



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELCA CASE NO. 8 OF 2017

SAMUEL KAROBIA MURIUKI APPELLANT

-VERSUS-

BENARD NGETHA RESPONDENT

RULING

1. The notice of motion dated **19th September, 2017** seeks stay of execution of the ruling delivered on 15th August, 2017 in Nanyuki land case No.31 of 2006 pending the hearing and determination of the application and the appeal.

2. The application is premised on the grounds that the respondent has obtained a decree allowing him to execute the decree of the lower court concerning the suit properties (land parcels Nos. Laikipia Nanyuki Marua Blocks 3/1938 and 899) which are the subject matter of this appeal; that the appellant has appealed against the decree; that unless the orders sought are granted, the application as well as the appeal will be rendered nugatory. Further, that there is an error apparent on the face of the court's record, that the application was brought without undue delay; the appeal is arguable with high chances of success and that that the applicant will suffer irreparable loss and damage unless the orders sought are granted.

3. The application is supported by the affidavit of the applicant, Samuel Karobia Muriuki, in which the grounds on the face of the application are reiterated.

4. Through a further affidavit sworn on **19th October, 2017** the applicant has given a detailed history of the suit hereto and averred that he has requested for certified copies of the lower court proceedings for the purpose of prosecuting his appeal which are yet to be availed.

5. In reply and opposition to the application, the respondent has deposed that the application is incompetent, frivolous, vexatious and an abuse of the process of the court. In that regard, the respondent has deposed that the orders sought have been overtaken by events as they have already been shown the common boundary to the suit property; that the applicant has not met the legal requirements for grant of an order of stay of execution and that the order sought to be stayed has not been attached.

6. It is further deposed that the appellant is a petty and difficult litigant; that the leave granted to the appellant to appeal out of time was set aside thus there is no competent appeal pending before the appeals committee and that the entire appeal has no merit.

Analysis and determination

7. Although this is an application for stay pending appeal which ought to be determined in accordance with the provisions of **Order 42 Rule 6** of the Civil Procedure Rules, the respondent has through his pleadings, raised an issue that may preliminary determine the application without going into its merits. The issue raised is that there is no appeal pending in any court concerning the decision appealed from to warrant granting the order of stay.

8. Whilst ordinarily this court ought to restrict itself on the appeal on which the current application for stay is premised, in the circumstances of this case where issues have been raised concerning the conduct of the applicant, (the applicant is inter alia accused of being a frivolous and vexatious litigant and abusing the process of the court), those accusations stem out of previous decisions of courts of concurrent jurisdiction to this court where it was *inter alia* determined that the orders in respect of which stay is sought have been executed and the leave granted to the applicant to lodge an appeal to the Appeals Tribunal out of time nullified. In that regard, see the decision in Nyeri HCC No. 27 of 2006 where the applicant herein *inter alia* claimed that the respondent had interfered with the boundary features of the suit property. The suit was found to be *res judicata* and an abuse of the process of court as the award of the Land Disputes Tribunal on which it was premised had been adopted by the court. That decision was neither appealed from nor set aside.

9. Also see the decision in Nyeri ELCA No. 105 of 2009 where the order given on 2nd September, 2009 allowing the applicant to appeal out

of time against the award of the Land Disputes Tribunal was set aside.

10. Upon considering the totality of the evidence adduced in this matter, I have no doubt that the issues upon which the application and the appeal herein are premised have been heard and determined by courts of competent jurisdiction to deal with those issues and a determination in respect thereof made. If the applicant was aggrieved by the determinations rendered by those courts, he ought to have moved those courts for review of their decisions or appealed against those decisions.

11. There being no competent appeal pending before the provincial appeals committee on which the application for stay can hinge, I agree with the respondent's contention that the application and the appeal on which it is premised is an abuse of the court process. Consequently, in exercise of the discretion vested on this court by **Sections 3A, 79B** of the Civil Procedure Act and **Order 42 Rule 6** of the Civil Procedure Rules, I dismiss the application and the appeal with costs to the respondents.

Dated, Signed and Delivered in open court at Nyeri this 4th day of July, 2018.

L N WAITHAKA

JUDGE

Coram:

Mr. Mshila for the appellant

N/A for the respondents

Court assistant - Esther