



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC APPEAL NO. E050 OF 2020

REGINA GATHONI.....APPELLANT

VERSUS

SAMUEL WAINAINA GITHACURI.....RESPONDENT

RULING

The Appellant brought the application dated 16/11/2020 seeking enlargement of time to file an appeal against the ruling of the Senior Principal Magistrate in **Kikuyu Principal Magistrates' Court Suit No. 25 of 2020** delivered on 30/7/2020. She also seeks stay of those orders pending hearing and determination of the appeal. The application was made on the grounds that the Respondent filed another suit in Kikuyu being **PMCC No. 294 of 2016** against Metrine Wambui, the Appellant's mother and that she died in 2019 without the Plaintiff taking action in that suit. The Appellant contended that the orders which the Plaintiff seeks in the two suits were similar and touched on the ownership of the land known as Karai/Karai/1387 ("the Suit Property") which the Respondent contended that the Appellant had encroached onto.

The Respondent filed an application for injunction in **Kikuyu SPMCC No. 25 of 2020** seeking an injunction to restrain the Appellant and the County Government of Kiambu from dealing with the Suit Property. The Learned Magistrate, Mr. G. Onsarigo delivered a ruling on 30/7/2020 in which he found that the Plaintiff had demonstrated a *prima facie* case against both Defendants. The Learned Magistrate referred to the replying affidavit sworn by Patrick Mbari on behalf of the 2nd Defendant who deponed that there was a public road neighbouring the Respondent's land and that it existed as such prior to 1991 when the land was allocated to the Respondent.

The Appellant swore the affidavit in support of the application. She deponed that her late father inherited from her grandfather a parcel of land which stretched across a public road. She urged that the land allocated to the Respondent did not abut her father's land and that it was separated by the public road. That sometime in 2016, the County Government of Kiambu decided to improve the public road but the Respondent objected claiming that the road was part of his land and that he then sued his neighbours including the Appellant's mother. He abandoned that suit and filed Suit number 25 of 2020 in which she explained in her pleadings that she did not have a capacity to be sued and that she neither owned any land in Kiambu nor did she live there. She could not understand why out of the eight children surviving her mother the suit was brought against her yet she was not an administrator of her late parent's estate. She deponed that her advocate applied for typed proceedings and the ruling but only received copies of this on 4/11/2020. She averred that if the order for stay were not granted she would suffer substantial loss with the possibility of imprisonment for failing to obey court orders which she could not comply with.

The Respondent swore a replying affidavit in opposition to the application brought by the Appellant. He deponed that he was the absolute and indefeasible owner of Karai/Karai/1387 measuring approximately 1.75 hectares. He contended that if indeed the Appellant were a stranger to his parcel of land then she would not be in breach of the court orders. On the issue of capacity to defend the suit before the Magistrate's Court, the Respondent averred that the Appellant participated fully in the hearing of the application and cannot be heard to argue that the issue of her locus should be ventilated first. He urged that it was an abuse of the court process for the Appellant to contend that her status in the suit was not taken into consideration. He argued that allowing the Appellant's application for stay of the orders issued on 30/7/2020 would render his suit before the Magistrate's Court nugatory. He contended that there had been inordinate delay in filing this application. He produced a copy of the title he holds over the Suit Property.

The Appellant filed a further affidavit and reiterated that the Respondent had not mentioned the earlier case which he filed before the Learned Magistrate. She pointed out that she did not dispute the Respondent's ownership of the Suit Property but maintained that there was no evidence to show that she owned any parcel of land close to the Respondent or that she lived there.

Parties filed submissions which the court considered. The Appellant submitted that the Respondent failed to disclose that he had filed the suit in the Kikuyu Magistrate Court against the Appellant's mother before she died and that there was a public access road between the Respondent's land and that of the deceased parents of the Appellant which had been in existence for over 50 years before the Kiambu County Government allocated the Respondent the land. She faulted the Learned Magistrate for not making any findings regarding her capacity to participate in the suit before that court. She emphasised that the question of jurisdiction can be raised at any stage when it is discovered.

The Respondent filed submissions in which he gave the background to the case which he filed before the Senior Principal Magistrates Court at Kikuyu. He submitted that his neighbours had encroached on his land by using part of it to access their portions of land. He added that the illegal access road cut across his property and submitted that the Appellant had trespassed on part of the Suit Property which had been hived off because of the access road and that she had started developing the land. He submitted that the County Government of Kiambu was also in the process of demarcating a public access road which would cut through his property.

The Respondent submitted that the court had to consider the period of delay, the reason for the delay, the arguability of the appeal, the prejudice to be suffered by the Respondent if the extension of time to lodge the appeal were granted, the importance of complying with time limits and whether any public interest was involved in the matter. Further, that the ruling giving rise to the appeal was delivered on 30/6/2020 and that the Appellant's application for stay of execution was dismissed on 17/10/2020. He submitted that it had taken the Appellant six months to file this application and faulted her for not filing a notice of appeal and argued that the notice of appeal could have been filed while the Appellant waited for the typed proceedings.

The Respondent submitted that the issue of *locus standi* should have been brought up and ventilated by the Appellant who participated fully in the hearing of the application for injunction. He reiterated that he stood to suffer substantial loss and urged the court to consider the requirements for grant of an order for stay of execution pending appeal under Order 42 Rule 6 of the Civil Procedure Rules. The Respondent contended that if the Appellant had no dealings with the Suit Property, then she should not be worried about the danger of imprisonment for failing to comply with court orders. He added that he was yet to extract the court order and that the intended appeal and application for stay were without basis. He urged that the Appellant had failed to show what loss she stood to suffer if stay were not granted or that she had an arguable appeal. The Respondent urged the court to dismiss the application while contending that the inordinate delay had not been explained.

The issue for consideration is whether the court should stay the orders issued by the Learned Magistrate on 30/7/2020 and whether the court should enlarge the time for the Appellant to lodge her appeal.

If indeed it is true that the Appellant does not own land next to the Respondent's land, then the orders restraining her from dealing with the Suit Property ought not to have issued against her. That is one of the points in her intended appeal. The court notes that the Learned Magistrate directed the District Land Surveyor for Kiambu County to ascertain the beacons and acreage of the suit land. If there was a public road in existence before the Suit Property was allocated to the Respondent as the Applicant argued, then that is a matter that will have to be established during the trial when a determination will be made regarding whether or not there was encroachment on the Respondent's land. The question then becomes whether injunctive orders should have been issued against the Appellant over the Suit Property if it forms part of a road. The Respondent submitted that the County Government of Kiambu was in the process of demarcating a public access road that would cut through his property. That is a matter the Respondent ought to take up with the County Government and not the Appellant. The Appellant has an arguable appeal.

The court grants the orders sought in the application dated 16/11/2020. The Applicant will file and serve her appeal within 30 days of the date of this ruling.

Delivered virtually at Nairobi this 9th day of August 2021.

K. BOR

JUDGE

In the presence of: -

Mr. Edwin Mugu for the Appellant

Ms. Catherine Kinyanjui for the Respondent

Mr. V. Owuor- Court Assistant