



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Appeal 840 of 2006

JOASH OMBIMA SENELWA.....APPELLANTS

VERSUS

PETER W. NJIRU & 4 OTHERS.....RESPONDENTS

RULING

Although the documentation herein has not been arranged in a proper sequence nonetheless the court has gone through the file and managed to piece together some background information necessary to be on record before considering the application on merit.

EMDI is a plaint filed by the Respondents to this application who filed suit dated 15.4.2005 and filed on 18.4.2005. In that suit they described themselves as the registered owners of LR No.61/670 situated at Kibera. It was further averred that the defendant who is the current appellant/applicant carries on a garage business on a portion of the said plot. That he had agreed in the year 1999 to move from the said plot but needed time. He was given ample time but later on changed his mind and refused to move prompting the suit. The Respondents sought an eviction order to issue against the defendant who is the appellant herein. In opposition to that plaint the applicant appellant put in an amended defence and counter claim amended on 14th December, 2006 and filed the same date. In paragraph 16 of the said defence the applicant averred in that defence that plot No.LR.61/670 is situated 2 km away from his location of business and so the plaintiff respondent were claiming a wrong plot. That he had been carrying on business on the said portion for a long period of time he had employed workers and established a clientele who needed his services. The Defendant applicant then put in a counter claim seeking a permanent injunction restraining the plaintiffs, their servants, agents, employees or any other person from interfering with the defendants business at Block 62, Kinoo Road, near Chrisco Church Kibera Lindi, costs and any other relief that this court may deem fit to grant. Nowhere in the said defence and counter claim did the defendant/applicant assert ownership over the disputed plot.

Along the line the Respondents herein carried out survey and then confirmed the correct plot number for the plot in dispute was LR. No.209/10177. I.R.60824. The Plaintiffs then moved to amend the plaint to reflect the correct plot number. In their reply to the defence and counter claim the plaintiffs who are the Respondents herein had described the defendant appellant/applicant that he is a trespasser.

The Memorandum of appeal seems to be in respect of two rulings delivered on the same date. It is apparent they relate to two opposing applications which were heard disposed off and separate rulings written but delivered on the same date. The application for the plaintiff respondent is not annexed. But it is apparent that it was for re-amending the plaint. The learned trial magistrate stated that the court has a discretion under the law to allow a party to amend its pleadings. She found nothing wrong in allowing the plaintiff to re-amend.

The appellant had put in an application dated 30.8.2005 seeking to have the plaintiffs amended plaint to be disallowed. The lower court disallowed that application on the basis that at the time the Plaintiff's amended their plaint, pleadings had not closed and so the amendment was in order. The defendant appellant/applicants application was found to have no merit the same was disallowed.

It is against the above outlined background that the memo of appeal dated 1.12.2006 and filed on 4.12.2006 was filed. This was followed by the filing of the application under consideration dated 18th January 2007 and filed the same date. It seeks stay of the lower courts' orders made on 16.11.2006 pending the hearing and determination of the appeal filed herein. The grounds in support are in the body of the application, supporting affidavit and oral submissions in court and the major ones are that:-

- (1) The applicant has a good appeal with chances of success.
- (2) If stay is not granted he will suffer as he is likely to be evicted from the suit land where he has carried on business for the last 10 years.
- (3) He has come to this court with speed.
- (4) This court should prevent the appellate orders from being granted in vain as the execution will proceed.
- (5) They have not yet obtained proceedings to process the appeal.

Counsel for the Respondents did not appear to prosecute the application but since they have a replying affidavit on record the law enjoins this court to consider the same as well. The main points relied on are:-

- (1) The applicant's application is defective and incompetent.
- (2) The lower court was right in upholding their right to amend as the law allows a party to amend its pleadings at any stage of the proceedings.
- (3) The applicants have not come to court with clean hands.
- (4) The applicants are using the court processes as delaying tactics to delay the finalization of the lower court case.

On the courts assessment of the facts herein, it is clear that the applicant seeks relief under Section 3, 3A, 63 (e) Civil Procedure Act order 41 rule 4 Civil Procedure Act. Section 3 of the Civil procedure Act gives the court special jurisdiction where no special provision is provided for either under the Civil Procedure Act or any other written law to cater for the situation being inquired into. Section 3A on the other hand is a saving clause which the court uses to invoke its inherent powers to prevent abuse of the court and for ends of justice to be met. Section 63 (e) on the other hand empowers the court to make such other interlocutory orders as may appear to the court to be just and convenient. Since the application is for stay pending appeal the other Section quoted save for purposes of routine practice do not help much as there is specific provisions within the Civil Procedure Rules dealing with stay pending appeal. All that the applicant is required to do is to bring himself within the ingredients set out in order 41 rule 4 (1) (2) and principles in decided cases on the subject. Order 41 rule (1) has been satisfied as the applicant has moved to seek leave from the court appealed to. Under sub rule 2 the applicant is to satisfy the court that if stay is not granted he will suffer substantial loss.

- (2) That he has moved to court to seek stay without undue delay.
- (3) That he is willing to furnish security for the due compliance of the decree that may ultimately be passed against him.
- (4) Principles from decided cases that:-

- (i) He has an arguable appeal with a probability of success.
- (ii) That he is not going to use the order as a shield and sword against his opponent.
- (iii) That he is going to process the appeal for hearing and disposal with speed.

This court has considered these principles in the light of the background information outlined herein as well as the arguments of the applicant and grounds in the Respondents replying affidavit and it makes the following findings:-

- (i) As stated earlier on the applicant is within order 41 rule 1 Civil Procedure Rules as he has presented the application for stay to the court appealed to.
- (ii) The orders complained of were made on 16.11.2006, the appeal was filed on 4.12.2006 and the application on 18.1.2007 a period of two months which can reasonably be taken to be within reasonable time to make it qualify to have been presented without undue delay.
- (iii) As for security for the due performance of the decree non has been offered.
- (iv) For speedy disposal of the appeal the applicant has not even exhibited a letter asking for proceedings for purposes of appeal. This Court doubts whether time is needed to type the lower courts record in view of the fact that proceedings were still at their infancy stage. Failure to display this erodes the applicants sincerity and seriousness in pursuing the appeal on a serious note.
- (v) As for loss of substantial loss, the applicant has not displayed this save that he fears eviction. Eviction was a substantive prayer in the plaint. This court does not see how this is going to be effected until the matter is heard and determined. His defence is on record and he is entitled to be heard on it unless if it has been struck out. This court has not been told that the same has been struck out or dismissed. It therefore follows that immediate fear of eviction is unfounded. This is confirmed further by the fact that the orders complained of were mainly for amendment of pleadings and not finalization and so the fear of eviction at an interlocutory stage is unfounded.
- (vi) As for the arguability of the appeal, what is being appealed against is the exercise of the courts discretion to amend or not to allow an amendment. An appellate court is usually slow to upset a lower courts exercise of discretion unless if it can be shown that the same was exercised wrongly or in judiciously.

It is for the appellate court to decide on that. Even if this court were to give the applicant the benefit of doubt on the success of the intended appeal the other ingredients for stay namely 4 of them have not been satisfied. This disentitles him to stay pending appeal as what will be stayed will be the progression of the lower courts proceedings which proceedings are going to determine, the rights of the parties over the subject matter. Such a move by this court would be an abuse of the due process of the law and the court powers. For the reasons given above the applicants applications dated 18.1.2007 and filed the same date be and is hereby dismissed with costs to the respondents. The respondents get costs because they filed a reply to the application and it matters not that they did not appear in court to prosecute it.

DATED, READ AND DELIVERED AT NAIROBI THIS 8TH DAY OF JUNE 2007.

R. NAMBUYE

JUDGE