



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 1509 OF 2002 (OS)

IN THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTIONS ACT (CAP.22, LAWS OF KENYA)

AND

IN THE MATTER OF LAND PARCEL NO. KABETE/MUTHUMU T.132

MARGARET WAMBUI MAGU.....PLAINTIFF

VERSUS

RACHEL NJERI NYAWANGA.....DEFENDANT

BENJAMIN GITUKU alias

BENJAMIN GITUKUI MAGU.....DEFENDANT

RULING

The main suit was heard before me between 9th December, 2003 and 21st April, 2004 and I delivered my judgement on 30th July, 2004. The judgment turned against the defendants, whose Notice of Motion dated 4th August, 2004 was filed on 9th August, 2004. This application, brought under S.3A of the Civil Procedure Act (Cap. 21) and Order XLI rule 4(1) and (2) of the Civil Procedure Rules, carries the following prayer:

“THAT there be a stay of execution of the Judgement and Decree of the Honourable Justice J.B. Ojwang (Ag) delivered on 30th July, 2004 pending the hearing and determination of the Defendants’ intended appeal.”

The grounds upon which the application are premised are as follows:

- (i) that, the defendants are aggrieved by the said judgement and decree and have filed a Notice of Appeal and requested typed proceedings with a view to appeal;
- (ii) that, the trial Judge having ordered that the suit property be transferred to the plaintiff, the defendants will suffer irreparable loss unless a stay of execution is ordered in this matter;
- (iii) that, unless a stay of execution is ordered, the intended appeal shall be rendered nugatory.

The 1st defendant, *Rachel Njeri Nyawanga*, swore a supporting affidavit on 5th August, 2004 and this

was filed with the application on 9th August, 2004. She avers as follows:

- (a) that, on 30th July, 2004 Ojwang, Ag. J. ordered that Land Parcel No. Kabete/Muthumu/T.132 which was registered in her father's name in 1959 and transferred to her in 1991, be transferred to the plaintiff;
- (b) that, the transfer documents were ordered to be executed by the Registrar of Lands;
- (c) that, she has filed a Notice of Appeal challenging the decision and has requested for certified copies of the proceedings and judgement, for the said intended appeal;
- (d) that, before the commencement of this suit, the plaintiff had amassed construction materials on the suit property and unless the Court's order is stayed, the Registrar of Lands will effect the transfer and the plaintiff will start constructing on the said property, or will dispose of the same to a third party;
- (e) that, the suit property was bequeathed to her by her father who is the 2nd defendant, and so disposal of the same by the plaintiff will deny her this inheritance;
- (f) that, unless the Court's decision is stayed, the property will be transferred to the plaintiff who may construct on it or dispose of it to a third party, thus rendering the intended appeal nugatory;
- (g) that, the stay of execution of the Court's judgement will not prejudice the plaintiff who has other parcels of land including the one neighbouring the suit property;
- (h) that, the intended appeal has high chances of success.

In the plaintiff/respondent's depositions she averred *inter alia*, that she had not undertaken any construction on the suit property, but that she believed to be true the advice of her advocate, that interim orders granted on 18th August, 2004 did not bar her from constructing on the suit plot. She deposed that the suit property was not an inheritance, or an item of sentimental value to the 1st defendant as it had not in the first place belonged to the 2nd defendant so that he could bequeath the same to the 1st defendant.

The application was heard before me on 23rd June, 2005 when the defendants were represented by learned counsel, **Mr. Angote** while the plaintiff was represented by **Mr. Masese**.

Mr. Angote urged that unless stay of execution of judgement and decree was granted, the two defendants would suffer irreparable loss. Counsel contended that the defendants stood to suffer substantial loss, unless stay was granted; and in this regard he invoked the provisions of Order XLI, rule 4(2) of the Civil Procedure Rules. A similar scenario had arisen in **Kenya Oil Company Ltd v. Westmont Power (Kenya) Ltd.**, Civil Case No. 106 of 2002 in which the specific elements were set out by **Nyamu, J:**

“Concerning the requirements of Order XLI rule 4(2) of the Civil Procedure Rules, the applicant must satisfy the Court on the following:

- 1. Firstly, that substantial loss may result to the applicant unless the application is granted. What this means is that if the appeal succeeds the respondent would not be in a position to make full restitution.**
- 2. Secondly, the applicant had to give such security as the Court may order.**
- 3. The application must have been made without unreasonable delay.”**

Mr. Angote submitted that if the property is transferred to the plaintiff's name, and then the plaintiff makes a transfer to a third party, then restitution would become impossible.

On security, learned counsel stated that the defendants/applicants were ready to deposit transfer documents in this matter – to be disposed of in accordance with the orders of the Court of Appeal.

On promptness of application, learned counsel stated that this condition had been complied with. Judgement was delivered on 30th July, 2004 while the application was filed on 9th August, 2004 – within a period of less than one month.

Counsel called in aid the Court of Appeal decision in *Butt v. Rent Restriction Tribunal* [1982] KLR 417. In that decision it was stated (p.419):

“If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal, if successful, may not be nugatory. A stay which would otherwise be granted ought not to be refused because the judge considers that another, which in his opinion will be a better remedy, will become available to the applicant at the conclusion of the proceedings.”

And in *Mukuma v. Abuoga* [1988] KLR 645 the Court of Appeal held that (p.645):

“Where a party is exercising his undoubted right of appeal, the Court ought to see that the appeal is not rendered nugatory by preserving the status quo until the appeal is heard.”

Learned counsel, *Mr. Masese*, contested the submissions made for the plaintiff/respondent. He stated that the plaintiff had made no indication she wanted to dispose of the property; she only wanted to construct buildings thereon, which could only enhance the value of the property. She had moreover undertaken to make compensation to the applicant, if the applicant succeeds on appeal. Counsel submitted that it would be inappropriate to stay execution of the High Court’s decree, as no appeal has as yet been lodged; no memorandum of appeal has been filed, as yet. The Court should be satisfied that the defendant was truly desirous of appealing, before an application such as the instant one, could be granted.

Learned counsel submitted that there was no threat of irreparable loss facing the defendants, as the relevant rights had been practically determined as far back in time as 1959. Whereas it was common ground, counsel submitted, that the 1st defendant did have intentions to sell off the disputed land, it had not been shown that the plaintiff/respondent had any sale intentions; and if sale of the same were to take place, this would *be to the detriment of the plaintiff*.

I must start from the position that the defendants have a right of appeal, and the exercise of the same will accord them a greater opportunity to have the merits of the case ventilated. *In principle*, such a position must be “good” for *both the defendants and the plaintiff* – that the right they each so steadfastly seek, can be investigated still more closely and the winner duly accorded her just deserts.

Therefore I take it that the plaintiff, even though she was the winner in the High Court and would be happy partaking of the fruits of her judgement, would not be resisting the broadening of the decision-making forum, to include the Court of Appeal. If she were to win twice, she would have much psychological comfort! From the evidence on record, it is the plaintiff who has always occupied and controlled the property, *L.R. No. Kabete/Muthumu/T.132*. The maintenance of at least that status quo, for the time being, very well ensures that the plaintiff will suffer no sensible prejudice if, and while, the defendants are accorded an opportunity to appeal.

In these circumstances, and in the interests of justice, I think it is not improper to make an order to facilitate and to sustain the defendants’ exercise of their acknowledged rights through the *appellate process*.

I will make the following orders:

1. Pending the conduct of appeal by the defendants, the registration of the plaintiff as sole proprietor of L.R. No. Kabete/Muthumu/T.132 in place of the 1st defendant, as decreed under the

suit, shall be stayed.

2. Pending the conduct of appeal by the defendants, action by the Registrar of the High Court to execute the necessary instruments and documents for effecting transfer of L.R. No. Kabete/Muthumu/T.132 from the 1st defendant's name to the name of the plaintiff, shall be stayed.

3. The defendants shall *move expeditiously to prosecute their appeal*, in a professional and business-like manner; failing which the plaintiff will be at liberty to file a suitable application as may be necessary.

4. Within *seven days of the date hereof*, the transfer documents and the title document in respect of L.R. No. Kabete/Muthumu/T.132 shall *be deposited by the defendants in Court, to be held subject to disposal in such manner as the Court of Appeal upon determining the outcome of the appeal, shall direct.*

5. These orders shall be extracted immediately and registered against L.R. No. Kabete/Muthumu/T.132, while the orders so registered against that property on the basis of this Court's directions made on 9th August, 2004 shall forthwith be lifted.

6. The costs of this application shall abide the appeal.

DATED and DELIVERED at Nairobi this 22nd day of July, 2005.

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court clerk: Mwangi

For the Defendants/Applicants: Mr. Angote, instructed by Ms. Amugo Angote & Co. Advocates

For the Plaintiff/Respondent: Mr. Masese, instructed by M/s. Njenga Mbugua & Co. Advocates