



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 12 of 2003

AHMED ALI GURE APPELLANT

VERSUS

DAUDI SETHE DIFF RESPONDENT

RULING

1. The application notice of motion 13 May 2008 and filed on 14 May 2008 prays for the following orders:-

1.1. “That this application be certified as urgent, service of this application be dispersed with and be heard exparte in the first instance.

1.2 That leave be granted to the appellant to appeal against the decision of the Hon. court made on the 8 May 2008 by Hon. Lady Justice Mary Ang’awa at Nairobi.

1.3 That the Honourable court be pleased to stay execution of the ruling of the court determined on 8 May 2008 by the Hon. Lady Justice Ang’awa at Nairobi dismissing the plaintiffs [really defendant applicants] appeal in the High Court dated 13 January 2003 pending the full hearing and determination of the application intended appeal.

1.4 That the Hon. court orders issued on 8 May 2008 that the plaintiff applicant situate on plot No. 2040 Garissa be demolished immediately be stayed pending full hearing and determination of the appellants intended appeal.

1.5 That costs be provided for.”

2. The application was opposed.

II: Background of application

3. Daudi Sethe Diff the original/plaintiff/respondent was duly allocated a parcel of land in Garissa Town by the Plot Allocation Committee held on 12 February 1997 that was chaired by the Provisional Commissioner Garissa being No.29 on PDR No.326/96/31.

4. Adjacent to the said plot was a road reserve and plot No.20 or 2040. That the plot 20 was allegedly allocated to Ahmed Ali Gure the original defendant/appellant/applicant.

5. The respondent/plaintiff filed suit in Mombasa. The same was transferred to Garissa Magistrates court where it was given No.33/2002. A trial was held by Mr. Mugo Muriuki a District Magistrate II Professional. The trial Magistrate visited the property with the parties. Ensured he called a District Land Surveyor to confirm the actual encroachment.

6. He delivered his judgment (8.1.03) in which he concluded that the said building built by the appellants/defendants had in fact encroached upon the respondent/ plaintiff property/land; partially and upon the road reserve.

7. Being dissatisfied with this decision the appellants/defendants appealed to this High Court. I heard the appeal and delivered my judgment on 8 May 2008. I was impressed with the conduct of the trial magistrate and in his eloquence of handling the proceeding and evidence before him. I found that the finding of the trial magistrate was correct and accurate to warrant this court interfering with the said judgment. I accordingly dismissed the appeal.

8. The appellants/respondents has returned to this court with this application of 13 May 2008 seeking for leave to appeal and seeking a stay of execution.

II: Application 13 May 2008.

9. The advocate for the applicant states to court that he has already appealed to the Court of Appeal in the notice of appeal dated 9 May 2008 and filed to court on the same day. He nonetheless noted that Order XLII r 1 (1) Civil Procedure Rules, he has no right to appeal and seeks this court leave to appeal to the Court of Appeal.

10. Under section 72 1(a) where a decision is made contrary to law or some usage having the force of law, and where the appeal is from the High Court to the Court of Appeal one does not need leave of the court to appeal to the Court of Appeal.

11. Secondly, the applicant/appellant seeks orders for stay of execution. This has been objected to by the respondent/plaintiff. Foremost the applicant has misled the court in his application by stating that his house/building on Plot 2040 has been ordered by the court to be demolished. This was not true as the orders was for the demolition on the encroachment.

12. Thirdly, the said applicant/appellant according to the respondent/plaintiff had began construction when the plaintiff originally filed suit. The said appellant/defendant was ordered by the magistrates court (17.10.02) to cease any attempts of construction . He disobeyed the court orders but was able to obtain a stay of execution (Ransely J) (4.9.03). The Hon. judge then made orders that a sum of Ksh.50,000/- be paid into an interest earning account in the name of the parties advocate within 14 days as security of costs.

13. The appellants/defendants continued to construct on the premises and continued his encroachment on the respondents/plaintiffs land. The plaintiff/respondents/plaintiff filed an application of 5 May 2006 again seeking to restrain the appellants/defendants from constructing. He continued with the construction.

14. The appellants/defendants actually constructed at his peril and during the pendency of this suit. The respondent/plaintiff prayed that the application be not allowed on further grounds that the encroachment is a matter of fact and not of law to warrant an appeal to the court of appeal.

IV) Opinion

15. I have herein an application for leave to appeal to the Court of Appeal. This is a second appeal and if there is any point of law I believe it is the right of the applicant to appeal as of right.

16. As to the circumstances of the issue of the stay of the execution of this courts judgement I would find that the appellants/defendants had constructed at his own peril. In so doing he took a risk in the event

that the court did not find for him. Both the subordinate court and this High Court held that there was encroachment by the appellants/defendant into the property of the respondent/plaintiff being on the road reserve and plot No.29 and 20. That the PDR No.326/96/31 has been clearly shown that an encroachment had occurred.

17. the stay of execution is not merited. I wish to clarify two things. The first is, that this court ordered the demolition of the part of the building sitting on the road reserve and on the respondents/plaintiffs property. There would be no demolition on the appellants defendants land except to abide with the “fire” rules on boundaries (ie 15 feet from the boundaries be provided by either owners).

18. I therefore would agree that the application is misleading on this point.

19. The second point is that I note the execution of the court orders are being attempted to be carried out by the police. The court of appeal in the **Ripples case** has established and held that police should not enforce civil cases orders. This is done by a court Bailiff of the High Court of Kenya. I would consequently then order and review the orders of the trial magistrate and of this court to read that execution be carried out by the court Bailiff of the High Court of Kenya. The Kenya police is only to provide security to ensure that peace is maintained during the process of demolition but **NOT** to participate in the said demolition. To that extent suo moto I vary the orders within the judgment.

20. The application be and is hereby dismissed with costs to the respondent/original/ plaintiff/respondent.

DATED THIS 26TH DAY OF JUNE 2008 AT NAIROBI.

M.A. ANG’AWA

JUDGE

R.M. Mokaya instructed by Mokaya & Co. Advocates for the appellants/applicant original defendant – present

K.M. Marete instructed by Keriako Tobiko & Co. Advocates for the respondent/Respondent original plaintiff - present