REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL SUIT NO. 1 OF 1997

DANIEL NG'ANG'A KIRATU……PLAINTIFF

VERSUS

SAMUEL MBURU KIRATU…….DEFENDANT

RULING

The Plaintiff filed an application by way of a chamber summons dated 13th May, 2003 seeking an order for stay of execution of the judgment dated 5th May, 2003 and all consequential orders until the final determination of the intended appeal. He also prayed that the subject matter of the suit, land parcel No**. NYANDARUA/MELANGINE 1631** be preserved pending the final determination of the appeal. The application was made on the ground that there was judgment in favour of the Defendant and the Plaintiff was dissatisfied with the same and therefore intended to appeal to the Court of Appeal. It was also said that the Defendant was likely to sell off the entire suit land and such sale would render the appeal nugatory.

The application was supported by an affidavit which was sworn by the Plaintiff on 13th May, 2003. To the said affidavit he attached a copy of the Notice of appeal and he deponed that he had solid information that the Defendant was planning to sell off the whole of the suit land which would cause him to suffer an irreparable loss and render the appeal nugatory. He further deponed that if the application was allowed, the decree holder would not be prejudiced in any way. He offered to give security for costs saying that his appeal had high chances of success. The appeal had already been filed and was Appeal No. 36 of 2003. The applicant's advocate informed the court that the parties herein were brothers and the applicant was claiming half of the land in dispute. He submitted that the superior court had dismissed the matter on a technicality and further stated that the Defendant had already sold a portion of the said land when the matter was proceeding. The applicant had deposited with the court as security an original title for **NYANDARUA/GILGIL WEST/47** together with a certificate for an official search of the said property. He submitted that the property was valued at more than Kshs.1,000,000/-. He further stated that since the respondent denied that he was intending to dispose of the suit land as such he was not going to be prejudiced if the order sought was made.

The respondent opposed the application and swore a replying affidavit on 21st May, 2003. He stated that the application was incompetent. His advocate Mr. Karanja, submitted that the application ought to have been brought by way of a Notice of Motion and not by a chamber summons. He further submitted that the suit was not dismissed on a technicality but for want of merit as there was no Land Control Board consent which had been obtained before the property was transferred. The respondent deponed that he had no intention of disposing of the suit land as he was living there with his family and said that the respondent had never been in occupation of the land. He further stated that the applicant had not shown that he would suffer irreparable damage if the order for stay was www.kenyalawreports.or.ke

not granted. I must, however, say that Order XLI Rule 4 talks of substantial loss and not irreparable loss. According to the respondent the appeal had no chance of success at all. With regard to provision of security, Mr. Karanja submitted that the applicant's affidavit which was filed on 11th June, 2003 and on which was annexed the Title Deed for NYANDARUA/GILGIL WEST/47 which was being offered as security had been filed without leave and prayed that it be expunged. On the other hand, if it was not expunged, the respondent was disputing the sufficiency of the security because there was no valuation report attached to the said Title Deed. And secondly, the security should not be for the costs alone but for the value of the land.

In reply, Mr. Mburu stated that the application was also brought under Section 3A of the Civil Procedure Act which gives the court a wide discretion and he also sought to rely on Order L Rule 12 of the Civil Procedure Rules. Regarding the issue of security, the same should not be punitive, be asserted. He reiterated that the suit was dismissed on a technicality because the evidence was not considered.

I have considered the affidavits filed by the parties in this matter and considered the submissions made by their respective advocates. Order XLI Rule 4(2) clearly states that:- "No order for stay of execution shall be made under sub rule (1) unless – (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant. The dispute in this matter related to a parcel of land reference No.

NYANDARUA/MELANGINE/234 now registered as NYANGARUA/MELANGINE/1631 which was registered in the name of the defendant but the plaintiff was urging the court to make a declaration that he was holding the same in trust on behalf of the plaintiff and that he should be ordered to transfer half of the land to him. He was also seeking an injunction to restrain the Defendant from dealing with the suit land in any manner prejudicial to the plaintiff's interest and entitlement. The court held that the plaintiff did not show that he obtained the consent of the Land Control Board for the trust which he was alleging and on that point alone the Plaintiff's suit was dismissed with costs to the Defendant. The judgment was delivered on 5th May, 2003 and on the following day a Notice of Appeal was filed and the present application was filed seven days thereafter.

The suit land is of a considerable size, measuring about 10.1 hectares. Although the respondent has sworn that he is not intending to sell the land, the applicant has sworn that the respondent has already sold a portion of the same. Indeed the respondent admitted that sometimes ago he sold a portion of the said land measuring about four (4) acres, although that transaction is the subject matter of another suit in this court **HCCC NO. 445 OF 2000 MARY KIGIO MUNGAI AND ANOTHER VS MBURU KIRATU & ANOTHER.** The applicant's fears that the respondent may sell the rest of the land unless an order of stay pending appeal is granted are therefore well founded. I agree with him that if that were to happen, the appeal would be rendered nugatory. I am therefore persuaded that substantial loss may result to the applicant unless the order sought is made. There is no dispute that the application herein was made without unreasonable delay as already stated herein above. The applicant has thus satisfied the first two limps of the conditions set out by Order XLI Rule 4(2) of the Civil Procedure Rules.

The respondent stated that the application was incompetent because it was brought by way of a Chamber Summons instead of a Notice of Motion. The applicant's advocate admitted that mistake but stated that the same was also brought under Section 3A of the Civil Procedure. He also sought refuge in the provisions of Order L Rule 12. It is now well settled that Section 3A should not be invoked where there were other specific provisions of the law under which an application could be brought. One such holding was by the Court of Appeal in ***WANJAU VS MURAYA (1983) K.L.R. 276.***

Order l Rule 12 cannot equally be invoked where an application which was supposed to be brought by way of a Notice of Motion is brought by way of a Chamber Summons. It can only be useful where a party has failed to state the order or rule under which he has brought an application or where he cites the wrong order or rule. However, there are several decisions which have held that an application which is otherwise competent will not be rejected merely because it was brought by way of a summons in chambers instead

of a Notice of Motion or for any other want of form provided the omission or default does not go to the root of the matter or prejudice the other party. In ***BOYER VS CALLOURE [1969] E.A. 385*** the court stated that a wrong procedure does not invalidate proceedings where it does not go to the jurisdiction and causes no prejudice to the other party's case. In ***JOSHUA KINYANJUI VS RACHEL WAHITO THANDE, Civil Appeal No. 284 of 1997*** the Court of Appeal stated that:-

"No application is to be defeated by use of wrong procedural mode and the Judge has the discretion to hear it either in court or in chambers." In strict sense, all Chamber Summons are supposed to be heard in chambers and Notices of Motion in the open court. However, in this station, as in many other stations country wide, almost all applications are heard in the open court although the opposite is also true in some stations where almost all the applications are heard in chambers. I am therefore not inclined to hold that the Plaintiff's application is incompetent merely because it was commenced by way of a Chamber Summons and not by a Motion.

The applicant is exercising his constitutional right of appeal and he wants to be heard by the highest court in the land as he has not other recourse and it would be unjust to block him because of his counsel's mistake in failing to put the right heading to an otherwise competent application. Moreover, the parties are brothers and the subject matter is a parcel of land and unless the parties are heard by the highest court and the dispute determined once and for all, the brothers and most likely their respective children will always live in hostility to one another.

With regard to the issue of security, I agree with the respondent's advocate that the affidavit filed by the applicant on 11th June, 2003 was filed without leave of the court. Order L Rule 16(2) is clear that:- "Any applicant upon whom a replying affidavit or statement of grounds of opposition has been served under sub-rule (1) may, with the leave of the court, file a supplementary affidavit."

The respondent's replying affidavit dated 22nd May, 2003 having been filed and served upon the applicant, he should have sought leave of the court to file that other affidavit. I therefore strike out that affidavit. The effect thereof is that the applicant has to provide such security as the court will order because the affidavit having been struck out the annextures thereto are also rejected.

I grant stay of execution of the judgment dated 5th May, 2003 and all the consequential orders made pursuant thereto until the determination of the Plaintiff's appeal but this is on condition that he provides security in the sum of Kshs.500,000/- within the next thirty (30) days from the date hereof. If the security will be in the form of land, the original title deed as well as a certificate of official search and a valuation report prepared by a registered valuer in respect of the land will have to be availed to court. If this security is not provided within the said period then the conditional order of stay granted will be deemed to be void and of no legal effect.

Having granted the prayer for stay of execution in the terms as herein above stated, the prayer that land parcel No. **NYANDARUA/MELANGINE/1631** be preserved pending the final determination of the plaintiff's appeal is quite reasonable. I grant the same but the order for preservation of the said property will also be on condition that the applicant provides the aforesaid security within the given period.

The applicant will pay the costs of this application to the respondent. DATED, SIGNED & DELIVERED at Nakuru this 2nd day of March, 2004.

DANIEL K. MUSINGA

AG. JUDGE

2/3/2004

Ruling delivered in the presence of Mr. Kahiga for the respondent and in the presence of

the applicant.

DANIEL K. MUSINGA

AG. JUDGE

2/3/2004