



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KILGORIS

KILGORIS APPEAL NO. 12 OF 2021

FORMERLY NAROK ELC APPEAL NO. 24 OF 2020

SAMUEL NG'OBOI KIRUSUA.....1ST APPELLANT

NICHOLAS TAJEWUO KIRUSUA.....2ND APPELLANT

-VERSUS-

JOHN OLAKUYIA KAPIO.....RESPONDENT

RULING

Before this court is a Notice of Motion dated 4/9/2020 seeking the following Orders;

1. Spent.
2. Spent.
3. That there be a stay of the Order of the Principal Magistrate (HON.R.M. OANDA) issued on 3/9/2020 directing the OCS Kilgoris Police Station to provide security on the visit to land parcel number TRAMSMARA/OLOMISMIS/981 pending the hearing and determination of this Appeal.
4. That there be a stay of proceedings in Kilgoris Principal Magistrate's MCL & E Case No. 16 of 2018 JOHN OLAKUYIA KAPIO VERSUS SAMUEL NG'OBOI KIRUSUA & ANOTHER until the hearing and determination of this Appeal.
5. That the costs of this application is provide for.

This Application is premised on the grounds that the Appellants are aggrieved by the Orders of the Principal Magistrate issued on 20/5/2020 while there existed an order for status quo issued by the High court in Kisii on 22/11/2016. That the mandatory Orders appealed from were issued on 3/9/2020 without any application whilst the case was listed as a mention to fix a hearing date. For the reasons above the mandatory order of injunction will determine the suit without the Appellant's having tendered their evidence.

The Application is Supported by the Affidavit of the 1st Appellant Samuel Ng'oboi Kirusua sworn on 4/9/2020 in which he avers that the Orders issued by the trial court on 3/9/2020 were mandatory and conclusive that interferes with the land which they have occupied and invested on the same since 1992 which date was for a mention to fix a hearing date and that being dissatisfied with such Orders they have now filed this application. Further, that the Respondent made a similar application in which the court at Kisii ordered that parties maintain status quo pending hearing and determination of the suit. That the Respondent also made an application for eviction and orders were granted on 20/5/2020. Further the Respondent also filed criminal proceedings against the 1st Appellant in Kilgoris Criminal Case Number 257 of 2017 in which he was convicted for disobeying lawful Order in which he has also appealed the same. It is the Appellants contention that the trial court has no basis to order re-establishment of boundaries and confirmation of what land they occupy since the court had ordered stay in Kilgoris PM No. 16 of 2018. As such they are of the view that they shall not get a fair hearing if the matter is heard by the Honourable PM. R.M Oanda as he has shown bias by failing to administer fairness in granting such extreme final Orders without granting the Appellants an opportunity to respond to the Application. The Appellants further contend that the Orders directing the OCS Kilgoris to provide security is grossly irregular. That in all circumstances, the Appellants ought to be given an opportunity to defend their rights.

For purposes of obtaining the correct position as contended by the Appellants, I will refer to the documents that they have relied on. SNK1 is a copy of the Order issued on 3/9/2020 in which the trial court granted the following orders and more particularly in the presence of Mr. Ochwangi counsel for the Plaintiff and Ms. Wekesa Counsel holding brief for Mr. Mukoya for the Defendant and granted the following

Orders:-

1. The Land Registrar and Surveyor do visit Land Parcel Number Transmara/Olomismis/981 and while there at:
 - a) They establish and fix boundary of the parcel of the land.
 - b) They confirm whether the Defendants are occupying the land and to what extent.
2. The OCS Kilgoris do provide security during the said visitation.
3. The Land Registrar and Surveyor to file the report within 60 days.
4. That this matter be mentioned on 12/11/2020.

SKN2 is an undated Memorandum of Appeal filed by the Appellant.

SNK3 is a copy of the Order issued on 22/11/2016 by Honourable Justice. J Mutungi in which he Ordered as follows

1. The parties do maintain the status quo where the parties continue occupation of portions that they are in occupation of and specifically the defendant is to be confined to the portion of 5 acres that he claims occupation of.
2. The Defendant is not to do any unwanted felling of indigenous trees within the portion he occupies and specifically not to fell the trees for commercial purposes e. g for sale of poles, timber or firewood.
3. Parties should fast track the hearing of the suit and in that regard should comply with order 11 CPR within the next 60 days from today and move the court for pretrial directions.

SNK 4 is a copy of the trial court dated 20/5/2020 in which the court in the presence of Mr. Ochwangi advocate for the Plaintiff/Applicant and in the absence of the Defendants/respondents directed as follows:-

1. The said application is certified as urgent.
2. Pending the hearing and determination of this application interpartes, an order of injunction is hereby issued against the defendants/respondents herein, their agents, servants and or employees, to move out, vacate and or grant vacant possession and remove the fence erected outside the 5 acres portion of L.R.No. TRANSMARA/OLOMISMIS/981, albeit without the authority and /or consent of the plaintiff/applicant contrary to and in contravention of the court order made on 3/11/2016.
3. The OCS Kilgoris Police Station do enforce and or implement the court orders herein and/or ensure compliance with.
4. The Applicant's do serve the Respondents.
5. The matter be mentioned on 28/5/2020 for further orders and directions.

SNK 5 is a copy of the Judgment dated 25/11/2019 in which the Appellant herein was convicted under section 215 of the Criminal Procedure Code of the offence of disobeying lawful order.

The Application was opposed by the Replying Affidavit of the Respondent dated 18/9/2020 in which he contends that the Appellants are obstructing the due process of the honourable court. That the court in KISII ELC NO. 89 OF 2015 issued interim orders which were specific and unequivocal. That the Appellant breached the Orders of the court issued on 3/11/2016 in which they were directed to confine themselves to the 5 acres of land. That owing to the continued disobedience of the court order, the Respondent had no option but to lodge a criminal complaint which resulted to the arrest and conviction of the 1st Appellant and also filed an application seeking mandatory injunction for removal of the Appellant from the extended boundaries which they occupied despite issuance of the court orders. The Respondents further contend that during all these proceedings the Appellants have had the Advocates present in court save for the court Orders issued on 20/5/2020. It is the Respondent's contention that an interlocutory order was borne out of a directive of the honourable court and therefore is not appealable as of right. That if indeed the Appellants were keen to file an appeal, they ought to have sought leave of the court to file an appeal which leave has not been sought. The Respondent also contends that the Orders seeking stay of execution cannot form basis of an appeal since they are discretionary orders. The Respondents do aver that the Appellants have trespassed upon the said suit land and are currently in occupation of the portions outside the 5 acres. The Appellants are also not keen on canvassing the original suit thereby delaying and denying justice to the Respondent. Finally, that the application is devoid of merit and ought to be dismissed. The Respondent has annexed as JOK1 a copy of the Order issued by Justice Mutungi on 22/11/2016, JOK2 is a copy of the judgment delivered on 25/11/2019 by Honourable D.K. Matutu and JOK 3 which is a copy of the Order issued on 20/5/2020 by Honourable R.M. Oanda.

I have read and analyzed the Notice of Motion Application, Replying Affidavit and the submissions filed by the parties and the issues for determination are whether the Appellants are entitled to stay of execution pending appeal and whether the trial court is biased towards the Appellants.

Order 42 rule 6 of the Civil Procedure Rules provides as follows:-

(2) 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 Court of Appeal in *Butt v Rent Restriction Tribunal [1982] KLR 417* provides guidance on how a court should exercise discretion and held that:-

- ‘1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.
3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of proceedings.
4. The court in exercising its discretion whether to grant(or) refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount or rent in dispute and the appellant had an undoubted right of appeal.
5. The court in exercising its powers under Order XLI rule 4 (2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse’.

The Appellants in this case have outlined their need for Stay of Execution pending Appeal. However, it is important to state that grant for stay of execution is a discretionary power granted by the court. The Appellant in this case have not demonstrated any substantial loss that they would suffer if the orders sought are not granted. Neither have they expressed any deposit for security for costs. In any case, their claim is that they were not served with any application resulting to the Orders granted on 3/11/2020. Having looked at the annexure **SNK 1**, I see no adverse fault on the trial court as the Orders granted were delivered in presence of Counsel for both parties. The Orders issued on 3/9/2020 did not in any way order for re-establishment of new boundaries. In fact, the Order was clear that the Land Registrar and Surveyor establish and fix boundary of the parcel of land. The role of the Surveyor to fix a boundary is well within the law. **Section 23 (1) of the Survey Act Cap 299** provides that:-‘The Director or any **Surveyor**, or any person authorized in writing by the Director in that behalf either generally or specifically, may enter upon any land, with such assistants as may be necessary, for the purpose of (a) making or **supervising any survey or resurvey**; or (b) **affixing or setting up thereon or therein any survey mark**; or (c) **inspecting any survey mark**; or (d) **altering, repairing, moving or removing any survey mark**; or (e) doing anything necessary for carrying out any of the aforesaid purposes; or (f) examining or inspecting the conduct of any survey (**emphasis mine**).

The annexure marked as **SNK 3** was also very clear that the Appellant herein confine themselves to the 5 acres portion of the suit land including not to do any unwanted felling of indigenous trees within the portion he occupies. As such I see no fault of the Honourable court in Kisii.

The other issue is whether the trial court is biased and has acted beyond his jurisdiction and fair determination of disputes. In the South African Case of *Brian Patrick De Lacy & another v South African Post Office* [2011] ZACC 17, contending that bias is a violation of constitutional rights which calls for this court’s intervention in exercise of its jurisdiction under Article 165 as read with Article 23(1) of the constitution the Court stated;

“[47] A complaint of perceived judicial bias is a constitutional matter. There are several reasons for this, but stating a few should make the point. Judicial authority is an integral and indispensable cog of our constitutional architecture. Our supreme law vests judicial authority in the courts. It commands that courts must function without fear, favour or prejudice, and subject only to the Constitution and the law. It follows that, at all times, the judicial function must be exercised in accordance with the Constitution. At a bare minimum this means that courts must act not only independently but also without bias, with unremitting fidelity to the law, and must be seen to be doing so.

[48] Thus when a litigant complains that a judicial officer has acted with bias or perceived bias he is in effect saying that the judicial officer has breached the Constitution and his oath of office. This is so because courts are final arbiters on the meaning of the Constitution and the law – a high duty that must be discharged without real or perceived bias. The issue is one of grave constitutional concern that demands the unflinching attention of the court seized with the complaint.

[49] Here, too, the trenchant indictment of judicial bias or of its apprehension instantly attracted constitutional concern. Another consideration is that once a claim of judicial bias is made, the judicial officer concerned would generally be entitled to a definitive outcome on the accusations. An accusation of bias, however frivolous, if not dispelled, may tarnish the judicial officer concerned and corrode public confidence in the judiciary as a whole. We are indeed seized with a constitutional matter.”

In the instant case, the fact that the trial court was in his capacity as a Magistrate exercising his duty cannot be said to be biased. It is incumbent upon the Appellants to demonstrate bias of the trial court towards their case. They have not done so. As I have stated above the Orders issued on 3/9/2020 were given in the presence of Counsel for both parties. This automatically translate to the fact that the Appellants were informed of the Orders of the Court.

The upshot of the above is that the Notice of Motion dated 4/9/2020 lacks merit and the same is dismissed with costs.

The Order of the court granted on 8/9/2020 is vacated.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KILGORIS ON THIS 1ST DAY OF JULY, 2021

MOHAMED N. KULLOW

JUDGE

1/7/2021

In the presence of:

CA:Chuma

N/A for parties and advocates