



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 498 of 2002

PETER MUIRURI KAMAU.....APPLICANT

VERSUS

LEE MBURU BONO.....RESPONDENT

RULING

The appellant herein has a judgment in his favour delivered by Ransley J. (as he then was) way back on 23rd October 2003.

In pursuance of the said judgment the appellant presented an application on 19.3.03 directed at the respondent who is the current applicant. The said application was granted *ex parte* on 19.4.07.

The granting of the *ex parte* orders prompted the current applicant to put in an application by way of notice of motion dated 21.5.07 seeking among others an order to set aside the *ex parte* orders made on 19.4.07. That application was contested by the current respondent who is the appellant and the representations gave rise to the orders made in the ruling of this court delivered on 15th February 2008.

For purposes of the record the orders granted on 19.4.2007 were:-

- (1) Respondent given 45 days from the date of the service upon him of this order to vacate the suit land.
- (2) Failing to comply with No.1 above eviction to issue supervised by the OCS Kikuyu.
- (3) Costs in the cause

The orders in the ruling of 15.2.2008 are to the effect that the application for setting aside was declined because among other orders the court found that:-

- (a) There had been proper service onto the current applicant/respondent of the application as well as the hearing notice of the application which gave rise to the orders of 19.04.07.
- (b) Existence of the alleged HCCC.1311/03 was not a bar to the finalization of the matters herein firstly because the appellant had denied filing the same, and secondly it had come later in time and so it does not take precedence over these proceedings.
- (c) The prayer for setting aside was declined because all that the new applicant/respondent did was just to apply for the said *ex parte* orders to be set aside without seeking any consequential orders or seeking the setting aside without specifying what other procedural steps he wished to take in the matter, so as to bring proceedings to an end which would be tantamount to holding the proceedings at ransom and leaving the appellant who is the beneficiary of those orders without a remedy and the proceedings will be left in an embarrassing position and that will amount to an abuse of the due

process of the Court.

(d) That without the applicant demonstrating a lawful claim to the property as shown by the tribunal, proceedings and the appellate judgment, there was no justification in him standing in the way of the appellant and prevent him from enjoying the fruits of his judgment (c) that this courts judgment of 23.10.03 did not say that the appellant was to initiate fresh proceedings in order to evict the Respondent who is the current applicant to these proceedings and so the said appellant was justified in seeking an eviction order from this court. Further that this court was vested with execution powers which it can use to effect the judgment and on that account the appellant's application for eviction was in the right forum.

(e) That interests of justice demanded that litigation herein be brought to an end and accordingly dismissed the application for setting aside with costs to the appellant who was the respondent to that application.

The same respondent to this appeal has come back to this court by way of notice of motion brought under Order XLI rule 4(1) and (2) Order XLII rules 1 (3) of the Civil Procedure Rules and seeking orders that the applicant be granted leave to appeal against the orders of 15th February, 2008 and that there be stay of execution of the said orders pending the hearing and determination of the intended appeal. The application is dated 19th February, 2008 and filed the same date.

Prayer 2 dealing with leave to appeal was dealt with preliminarily on 25.02.08 as the court was informed that time for lodging the appeal was running out. The sought leave was granted accordingly. The ruling is in respect of prayer 3 which is seeking stay pending the determination of the intended appeal.

The grounds in sup port are set out in the body of the application, grounds in the supporting affidavit and annexures. The major ones are that.

- (1)** He was ruled against in the ruling of this Court delivered on 15.02.08.
- (2)** That there is a threat of imminent eviction.
- (3)** He is desirous of appealing and he has sought leave to appeal.
- (4)** That he has invested quite heavily on the said property and if stay is not granted he will suffer as the appeal will be rendered nugatory. He will also suffer irreparably as his property would have been destroyed and he will suffer irreparable loss.
- (5)** That they have presented sufficient material to enable the court exercise its discretion in favour of the applicant.
- (6)** They are willing to give security for costs of the proceedings in the Court of Appeal which may be suffered by the appellant. They are also to meet the cost for the appellant's upkeep and medical care which is acute and pressing and which is making him want to dispose off the property in question. They are also willing to satisfy any other condition that this court may deem fit to grant.
- (7)** They agree the appeal is on procedurally but if allowed the same will allow the applicant a chance to address the court on the fact that judgment delivered on 23rd October 2003 was not at al in favour of the respondent.
- (8)** That they lodged the notice of appeal on 28.02.08 and they have 60 days from that date within which to lodge the appeal.
- (9)** That he applicant has lived on the suit property for long, he has invested heavily on it, he lives on the same with his family, he has nowhere else to go and if stay is not granted he will suffer irreparably.

The respondent/appellant has responded to the said application by grounds set out in the replying affidavit and written skeleton arguments and the major points are:-

- (1)** That the respondent/applicant has been adjudged a trespasser and he has no business standing in the path of the appellant and preventing him from enjoying the fruits of his judgment.
- (2)** The application is not within the principles set out in order XLI rule 4 governing the granting of such a relief.

- (3) That the appeal has not been filed.
- (4) The appellant is old and ailing and it is high time that the proceedings were concluded.

On case law the Respondent/Applicant has relied on the case of **HALAI AND ANOTHER VERSUS THORNTON AND TURPIN [1963] ED.[1990] KLR 365** which is a Court of Appeal decision where it was held inter alia that the high court's discretion to order a stay of execution of its order or decree is fettered by three conditions.

- (i) Firstly the applicant must establish a sufficient cause.
- (ii) Secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay.
- (iii) Thirdly the applicant must furnish security.
- (iv) The application must of course be made without undue delay.

The case of **JETHNA VERSUS SHAH t/a SUPREME STYLES [1989] KLR 198** also a Court of Appeal decision, the court held inter alia that the purposes of an application for stay is to preserve the subject matter in dispute so that the right of an appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory.

The appellant respondent on the other hand has relied on the case of **CARTER AND SONS LTD VERSUS DEPOSIT PROTECTION FUND BOARD** (The liquidator for the Kenya Finance Corporation Ltd (in liquidation), Kangu contractors and Pepco, Construction Company Ltd. Nairobi CA 291 of 1997 where by the Court of Appeal held inter alia that:

- (i) The mere fact that there are strong grounds of appeal would not in itself justify an order for stay.
- (ii) A party is expected to prefer an appeal only when there are strong reasons for doing so.
- (iii) A judge of the superior court has the power to grant stay within the four corners of the said rule.
- (iv) An appeal is not automatically to operate as a stay of execution.
- (v) The right of a decree holder having been determined by a competent court, it is not fair that he should be deprived of the fruits of his decree mainly because the judgment debtor prefers an appeal.
- (vi) The Court however has discretion to grant a stay provided the conditions prescribed in the sub rule are satisfied.
- (vii) The discretion vested in the superior court under order XLI rule 4 is not unfettered.
- (viii) The Courts exercise of its discretion has a rider to the effect that the said discretion must be exercised judicially.

The Courts assessment of the facts herein is to the effect that there is no dispute that the appellant who is a respondent to this application has three orders in his favour regarding the subject matter of these proceedings namely:-

(1). The orders of 23.10.03 whereby though the court faulted the land Disputes tribunal, proceedings, on a point of technicality, made it clear that *“if the appellant who is the respondent to this application does not want the Respondent who is the applicant to this application on his (appellant) land, then he has no business being there”*.

Secondly that the tribunal had no powers to order the appellant to pay compensation to the respondent for any developments done on the land. It is on record from the applicant's depositions that it is the appellant who appealed against the tribunals orders. The respondent/applicant did not cross appeal.

- (2). It is also undisputed that the orders of 19.4.07 gave the appellant the right to evict the respondent from the suit land.
- (3). It is also undisputed that the orders of 15.02.08 confirmed this Courts orders of 19.4.07 when it declined to set them aside.

It is that refusal to set aside that has prompted the applicant to move to the Court of Appeal. He now seeks stay

pending hearing of the intended appeal. The ingredients that he has to satisfy as established by case law are those set out in order 41 rule 4(2) of the Civil Procedure rules under which the application has been presented. These are:-

- (i) The application has to be made without unreasonable delay. This court has no doubt that the decision having been made on 15.2.08 and the application for stay having been presented on 19th February, 2008 satisfies the requirement of having been presented without undue delay.
- (ii) The court has to be satisfied that substantial loss may result to the applicant if stay is not granted. The substantial loss presented is loss of property which has been valued as per the valuation report annexed to the supplementary affidavit. This will have to be weighed against the need of the applicant in moving with utmost speed to process the appeal for hearing and disposal.
- (iii) The 3rd ingredient is that there is an offer of Security for costs.

This Court has applied the foregoing ingredients to the facts displayed herein and the Court makes its findings to the effect that:-

- (1). The Respondent/Applicant has fully satisfied the ingredient presenting the application without undue delay and the offer to which security for costs as well as complying with other conditions that may be set by the court as the due performance of the decree.
- (2). The Respondent/applicant has also furnished a valuation report indicating the likelihood of the loss that he is bound to suffer should the eviction be effected. This has to be weighed against the appellant/respondents right to the realization of the decree in his favour. Alongside this is the Respondents/Applicants assertion that the appeal will be rendered nugatory.

In view of the fact that eviction is sought and in this court's opinion save for the damage that may be done to the structures standing, there is no way the appeal there in can be rendered nugatory as there is room for reversal orders to be made restoring him back to the land. There is also room for the appellant being ordered to restore the respondent/applicant to the position he was in before the status quo the ground was disrupted.

That possibility notwithstanding the court has to guard against disturbing the status quo to an extent that both parties are likely to be exposed to unnecessary hardship and inconvenience after the final determination of the intended appeal. What this court has to guard against is a situation where if either party wins an appeal, either of them will be exposed to meet cost of restoring the other to the current status quo.

The court is alive to the fact that the exercise of the right of appeal in itself per se is not a guarantee of success. However since the decision sought to be appealed against emanated from this court, this court is not in a position to re-evaluate the facts and then determine the likelihood of the success of the said appeal. That is a matter that should be gone into by the Court of Appeal.

In addition to the Respondent taking steps to appeal by lodging a notice of appeal and drawing up a memorandum of appeal, there has to be demonstrated a willingness and desire to have the intended appeal prosecuted speedily by taking steps towards this purpose. This court has judicial notice to the fact that such steps would make filing of memorandum of appeal, processing of proceedings. Herein a copy of the draft memo of appeal is annexed to the affidavit in support of the application though ready, the same has not been filed. Counsel simply says they have sixty days to do so. There is no letter asking for proceedings to ready the record of appeal. Neither is there an undertaking to process the appeal for hearing and disposal quickly.

In view of the foregoing remarks and since as per the holding in the cited case of **HALAI & ANOTHER VERSUS THORNTON AND THUPIN (1963) LTD (supra)**, the Court of Appeal is already seized of this matter by virtue of the lodging of the notice of Appeal in the said Court, this court is of the view that the Court of Appeal is in a better position to revisit this matter in the light of the background information on record and then determining whether it is a proper candidate for leave pending appeal or not.

For this reason the applicant will only have 30 days stay of execution granted by this Court to run from the date of delivery of this ruling during which time he will be in a position to seek stay from the Court appealed to.

- (2) The appellant who is the respondent to this application will have costs of the application.

DATED, READ AND DELIVERED AT NAIROBI THIS 24TH DAY OF APRIL 2008.

R.N. NAMBUYE

JUDGE