



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISHI

ELC CIVIL APPEAL NO. 16 OF 2020

PHERUS ARORI MONDA.....APPELLANT

VERSUS

JOHN S. AKAMA.....RESPONDENT

RULING

INTRODUCTION

1. On 4th December, 2020, the Applicant filed a Notice of Motion dated 1st December, 2020 seeking the following orders;

a) Spent

b) THAT pending the hearing and determination of this application *Interpartes*, the Appellant/Applicant be and is hereby granted a temporary order staying the ruling of the lower court which allowed the Respondent to continue with construction on the disputed property variously described as Block 1/596 and Block 1/478.

c) THAT pending the hearing and determination of this Appeal, the Appellant/Applicant be and is hereby granted an order staying the ruling of the lower court which allowed the Respondent to continue with construction on the disputed property variously described as Block 1/596 and Block 1/478.

d) THAT the Officer Commanding Police Division Nyanchwa do enforce compliance of the court order

2. The application is based on section 1A, 1B and 3A of the Civil Procedure Act, Order 42 rule 6(1) and (6) order 40 rule 1 and 3 of the Civil Procedure Rules 2010 and section 19 of the Environment and Land Court Act. To support his application, the Appellant averred that the dispute between him and the Respondent concerns the same property which he describes as Block 1/596 and Block 1/478. The lower court in its ruling allowed the Respondents to continue with the construction even before the dispute was resolved which order he believes was against the principles of justice requiring that such property be preserved pending determination. He avers that the maps he presented before this court are prima facie evidence that the disputed plot is actually Block 1/596 which belongs to him while the Respondent had not presented any evidence before the court to contradict the same. It was also his averment that the Respondent had not raised any question concerning the validity of the ownership documents he holds over the property.

3. The application is opposed through the Respondent's Grounds of Opposition dated 22nd January, 2021 and filed in this court on 22nd January, 2020 where in the Respondent avers that the application is premature, misconceived and otherwise bad in law for reasons that it is barred by order 42 Rule 2 of the Civil Procedures Rules, 2010 and that it does not disclose any sufficient and/or reasonable cause to warrant the orders sought. He also avers that the application was mounted with unreasonable delay which delay has not been explained.

4. The application was canvassed by way of written submissions and both parties filed their respective submissions, which I have considered together with the parties depositions.

PLAINTIFF'S SUBMISSIONS

5. Learned counsel for the Plaintiff submitted that the Applicant had established a prima facie case for preservation of the suit property pending the substantive hearing and determination of the suit before the lower court. He opined that none of the parties would suffer any loss if an order for preservation of status quo was made. However, the trial Magistrate dismissed the Appellant's application for maintenance of status quo and gave the Respondent leeway to proceed with construction on the suit property. In so doing, counsel submitted that the Learned

Trial Magistrate was acting against the principle of granting an injunction which would give the parties the opportunity to ventilate their respective claims. He argued that it is a principle of law that a property that is the subject of a suit should be preserved pending determination to avoid rendering the suit a nugatory.

6. Counsel for the Applicant argued that the suit before the court has clear triable issues which ought to be determined in substance after hearing the parties' viva voce evidence and thus there is need to preserve status quo. He submitted that the Applicant had met the conditions set out in **Mukisa Biscuits Co. LTD vs West End Distributors LTD (1969) EA 696**. He opined that the balance of convenience tilts in favour of granting the restraining orders pending the appeal and the lower court suit which is yet to be determined.

RESPONDENT'S SUBMISSIONS

7. Learned counsel for the Respondent on his part and in opposition to the Applicant's claim submitted that the Applicant had not shown to this honourable court the said ruling of the lower court which he wanted stayed pending the hearing and determination of the Appeal. He opined that the ruling sought to be stayed ought to have been attached as an exhibit to the application. He reiterated that it was not the duty of the Honourable court to look at the pleadings in the lower court to determine when the ruling was made or even get the gist of it. Thus he argued that the prayers in the application were being sought in vacuum.

8. Counsel further submitted that the request by the Appellant for the court to stay an order of the court allowing the Respondent to continue with construction on the disputed property which he (the Appellant) described as Block 1/596 and Block 1/ 478 was irregular and mischievous. He argued that a parcel of land cannot be reserved with two registration numbers and if such registration exists, the said registration is a forgery. He therefore argued that to request this honourable court to grant orders on a parcel of land that does not exist is mischievous on the part of the Applicant. It was his contention that the Applicant had not presented before this court any official search certificate or a green card of the said parcel of land he lays claim over to enable this court make a determination whether to grant him his prayers in the application. He submitted that the Applicant had not made any attempt to describe the exact parcel of land where the construction was going on and which construction this court should stop because there exists no property described as block1/596 or block 1/478.

9. In his submissions counsel contended that that the Applicant did apply for temporary orders of injunction in the lower court but he did not describe or show to the trial court the parcel of land in respect of which the order was being sought. He submitted that there was no mention of any specific parcel of land in the said application for temporary orders of injunction and thus the trial learned magistrate could not issue temporary orders of injunction on a parcel of land that did not exist.

10. It was his submission that the Appellant relied on the Registry Index Map (R.I.M) to describe the suit property which map he argued could not be used as a point of reference to grant the orders sought in this application. He opined that the said map could only be useful during the hearing of the main suit and not during the interlocutory stage of the case.

11. Counsel argued that the application to stay the ruling which was delivered on 18th November, 2020, has been filed before this court after inordinate delay which delay has not been explained. He therefore believes that the instant application has been filed in vacuum and the orders sought cannot be granted because the Appellant is non-suited.

12. Counsel further submitted that the Applicant has not satisfied the conditions for stay provided for under Order 42, Rule 6(2) of the Civil Procedure Rules.

ISSUES FOR DETERMINATION

13. I have considered the Applicant's application for stay of execution pending the hearing and determination of his intended Appeal. I have also considered the reasons given for and against the said application and the singular issue for determination is whether a stay of execution should be granted.

ANALYSIS AND DETERMINATION

14. The law concerning stay of execution pending Appeal is found in Order 42 Rule 6 of the Civil Procedure Rules which clearly sets out the grounds to be met. However, before I determine whether the conditions set out in Order 42 Rule 6 have been met, it is necessary for me ascertain that the Applicant has filed certified copy of the ruling he is appealing against and whose execution he wants the court to stay. In the absence of such certified copy of the Ruling, it is necessary to establish whether the Applicant has attached to his supporting affidavit, a letter requesting for the said ruling. Order 42 rule 2 makes the certified copy of the ruling of the lower court a mandatory document in the Appeal process.

14. Unfortunately, in this case, the Applicant has only attached a Memorandum of Appeal together with the pleadings he filed before the lower court. He has only mentioned in the application that a ruling was made on 18th November, 2020 dismissing his application for temporary injunction. As correctly pointed out by counsel for the Respondent, the Applicant wants this court to get the Ruling from the lower court and stay it, an exercise which would amount to the court descending into the arena of conflict. The court cannot grant prayers in a vacuum. Without the ruling, the court has been denied an opportunity to consider whether the intended Appeal raises serious issues of consideration to warrant the issuance of the orders sought.

15. That being the case, it will be an exercise in futility to try and establish whether or not the Applicant has met the conditions set out in Order 42 rule 46.

16. The upshot is that I find no merit in the application and I dismiss it with costs to the Respondent.

Dated, signed and delivered at Kisii this 11th day of June 2021.

J.M ONYANGO

JUDGE