

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

CIVIL APPEAL NO. 76 OF 2001

JULIUS MUNYAO MUINDE APPELLANT

VERSUS

JULIUS M. MUSESAYA RESPONDENT

R U L I N G

The respondent to this appeal and the application has judgement in his favour from the lower court. The appellants became aggrieved by that judgement and they have preferred this appeal to this court. They sought stay in the lower court which was declined hence this application.

The main grounds are in the supporting affidavit grounds in the body of the application, grounds in the further affidavit and oral submissions in court. The major points relied upon are that the applicants were dissatisfied with the lower courts judgement and have preferred this appeal, that they sought stay in the lower court pending appeal but inadvertently the stay touched on the issue of payment of costs only, that that application was dismissed by the lower court and the applicants have since paid the assessed costs, that there are premises on the suit property which were ordered to be demolished and if demolished the applicants will suffer loss damage and prejudice and the appeal which is arguable will be rendered nugatory, that it is only fair and just that stay be granted and in the alternative an injunction should issue against the respondents in the manner sought to restrain them from carrying out demolition of the said premises until the appeal is heard and determined, that the replying affidavit dwell on the merits of the appeal which is not an issue herein, that they are properly before this court as a dismissal of a similar application in the lower court is not a bar to the bringing of this application to the court appealed to.

The respondent., has opposed the application on the basis of the grounds in the replying affidavit and oral submissions in court and the major ones are that a similar application for stay of the entire lower courts decree was made in the lower court and dismissed, that counsel for the applicant presented arguments on both the costs and demolition but the same were dismissed and they cannot now come to this court seeking stay on the basis of demolition, that the evidence on record shows that the plot belongs to the respondent and so the appeal has no chances of success, that the construction was done during the pendency of the lower proceedings and after the court had issued orders that the construction should not go on, that there is nothing to prove threats of demolition and so the application is un merited, no particulars of loss has been exhibited and it cannot be presumed, that the prayer sought for an injunction does not lie in favour of the applicants as there is no suit upon which it can be based and secondly order 41 rule 4(1) and (6) do not make provision for the issuance of a temporarily injunction, that there are no clear circumstances herein to warrant the granting of the said injunction, that this court has to weigh the lower court judgement as against the grounds of appeal in order to determine the arguability of the appeal and when this is done it is clear that the grounds of appeal cannot stand, that the appellants did not claim ownership as they did not file a counter claim and called no evidence and produced no documents as they pleaded ignorance of plot 17, that there is no material to show that the appeal has chances of success because the applicants have not shown what loss they stand to suffer if the demolition is carried out, that they had no answer to the plaintiffs claim in the lower court and where will they get grounds to support the appeal, that the applicants just want to delay the matter because they are carrying on business in the

premise and reaping profits, that they will not be prejudiced in any way if stay is refused, that the respondent who has a judgement in his favour cannot be injuncted.

On the courts assessment of the facts herein it is clear that this is a second application for an application for stay pending appeal the first one having been refused by the lower court though on one limb only. It is the finding of this court that the rules allow a party who has lost or partially won on application for stay pending appeal in the lower court to present another one to the court appealed to and so the second application is properly before this court and the same will be looked at on its own merits. On the merits of the same it is clear that it is presented on two fronts namely:-

1. One for stay pending appeal and
2. Injunction.

On the first limb of stay pending appeal it is argued that if stay is not granted the appeal will be rendered nugatory and the applicants will suffer loss and damage. This court has been told that the appeal is against the lower court decree on its entirety. One aspect of costs has been satisfied and this court has not been asked to revise that order in this second application. What this court has therefore to deal with now is to ensure that the appeal will not be rendered nugatory should it succeed and that the applicant will not suffer substantial loss. As regards the merits of the appeal it is the finding of this court that that should be left for the time the appeal will be argued.

However the issue of rendering the appeal nugatory and substantial loss on the facts herein both are intertwined and they can be dealt with together and when it is so done it is clear that in order for loss to arise it has to be shown how the demolition will cause loss. The applicants have not exhibited anything to show the value of the bunding to show that should they win an appeal and the bindings would have been demolished they will be restored at a great expense. In the absence of such information being put before this court it is evidently clear that proof of loss and damage has not been shown.

Turning to the issue of a temporary injunction it is clear that the proper provision to be applied is order 39 of the CPR and not order 41 CPR.

Order 39 CPR requires such a relief to be cemented on a plaint. There is no plaint in this application and so that relief is misplaced and the same cannot stand and there is no need to go into the other merits of that relief. For the reasons given application dated 16.5.2002 has to fail and the same is dismissed with costs to the respondent.

Dated, read and delivered at Machakos this 10th day of February 2003.

R. NAMBUYE

JUDGE