



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT NYAHURURU

ELC APPEAL NO 2 OF 2019

JEREMIAH THUKU NGANGA....1ST APPELLANT/APPLICANT

PETER KARAMI NGANGA.....2ND APPELLANT/APPLICANT

VERSUS

JOHN WAITHAKA AIDAN (suing on behalf of the estate of AIDA

WANGUI WAITHAKA.....RESPONDENT

RULING

1. Before me for determination is the Notice of Motion dated 5th April 2019 brought under Sections 1A, 1B and 3A of the Civil Procedure Act, Order 42 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules, and all other enabling provisions of the law where the Applicant seeks for the following orders.

a. Spent.....

b. Spent.....

c. That pending the hearing and determination of the Appeal herein, there be a stay of execution of the order issued on the 26th March 2019 and the proceedings in Engineer SPMELC Case No. 34 of 2018.

d. That costs of this application be provided for.

2. The said application is supported by the grounds set on the face of the application as well as on the sworn affidavits of Peter Karami Nganga, the 2nd Applicant/Appellant herein.

3. By the direction of the court, the said application was argued orally on the 13th May 2019 wherein the Applicant submitted as follows:

4. That vide a notice of motion dated 13th October 2018 the Respondents sought for order of injunction against the Appellants restraining them from selling, disposing of alienating, interfering, cultivating or doing anything adverse to a disputed portion of land lying between the boundaries of land parcels no Nyandarua/Kitiri/515 and 345 pending the hearing and determination of the suit which application as allowed as prayed by the SPMELC court sitting at Engineer Law Court.

5. Being dissatisfied by the order, the Applicants filed an Appeal on 5th April 2019 which Appeal has high chances of success for reasons that the learned trial Magistrate failed to appreciate that parcel No Nyandarua/Kitiri/515 was sub divided on 10th August 2018 before the suit in the lower court was filed and new parcels being 9368 -9379 were created wherein most of the sub divisions were transferred to 3rd parties who were not parties to the suit. That the injunctive order could not issue to properties which no longer existed.

6. Further, that the court also failed to appreciate the fact that the Applicants have been in occupation of the disputed piece of land from 1964 and their plea was never taken into consideration. That if the orders of injunction were not stayed, the Applicant's appeal shall be rendered nugatory as the execution of the order shall lead to the execution which would in turn lead to eviction and demolition of their property on the disputed piece of land measuring 12 acres

7. That in the circumstance, the court exercises its wide discretion to stay the execution of the order pending the hearing and determination of

the Appeal.

8. The Applicants further submitted that there had been no delay in filing the present application which was filed less than 10 days from the date of the ruling and that the Respondent did not stand to suffer any loss.
9. That the proper orders that ought to have been issued in the circumstance, were orders of maintaining status quo pending the hearing and determination of the suit.
10. That the appeal was not going to take long to be heard and determined as the Appellants had already applied for the proceedings of the lower court, and the same had been availed, all that was remaining was the filing of the record of Appeal
11. That the grounds of opposition filed by the Respondent had been noted and to respond, the Appellants, came before court order 43(1) (ii) which provision of the law did not require leave to file an appeal. That further, the provision of service was not applicable to the instant application, that further, issues of security were only available where an appeal lies for orders of specific performance and for an order of payment of money.
12. In response and in opposite of the Application, the Respondent's submission was that they had been served with the application and notice 10 days after filing of the application. That he who comes with equity must come with clean hands. The issue in dispute had been an issue of boundary dispute since 1964 between parcel of land No. Nyandarua/Kitiri.575 and 345 wherein parties have tried various ways of settling the dispute including amicable settlement through the area chief and village elders but the same did not bear fruits which necessitated the Respondent's deceased mother to file the matter before the boundaries and disputes tribunal.
13. That the submission by the Applicants' counsel to the effect that on sub division, the parcel of land No 515 was currently occupied by 3rd parties were allegations which were not supported with evidence as no title deeds had been annexed to show that 3rd parties are proprietors of the said properties. That no consent for transfer had been adduced as evidence to show that the properties had been transferred or sold as alleged and further, no documentation had been provided to prove ownership, transfer and sub division of the said properties. That such omissions by the Applicants were not to be used to subvert and deny the Respondents the injunctive reliefs sought at the Senior Magistrate's Courts at Engineer law Court.
14. That the issue in dispute has never been the sub division of parcel No. 515 but it has always been a boundary dispute between parties. That the issues raised in this court were meant to further delay proceedings in the trial court and to continuously frustrate the Respondent and her estate as he would not be in a position to administer the deceased's estate until the matter is heard and determined.
15. That this court should not allow the Appellants to bring up issues not deponed in their replying affidavit, which issues were brought in bad faith for the purpose of frustrating the Respondent.
16. The court has been directed to take note of annexure marked as PNK 3 which are photographs alleged to have been taken at the suit land measuring 12.7 acres that has been condensed to 3 photographs
17. That the court could not rely on the annexure marked as PNK3, photographs of the so parcel of land because 12.7 acres of land cannot be condensed into 3 photographs that are not clear and do not have a definition of where they were taken because it could be anywhere and further they did not know the authenticity of the same.
18. That the Respondent's application dated 30th October 2018 had raised numerous issues supported by evidence and documentation where it was their firm belief that they have established a prima facie case and that this application by the applicants must fail and should be dismissed.
19. If the orders granted on 26th March 2019 was not upheld by this court, the Respondent stands to suffer because she will not be in a position to administer the estate of the deceased with a result that they will be denying the deceased's estate the right to own property and to earn a living out of the property. They prayed that the application be dismissed with costs.
20. In rejoinder, the Applicant submitted that Respondent did not file a replying affidavit to challenge the evidence provided by the appellants to the supporting affidavit. That they did not take a separate set of photographs to dispute the fact that the photographs were not taken at the subject suit land.
21. That the matters pending before the lower court were not matters on administration of a deceased's estate but a claim for land. That the Respondent through his own annexure filed in the lower court and in particular annexure JWA 6(a) (b) at Paragraph 8 of the Supporting affidavit confirmed by way of a mutation form and a map, that parcel No. 515 had already been subdivided.
22. That the Appellants had a right of appeal being dissatisfied with an order of injunction and therefore cannot be said to be out to delay the lower court matter. An order of stay is a discretionary order and that the material placed before court was sufficient to grant the order of stay. That the Respondent, apart from delay, had not pleaded any other prejudice. The delay to be occasioned would not be oppressive before the appeal is heard and determined and weighed against the eviction of the appellant.

Analysis and Determination

23. I have considered the application, the affidavit on record, and submissions by counsel as well as the law concerning stay of execution pending Appeal under Order 42 Rule 6 of the Civil Procedure Rules which stipulates as follows:

No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(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.

24. There are three conditions for granting of stay order pending appeal under Order 42 Rule (6) (2) of the Civil Procedure Rules to which :

a. The court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered;

b. The application is brought without undue delay and

c. 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.

25. Evidently, the three (3) prerequisite conditions set out in the said Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed. The key word is “**and**” which connotes that all three (3) conditions must be met simultaneously.

26. Having said so, and having regard to the Application before me, I note that the orders issued vide the ruling delivered on the 26th March 2019 were to the following effect:

From the foregoing, it is only prudent and just to issue a temporary injunction so as to preserve the land pending the determination as to the true location of the boundary between Nyandarua/Kitiri/345 and Nyayndarua/Kitiri/515. In the circumstance, a temporary injunction is hereby issued against the Defendants restraining them from interfering with the disputed piece of land lying between Nyandarua/Kitiri/345 and Nyayndarua/Kitiri/515 pending the hearing and determination of this suit. The Officer commanding Kinangop Police Station shall oversee the implementation of this order. Costs of the application shall go to the Plaintiff.

27. On the first condition of proving that substantial loss may result unless stay of the order is made. From the submission herein adduced, it is clear that the application which the Respondent had presented before the Magistrate’s Court was, on the face of it, an application for a prohibitory injunction **restraining** the applicant from doing something, engaging in certain conduct or taking certain action in this case **interfering** with the disputed parcel of land, which application was allowed by the trial court.

28. I have read the said ruling and the same does not in any way seek to restrain the applicant from **occupying, living, continuing to live, or staying** on the suit property the Applicants having been in possession of the disputed land as at the time the application for injunction was made.

29. To seek to stop them from occupying, living, continuing to live or to stay on the suit premises required nothing short of clear and specific prayer for a mandatory injunction. I therefore do not see from the ruling anything that connotes eviction orders as against the Applicants.

30. I find that the applicant has not demonstrate what kind of substantial loss he will suffer if the stay order was not made in his favour now that the said orders were not eviction orders.

31. The Court of Appeal in the case of **Mukuma V Abuoga (1988) KLR 645 defined what substantial loss constituted wherein they held that;**

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

32. In the application before me, the Applicants have not pleaded that they would suffer any **substantial loss** and neither have they provided any evidence on the kind of irreparable loss they would suffer if the order of stay was not granted.

33. On the second condition, upon perusal of the court record, this Court finds that the delivery of the ruling in the matter being appealed against, was on the 26th March 2019 wherein the Applicant applied for stay of execution in the trial court on the 5th April 2019. I find that the said application is brought without undue delay.

34. On the last condition as to provision of security, I find that the Respondent has rightly submitted that the Applicant in the present application has not furnished and/or offered any security for a grant of the order for stay which was a mandatory legal requirement pursuant to the provisions of Order 42 Rule 6(2) (b) of the Civil Procedure Rules.

35. Section 3A. provides as follows:

Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

36. Having found that two conditions necessary for grant of orders for stay of execution to issue under Order 42 Rule 6(2) of the Civil Procedure Rules have not been met by the Appellant/Applicant and further, having regard to the above captioned provisions of the law as stipulated under Section 3A of the Civil Procedure Act, this court is not inclined to grant the order of stay of execution so sought.

i. In the circumstance, the Appellant/Applicants' Notice of Motion dated 5th April 2019 is hereby denied and dismissed with costs to the Respondent.

i. The Appellant/Applicants shall lodge their Appeal against the decree of the lower Court within 14 days from this date.

iii. That upon filing of the memorandum of Appeal in (ii) above, the Applicant shall prepare, file and serve their record of appeal within 45 days.

Dated and delivered at Nyahururu this 9th day of July, 2019

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE