling delivered in open court.

D. MUSINGA

JUDGE.