



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. 8 OF 2020

JOHN MBWIRI KAMUNDI APPELLANT

VERSUS

JOSEPH KINJA RESPONDENT

RULING

1. Before this Court are two (2) applications brought by both parties. The respondent's application is dated 12/03/2020 seeking leave to file a cross appeal, while the appellant's application is dated 4.9.2020 seeking inter-alia injunctive orders against the respondent as well as a stay of the trial court's judgment. Vide the court's directions given on 5.10.2020, both applications were to be heard simultaneously by way of written submissions. However, I have not seen any submissions of the appellant by the time I embarked on writing this ruling. For ease of reference, this court will identify the appellant as Mbwiri, while the respondent is hereby identified as Kinja.

Application dated 12/3/2020 by Kinja

2. This application is brought pursuant to the provisions of Section 1A, 1B, 3A & 79G of the Civil Procedure Act and Order 42 rule 1 and Order 51 rule 1of the Civil Procedure Rules where Kinja seeks the following orders;

1) That this Honorable Court be pleased to extend the time for filing a Cross-appeal by the respondent to enable the respondent to cross-appeal on the judgment of Honorable J. IRURA Principle Magistrate delivered on 8th January 2020 in NKUBU ELC 16 OF 2016.

2) That cost of this application be provide for.

3. This application is based on the grounds on the face of it and on the supporting affidavit of Kinja who avers that the learned magistrate dismissed the main suit and the counter-claim, despite the fact that the counter-claim was meritorious. Upon dismissal, he extracted the court order and attempted to register the land from where the registration process had halted prior to filing of the suit, but the land registries declined to assist claiming that there were no explicit orders from the court directing that he be so registered as the owner of the land. That the only way to determine that he is the rightful owner is by way of an appeal. The delay in filing the same was not inordinate but was occasioned by that process where he was trying to register the land. He contends that he has an arguable cross-appeal with chances of success and the orders sought are not prejudicial to the appellant. It is therefore in the interest of justice that his application be allowed.

4. In support of his application, it was submitted for Kinja that the courts had been closed down for a period of 3 months due to the covid 19 pandemic and thus the delay in filing the cross-appeal was only by a month which is not inordinate. He avers that the appellant's argument that the grounds in the draft cross appeal are similar to the appeal is not true, as each party is claiming the land for themselves. He implores the court to consider the application within the broader context on the criterion of justice and prejudice test and allow the same in the interest of justice and fairness to all parties.

5. Joseph Kinja has relied on the following cases; **Forward Savings & Credit Co-operative Society Limited & 2 Others vs. Lewis Mutua Mbuta (2020)eKLR, Leo Sila Mutiso V Rose Hellen Wangari NBI CIVIL Application No.251 of 1997, Hassan Nyanje Charo V Khatib Mwashetani & 3 others [2014]eKLR.**

6. The appellant, Mbwiri has opposed the application vide his replying affidavit dated 18/08/2020. He avers that after judgment was delivered in the trial court on 8th January 2020, he served the memorandum of appeal on 10th February 2020, which raises similar issues as those now being raised by Kinja. He further states that Kinja had rushed to extract the court order, then he went to the land registries to try and have the land registered in his name and when that failed, it is when he sought to file a cross-appeal. If he was truly not satisfied with the judgment, he should have filed his appeal within 30 days and not tried to register the land in his name. Mbwiri therefore contends that the application by Kinja is an afterthought, it lacks merits and justification, it is not properly supported, it is incompetent, fatally defective and an

abuse of the court process and the court should dismiss it with costs.

The Application dated 4/9/2020 by Mbwiri (Appellant)

7. This application is brought pursuant to the provisions of Section 1A, 1B, 3A & 79G of the Civil Procedure Act, Order 22 rule 22, Order 42 rule 6 and Order 51 rule 1 of the Civil Procedure Rules, where Mbwiri is seeking the following orders;

1) Spent.

2) That this Honorable court be pleased to issue orders of temporary Injunction restraining the respondent by himself, his agents, surveyors or anybody else acting under his instructions from surveying, sub-dividing, entering, occupying, tilling or in any other way interfering with the appellant's quiet possession, user and enjoyment of land parcel LR. NKUENE/KITHUNGURI/241 pending the hearing and determination of this application and the appeal.

3) That there be a stay of execution of the Judgment/Decree in NKUBU ELC 16 OF 2016 pending the hearing and determination of this application and the appeal.

4) Cost of the application be provided for.

8. The application is premised on the grounds on the face of the application and on the supporting affidavit dated 4.9.2020 as well as a further affidavit dated 10.9.2020, both sworn by Mbwiri. He avers that he is the registered owner of the suit land which he inherited from his late mother. That upon registering the same in his name in the year 1991 he has been in exclusive possession through his sister who has developed the land extensively. However, the respondent without any consent or authority trespassed on the parcel of land in the company of 20 other people and they proceeded to till the land. He reported the illegal and malicious acts at Nkubu Police Station vide OB NO. 44/02/09/2020 and he is worried that the respondent will return with his agents and he will lose possession rendering the instant appeal nugatory and an academic exercise.

9. He further states that Kinja stands to suffer no prejudice as he has never been in possession of the suit land and he prays that the application be allowed.

10. The application is opposed by the respondent vide a replying affidavit dated 13/10/2020, where Kinja contends that the application has not met the threshold for the granting of the orders sought. That granting the said orders at this point will amount to determining the appeal.

11. He further states that he has not trespassed on the suit land, nor is the suit land in danger of being disposed. He contends that the suit land is unregistered. Further, a stay of execution should not be granted as the condition precedent anchored in law to deposit security has not been tendered nor has the appellant demonstrated willingness to deposit such security. The orders sought in the application shall be in vain as Kinja has no interest in NKUENE/KITHUNGURI/241 but only in the unregistered land. He prays for the dismissal of the application.

12. In his submissions, Kinja reiterated that the disputed land is unregistered and he has not trespassed on the appellants land or on NKUENE/KITHUNGURI/241, thus granting the said orders would be in vain. He added that there is no likely hood of interference with the substratum of the appeal to warrant issuance of the stay of execution. In support of his arguments, Kinja relied on the cases of; **Giella vs. Cassman Brown Ltd Company (1973) E.A. Kenleb Cons Ltd vs. Gatitu Service Station Ltd & Another (1990) eKLR, Kenya Commercial Finance Co. Ltd. Vs. Afraha Education Society (2001) Vol. 1 EA.**

Analysis and determination

13. I have considered the applications herein, affidavits both in support and in opposition thereof as well as the submissions proffered. The issues for determination are:

a) whether the Respondent, Kinja should be granted leave to file a cross appeal out of time.

b) whether the appellant has met the threshold for issuance of injunctive and stay orders;

c) who should bear the cost of the applications?

Leave to file a cross appeal out of time.

14. It is trite law that an order for extension of time to file an appeal is discretionary. Such discretion must however be exercised judicially. The factors to be considered in an application such as the present one, were set out by the Court of Appeal in **Aviation Cargo Support Limited v St. Mark Freight Services Limited [2014] eKLR** as follows:

“For the Court to exercise its discretion in favour of an applicant, the latter must demonstrate to the Court that the delay in lodging the record of appeal is not inordinate and where it is inordinate, the applicant must give plausible explanation to the satisfaction of the Court why it occurred and what steps the applicant took to ensure that it came to Court as soon as was practicable.”

15. The Respondent, Kinja was aggrieved with the trial court's decision as his counter claim was dismissed. He has given an explanation as

to why he delayed in filing the appeal. He had first tried to have the land registered in his name taking up the process from where it had reached before the matter was filed in court. Further, it is noted that the covid 19 pandemic struck sometime in March 2020 thereby adversely affecting many events. Thus I am inclined to find that Kinja may have been caught up by time as he was pursuing the registration of the land at a time when there was a new disease in the country.

16. The Appellant, Mbwiri has not demonstrated the prejudice he will suffer if the cross appeal is filed. In the main appeal, Mbwiri wants the court to allow the claim in his favour while in the proposed cross appeal, Kinja wants the court to allow his counterclaim. Thus the two parties have distinct interests in the matter. To this and in the interests of justice, I allow the application dated 12.3.2020.

Whether the appellant has met the threshold for issuance of injunctive and stay orders:

17. The law on granting of interlocutory injunction is set out under order 40(1) (a) and (b) of the Civil Procedure Rules 2010. The conditions for consideration in granting an injunction were settled in **Giella vs Cassman Brown & Company Limited (1973) E A 358**, and reiterated in the case of **Nguruman Limited versus Jan Bonde Nielsen & 2 others CA No.77 of 2012 (2014)eKLR** where the Court of Appeal held that;

“in an interlocutory injunction application the applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, all any doubts as to b, by showing that the balance of convenience is in his favor. These are the three pillars on which rests the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and state are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially”

18. The first question I must answer is whether the applicant has established a prima facie case. A prima facie case was defined by the Court of Appeal in **Mr Rao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] eKLR** where the court stated that;

“A prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

19. I have read the judgment of the trial court where the court while making reference to the scene visit report stated as follows;

“The above report or letter proved that the portion of land the defendant was alleged to have trespassed on and caused damage of the crops therein is unregistered and does not form part of the suit land despite both parties claiming the said disputed portion of land.....”

20. The trial court was relying on a report after the scene was visited by the Land Registrar and surveyor of which appellant's land was said to be parcel NKUENE/KITHUNGURI/241. It follows that the appellant does not have a prima facie case at this stage and I need not interrogate the other criterias regarding the issuance of injunctive orders. The parties are in court each seeking to be declared as the owner of a parcel of land that is unregistered and this issue can only be properly interrogated in the appeal. I find no merits in the prayer for injunction.

21. On the issue of stay of the trial court's judgment, the pertinent question to ask is; *What action is to be stayed?* After all, the suits before the trial court were dismissed. **In Western College of Arts and Applied Sciences v Oranga & Others (1976-80) 1 KLR, the Court of Appeal for East Africa** stated, court stated as follows:

“But what is there to be executed under the judgment, the subject of the intended appeal? The High Court has merely dismissed the suit with costs. Any execution can only be in respect of costs”.

19. In the application before me, there is nothing which the Magistrates Court has ordered to be done or to refrain from being done. All it did was to dismiss the plaintiff's (appellant) suit as well as the defendant's (respondent) counter-claim.

20. To this end, I find that the stay order is unmerited.

Final orders

1) The application dated 12.3.2020 is allowed. The Respondent, Joseph Kinja is granted leave to file and serve his cross appeal within thirty (30) days from today's date, failure to which the order shall lapse.

2) The application dated 4.9.2020 by the appellant John Mbwiri is hereby dismissed.

3) Each party to bear their own costs in both applications.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 14TH DAY OF JULY, 2021 IN PRESENCE OF:

C/A: Kananu

Kiyuki miss for respondent

Ms. Muriithi for appellant

HON. LUCY. N. MBUGUA

ELC JUDGE