



REPUBLIC OF KENYA

HIGH COURT AT NAIROBI (MILIMANI LAW COURTS

CIVIL CASE 3532 OF 1995

NITIN PROPERTIES LIMITED.....PLAINTIFF

VERSUS

JAGJIT SINGH KALSI.....1ST DEFENDANT

KALDEEP KAUR KALSI.....2ND DEFENDANT

RULING

There is a judgment on record delivered by D.K.S Aganyanya J as he then was (now JA) on the 16th day of January 2009. It is a matter of judicial notoriety that the said D.K.S Aganyanya J is the other half of the judge seized of the matter, a matter within the knowledge of counsels of both sides herein, and which counsels okayed the seizure of this matter in the manner proceeded with as a sign of judicial maturity.

The current applicant who is the losing party in that judgment is desirous of seeking a second opinion in the exercise of their undoubted right of appeal. In the pursuit of that right, they have presented to this court, an application by way of notice of motion dated 3rd February 2009 and filed on the 4th of February 2009. It is brought under section 3 A and 63 (e) of the CPA Cap 21 and order XLI rule 4 of the CPR. Four prayers are sought namely:-

(1) *Spent*

(2) *That his honorable court, be pleased to grant an order to stay the execution of its decree/order dated 16th January 2009 pending the inter parte hearing and determination of this application.*

(3) *That this honorable court, be pleased to grant an order to stay the execution of its decree/order dated 16th January 2009 pending the hearing and determination of the intended appeal.*

(4) *That costs of this application be in the cause.*

The grounds in support are set out in the body of the application, supporting affidavit, written skeleton arguments and oral highlights and the major ones are that:-

- Applicant moved to this court, seeking relief by way of adverse possession whose judgment was delivered on the 16th day of January 2009 against the applicant.

- The applicant became aggrieved by the said judgment and moved with speed to lodge a notice of appeal to the Court of Appeal.

- The current application has been necessitated by the fact, that immediately after the delivery of the judgment, the respondent sent his servants and or agents to enter the disputed portion and started cutting down trees and other vegetation that formed a continuous hedge which was the physical boundary separating land reference Nos. 209/4275/21 and 209/42/75/22

(ii) The respondents have through their counsel, threatened to bring down the applicants buildings standing on the suit land which include large roomed servant quarters, which property has been standing on the premises since 1946.

(iii) The applicants mother has over the years and at great expense planted trees, grass, flowers and other plants of very rare species and of indigenous type, tended them tediously and very carefully. They are of great environmental and sentimental value.

- They believe they have an arguable appeal with a high probability of success.
- It is their view that unless stay is granted, the applicant will suffer irreversible damage.
- They are prepared to abide by any conditions that may be set by the court.

The written arguments simply reiterates the content of the grounds in both the body of the application and supporting affidavit and then stressed he following:

- That the application has been presented to this court, without undue delay.
- They have an undoubted right of appeal.
- Maintain that if stay is not granted, then the applicant will suffer irreversible loss because once the respondent takes over the suit land they will proceed to carry out the intended developments as per communication from their counsel namely cut down trees and vegetation, flowers, grass plus putting up structures etc and should the applicant win on appeal, the prevailing circumstances then on the ground will be irreversible, thus rendering the appeal nugatory and still reiterate their readiness to abide by any condition that may be set by this court.

There were also oral highlights which are nothing but a reiteration of the content of the grounds both in the body of the application and stressed the following.

- They have an unrestricted right of appeal under section 65 of the CPA which right cannot be eroded.
- The merits of the intended appeal is the preserve of the Court of Appeal as the court, appealed to, meaning that as to whether the appeal has merits or not cannot form the basis for the granting or the denial of the plea for stay pending the appeal herein.
- Stay is necessary as the claim is for adverse possession and if not granted the right will have become extinct.
- They filed both the notice of appeal and application promptly.

The respondents on the other hand have opposed the application on the basis of the replying affidavit sworn by one Jagsut Singh Kalsi on the 4th day of March 2009 and filed the same date, content of written skeleton arguments and oral highlights. The salient features of the same are as follows.

- There is no merit in the application for stay.
- The appeal has little chances of success as there is admission that adverse possession was for 9 years only and as such the learned judge rightly held that there was no adverse possession.

- The court, is invited to take note that the litigation herein has been going on since 1987 with the applicant being a beneficiary of an injunctive relief which restrained the respondents from putting up maisonettes from which they could earn some rental income.
- Now that they are the victors of the prolonged litigation, they are desirous of carrying out the said developments.
- The court, is urged not to allow the relief sought as the respondent will suffer, in that, the costs of construction would have gone up in the forthcoming 4 years when the appeal will await finalizations.
- Deny the assertion that the applicant will suffer irreversible loss.

The written skeleton arguments reiterated the content of the replying affidavit and then stressed the following:

- The application is unnecessary as no steps in execution are required to be taken by the respondent in order to benefit from the judgment and decree.
- Sufficient cause required to be satisfied as a pre requisite for the granting of the stay orders has not been demonstrated as there is common knowledge that the said trees and vegetation that formed a common boundary between the two plots were cut down and removed in the presence of representatives of both sides on the 17th day of January 2009 and are no longer in existence.

(ii) The buildings referred to is the applicants servants quarters which is very old and of no value. In addition it is an illegal structure constructed without permission and or approval from the city council, whose loss can be quantified and paid for in terms of damages.

- Do not agree that the application was presented without unreasonable delay from 16th January 2009 to 4th February when the application was filed. More so when no oral application for stay was made by the applicant upon delivery of the judgment complained of.
- The seriousness of perusing the intended appeal has not been demonstrated as the applicant only filed a notice of appeal and since then no steps have been taken by them to seek proceedings as no letter seeking proceedings has been copied to them.
- There has been prolonged litigation herein and the court, is invited to allow the respondent enjoy its fruits of the judgment after a prolonged litigation of 22 years. They should be enabled to realize their dream of wanting to put up maisonette over the years during the pendency of the litigations.
- Maintain there is no basis for the stay pending intended appeal and the application should be dismissed with costs to them.

The oral highlights simply reiterated the content of the replying affidavit and oral submissions in court, and then stressed the following.

- There is nothing to execute.
- Trees sought to be protected have been removed.
- An inordinate delay of 19 days has not been explained.
- Notice asking for proceedings has not been served.
- Litigation has been long and it should be brought to an end.

- No security has been offered.
- The respondent who has won the case should be allowed to enjoy the fruits of this judgment.

In response to the oral responses by the respondent, counsel for the applicant, added that if they succeed on the application they will speed up the disposal of the appeal.

- Contend that a delay of 19 days is not inordinate.
- They have already put in request for proceedings and the same was served in time.
- Right of appeal is not denied.
- Notice of appeal was served on time
- Since the injunction has been in place for 23 years no harm will be suffered if the status quo is maintained for the balance of the period during the pendency of the appeal.
- If stay is not granted then there will be no need to proceed with the appeal as the right shall have become extinct.
- there is no requirement for security.

On the court's assessment of the facts herein, it is clear that the following facts are not in dispute:-

- (1) that the litigation herein has been prolonged.
- (2) That the said litigation has been determined in favour of the respondent.
- (3) That the applicant has become aggrieved by the said determination and is desirous of seeking a second opinion on the issue.
- (4) That the said applicant has an undoubted right of appeal which this court, has no right to take away or stand in the path of its exercise.
- (5) That the applicant has already put in place measures towards the exercise of this undoubted right, namely by filing the notice of appeal and request for proceedings.
- (6) Being a decision of the superior court, which is being appealed against, the provisions cited by the applicant namely order XLI rules 1 (4) (2) CPR is the relevant provisions pending the necessary ingredients which are to be satisfied by a litigant wishing to avail himself of this procedural relief.
- (7) The inbuilt ingredients to be satisfied are a demonstration that:-
 - (a) The application has been presented without undue delay
 - (b) If stay sought is not granted the applicant will suffer substantial loss.
 - (c) Security has been provided.
- (8) There are those that have been established by case law emanating from the court of Appeal and as dutifully followed by the superior court namely demonstration that:-
 - (a) There exist an arguable appeal with chances of success.
 - (b) If stay is not granted the appeal will be rendered nugatory.

(c) Care has to be taken to ensure that the successful party has not been unreasonably withheld from the enjoyment of the fruits of his judgment

(d) Care has to be taken to ensure that the beneficiary of stay order, does not use the said order as a shield and sword against his opponent.

All these ingredients have been applied to the rival arguments herein, and the court, proceeds to make the following findings:-

(1) The ingredient for the presentation of the application without undue delay has been satisfied as a period of 19 days cannot be termed to be an inordinate delay in the opinion of this court.

(2) On irreversible loss the court, is satisfied that the alleged trees and flowers forming the hedge have been removed, but the servants quarter still stands. The court, accepts that indeed the value of the servants quarter of the applicant can be quantified and paid for in terms of compensation. Indeed it may have no value in view of the fact that it is old. However it will be imprudent for this court, to overlook the fact that the respondent wants to put up maisonettes presumably of great value. It therefore follows that should the applicant win then both sides will be put to great expense, either for the applicant to pay for them, and acquire them or for the applicant to require the respondent to pull them down. Therefore care has to be taken to ensure that both sides are spared this hardship.

(3) As regards security for the due performance of the decree, this not being a money decree, may be security may be on costs in the Court of Appeal which is a matter reserved for the jurisdiction of the Court of Appeal or an undertaking to speed up the processing of the appeal. In this court's opinion, an undertaking to pay costs of the application and speeding up the processing and readying of the appeal for disposal would be sufficient security.

(4) The other ingredients on the existence of an arguable appeal whose result should not be rendered nugatory and ensuring that the beneficiary of the stay order does not use the said order as a shield and sword at the same time is a matter to be interrogated by the Court of Appeal.

(5) As regards ensuring that the successful party is not unreasonably withheld from the enjoyment of the fruits of his judgment, stands at par with the ensuring that the resultant appeal is not rendered nugatory in the first instance, and in the second instance to ensure that unnecessary barricades are not put in the path of the applicant to barricade the exercise of the undoubted right of appeal, and in the 3rd instance to ensure that the court, does not give relief with one hand and take it away with another. This ground is relevant to the argument herein in view of the fact that the applicant is hanging on adverse possession, and once the status quo is disturbed, it will be difficult to restore it as the continuity would have been brought to an end, thus extinguishing the right and there will be nothing to pursue.

(6) Jurisdiction exists to grant a conditional stay or refer the applicant to seek the relief from the court appealed to.

(7) There is also jurisdiction for the applicant to seek the relief from the court, appealed to whether he is successful in the superior court or not.

(8) By reason of what has been stated in number 1, 2, 3, 4, 5, 6 and 7 above, the court, finds that this is a proper candidate for a conditional stay. Stay pending appeal is granted for a period of 90 days from the date of the reading of the ruling within which the applicant is expected to process the appeal and then seek stay from the court of appeal which will be in a position to assess the arguability of the appeal and then make appropriate orders.

(9) The respondent will have costs of the application.

Dated, Read and delivered at Nairobi this 18th day of September 2009.

R. N. NAMBUYE

JUDGE