



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND AT NYAHURURU

ELCA NO. 19 OF 2019

LEDERO GROUP RANCH.....APPELLANT

VERSUS

NAUNERI GROUP RANCH.....DEFENDANT

RULING

1. By a judgment dated 15th March, 2021 the court dismissed the Appellant's appeal against the decision of the Land Registrar Samburu County which determined a boundary dispute between the parties. Being aggrieved by the said judgment, the Appellant filed a notice of appeal dated 20th March 2021 signifying its intention to appeal to the Court of Appeal against the entire judgment.

2. Vide a notice of motion dated 29th March, 2021 based upon **Section 63 (e) of the Civil Procedure Act (Cap. 21), Order 22 Rule 22, Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, 2010 (the Rules)** the Appellant sought stay of execution of the 'ruling' of the Land Registrar dated 14th November, 2019, the taxation proceedings and any consequential orders arising from the judgment dated 15th March, 2021.

3. The application was supported by the supporting affidavit sworn by Peter Daniel Lesooni on 29th March, 2021 and the exhibits thereto. The Appellant contended that following the judgment of 15th March, 2021 the Respondent had taken steps to take over and occupy the portion of land the subject of the boundary dispute. It was further contended that the Appellant had filed a notice of appeal and requested for certified copies of proceedings to enable it file the record of appeal. The Appellant contended that it had an arguable appeal hence it should be granted the orders sought to enable it pursue the appeal.

4. The Respondent filed grounds of opposition dated 24th May, 2021 opposing the application on several grounds. First, that there was no demonstration that the intended appeal was arguable. Second, that there was no evidence of the risk of substantial loss. Third, that whatever loss the Appellant may suffer was merely ordinary loss which every judgment debtor must necessarily suffer. Fourth, that there were no special circumstances to warrant a stay of execution. Fifth, that granting a stay would be an impediment to the Respondent's enjoyment of the fruits of its judgment. Consequently, the court was urged to dismiss the application.

5. When the application was listed for *inter partes* hearing, it was directed that the same shall be canvassed through written submissions. The record shows that the Appellant filed its submissions on 4th August 2021 whereas the Respondent filed its submissions on 7th July, 2021.

6. The Appellant submitted that unless a stay was granted it shall suffer substantial loss and that its intended appeal to the Court of Appeal shall be rendered nugatory. The Appellant further submitted that the application for stay was filed without unreasonable delay and that it was willing to abide by any conditions which the court may impose upon granting stay. The Appellant cited the cases of **Paul Kamura Kirunge v John Peter Nganga [2019]eKLR, James Wangalwa & Another v Agnes Naliaka Cheseto [2012]eKLR, Apar Industries Ltd v Joe Freighters Limited [2015] eKLR, and Butt v Rent Restriction Tribunal [1979] eKLR** in support of its application.

7. The Respondent submitted that the determination of the Land Registrar sought to be stayed was not a ruling of this court and had not been brought to court for execution hence there was no legal basis for granting a stay of execution under **Order 42 Rule 6 of the Rules**. It was further submitted that by its judgment of 15th March, 2021 the court simply dismissed the appeal and that it did not order any party to do or refrain from doing anything capable of being stayed.

8. It was further submitted that the Appellant had failed to demonstrate what substantial loss, if any, it may suffer unless the stay sought is granted. The Respondent further contended that taxation or payment of costs cannot constitute substantial loss since there was no evidence to demonstrate that such costs cannot be recovered should the intended appeal ultimately succeed. The Respondent relied upon the cases of **Halai & Another v Thornton & Turpin [1963] Ltd [1990]eKLR, Century Oil Trading Company Ltd v Kenya Shell Limited Nairobi HCMCA NO 1561 of 2007, and Victory Construction v BM (a Minor suing through next friend one PMW) [2019]eKLR** in opposition of the application.

9. The court has considered the Appellant's notice of motion dated 15th March, 2021 together with the supporting affidavit as well as the Respondent's grounds of opposition. The court is of the opinion that the main question for determination is whether or not the Appellant has made out a case for the stay orders sought in the application.

10. The main legal provisions on stay of execution are contained in **Order 42 Rule 6 (2) of the Rules** which stipulates as follows:

“ 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”.

11. It is evident from the material on record that the ruling or decision dated 14th November, 2019 sought to be stayed was not made by this court. There is no indication on record that any execution proceedings have been commenced and, if so, in which forum. The material on record further shows that the judgment of 15th March, 2021 merely dismissed the Appellant's appeal against the Land Registrar's decision dated 14th November, 2019. It did not make any positive order capable of execution, save, perhaps, the order on costs. **See Western College of Arts & Applied Sciences v Oranga & Others [1976] KLR 63.**

12. The court is not satisfied that taxation or payment of costs can result in substantial loss or render the intended appeal nugatory. Both parties herein are group ranches and there is no evidence on record to demonstrate that if the costs of the appeal were to be paid then the Appellant shall be unable to recover the same should it ultimately succeed before the Court of Appeal. **See Kenya Shell Limited v Benjamin Kabiru & Another [1986] eKLR**

13. The court has further noted that both parties as group ranches hold whatever land they have on behalf of their members. They shall be obligated to distribute whatever land they hold amongst their members at the end of the day. In fact, the material on record shows that the Appellant has already done allocations amongst its members. The court is of the opinion that the disputed portion of land between the river and the road shall still be recoverable by the successful party upon conclusion of the intended appeal. There is no evidence on record to demonstrate any risk of alienation thereof pending hearing and determination of the intended appeal.

14. The upshot of the foregoing is that the court is not satisfied that the Appellant has demonstrated the grounds for granting a stay of execution under **Order 42 Rule 6 of the Rules**. Accordingly, the Appellant's notice of motion dated 20th March, 2021 is hereby dismissed with costs to the Respondent. Orders accordingly.

RULING DATED AND SIGNED IN CHAMBERS AT NYAHURURU THIS 28TH DAY OF OCTOBER, 2021 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

Ms. Kinuthia holding brief for Mr. Mureithi for the Appellant

No appearance for the Respondent

CA - Carol

.....

Y. M. ANGIMA

JUDGE