REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL 182 OF 1999

NGANGA KABAE.....APPELLANT

VERSUS

KAHUNYO KIMANI.....RESPONDENT

JUDGMENT

A land dispute between the Appellant and Respondent which was the subject of litigation in Kiambu RMCC No. 57 of 1980, was referred to arbitration by an Order of the lower court (Hon. Omondi Tunya, SRM, as he then was) on 13th April, 1982. The award was subsequently made, and read in Court on 5th June, 1984, by virtue of which the Appellant and the Respondent were each given half the suit plot (Ndumberi/Ndumberi T. 18). The decree of the Court was issued on 19th February, 1985, and the Respondent, who was in occupation of the entire suit land was ordered to convey ½ to the Appellant.

However, when a search relating to the title of the suit land was made, it was discovered that one half of it was owned by a third party, Dominic Njoroge Nganga. The Respondent, therefore, refused to part with the remaining ½ share in favour of the Appellant.

The Appellant thereafter went back to the Court with an application filed on 18th March, 1993 praying that the Respondent be ordered to transfer the ½ share to him, failing which the Executive Order sign the necessary transfer papers. That Order was issued by the lower court on 23rd March, 1993. Subsequently, an application by the Respondent to set aside and review of the said order was rejected. Now, armed with the Order of 23rd March, 1993 the Appellant moved to the Court on 21st January, 997 seeking eviction of the Respondent.

The Court granted the eviction order on 17th March, 1998. However, before eviction could take place, the Respondent moved to the Court to “stay” the same “until the final determination of Kiambu SPMCC NO 1830 of 1996”. It was brought under Order 21 Rule 22 of the Civil Procedure Rules. In a Ruling dated 22nd May, 1998, the lower court granted the stay as prayed. It is against that Ruling that this appeal has been preferred. It is based on the following five grounds of Appeal:

> ***1. THAT the learned Magistrate erred in law in granting a stay of execution of the eviction orders issued on 17th March, 1998.***
>
> ***2. THAT the learned Magistrate erred in law in taking into account the suit SPMCC No. 1830 of 1996 by the respondent against a third party.***
>
> ***3. THAT the learned Magistrate erred in law in failing to take into account the fact that there***

was no suit pending by the respondent against the appellant before a court of law.

4. THAT the learned Magistrate erred in law and in fact in finding that if the eviction order is carried out before SPMCC NO. 1830 of 1996 – Kiambu is heard and determined, the respondent is likely to suffer damage which cannot be repaid or compensated in monetary terms if the pending suit is determined in the respondent's favour when the appellant was not a party to the suit.

5. THAT the learned Magistrate erred in law and fact in failing to appreciate that the plaintiff was not a party to SPMCC NO 1830 of 1996 – Kiambu and in the circumstances had no interest in the outcome of the same.

Mr Majanja, Counsel for the Appellant, argued before this court that the lower court's ruling which stayed the eviction orders was irregular because the application was brought under the wrong provisions of the law; that there is no appeal pending against that order or any other order granting the Appellant the half share of the suit land; and that it is irregular to grant stay pending the determination of an unrelated suit in which the Appellant is not a party.

Ms Kimani, Counsel for the Respondent, argued that the lower court's Ruling took into account the need to maintain status quo in the interest of Justice – that this was based on new facts that had come to light, in that a 3rd party had been registered as the owner of ½ share of the suit land.

Having examined the record of proceedings in the lower court of this most unfortunate and protracted case going back to 1982, I must say that I completely agree with the submissions of Mr Majanja, that there is absolutely no basis in law for the Orders made by the lower court giving rise to this appeal. Such Orders should never have been made. It is now seven years since those Orders were made with the result that the Appellant here who is the rightful owner of one-half of the suit land has been denied his rights to peaceful enjoyment of his property, simply because another case to which he is not a party, and over which he has no control, is still undecided (since 1996) and continues to drag on indefinitely. This case is a clear representation of how Justice delayed is Justice denied to all the parties involved in this litigation.

Now, let me outline the reasons why I agree with the submissions made by Mr Majanja for the Appellant.

First, the application to stay the execution of the eviction order was made under the wrong provisions of the law – Order 21 Rule 22 of the Civil Procedure Rules. That rule is simply intended to give the court executing a decree the power to stay the execution "for a reasonable time" to enable the Applicant to apply for stay under Order 41 Rule 4. When the lower court granted stay, it fixed no time limit, and went so far as to order stay pending the outcome of an unrelated case (No. 1830 of 1996) in an unrelated court in which the Appellant was neither a party, nor over which he had any control. The lower court completely failed to comply with the terms of Order 41 Rule 4 which is the correct provision of law governing stay of execution pending appeal.

The principles which govern the exercise of this court's jurisdiction in deciding applications for stay of execution pending appeal are found in Order XLI Rule 4 of the Civil Procedure Rules. To entitle one to an order for stay pending appeal, the following must be satisfied:-

(a) The Application must be brought without inordinate delay;

(b) The Applicant must show that he stands to suffer substantial loss if his application is refused;

(c) The Applicant must be ready to offer security to cover any decree that may ultimately be passed against him should his appeal fail.

Now, had the Respondent complied with the above principles? He did not demonstrate what substantial loss, if any, he would suffer if the order of stay was not given; and he offered absolutely no security for the due performance of the decree, and the lower court ordered none. Even if the Court was satisfied that

the Respondent had demonstrated that he would suffer "substantial loss" if stay was not granted, it was improper for the Court to grant such stay without security.

Second, and more importantly, an application for stay under Order 41 Rule 4 may be made only where an appeal has been preferred, in which case the Court may Order stay pending appeal. Here, no such appeal had been preferred. There is no appeal pending against the first and original order granting the Appellant one-half the interest of the suit land; nor is there any appeal pending in respect of the other orders of the lower court – such as the Order dismissing the application for review; or of the orders giving rise to this appeal. The Order of eviction granted in favour of the Appellant has not been appealed against. In that event, how could a stay be granted in respect of such an Order?

Finally, the Order of stay is open-ended, and unlimited in time, even though an appeal has not been preferred against the Order that was stayed. Here is what the lower court said in its Ruling of 22nd May, 1998.

"I have weighed the facts of this case and No. 1830/96. It is my opinion that none of the parties is likely to suffer loss if the eviction order is not executed. It does not matter that the Respondent herein is not a party to CC. No. 1836/96 but in the interests of Justice, he should wait for the hearing and determination of the civil suit. This will enable the long protracted dispute on this parcel of land be finally determined".

Now, case 1830 of 1996 referred to above is an action commenced by the Respondent against a third party who has registered himself as the owner of ½ share of the suit land. The Appellant is not a party to that suit. He has no control over it. So, in theory, if that suit takes another 25 years to conclude, as this one has apparently taken that long to reach this stage, then the Appellant, and his future generations, must wait another 25 years. Clearly, this is unacceptable, and untenable in law. Why should a person who has a lawful decree of the Court have to wait indefinitely to enjoy the fruits of his decree? I see absolutely no basis in law for the Ruling of the lower court that is the subject of this appeal. Accordingly, I allow this appeal with costs to the Appellant, and set aside the Order of the lower court made on 22nd May, 1998 with costs to the Appellant.

Dated and delivered at Nairobi this 15th day of June, 2005.

ALNASHIR VISRAM

JUDGE