



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

ELC CASE NO. 94 OF 2001 (O.S)

LOISE WANJA KIBUTIRI.....PLAINTIFF/RESPONDENT

-VERSUS-

JAMES NJORO KIBUTIRI...1ST DEFENDANT/RESPONDENT

DAVID KIBUTIRI NJAU.....2ND DEFENDANT/APPLICANT

RULING

INTRODUCTION

1. Vide the Notice of Motion Application dated the 11th of December 2020, the 2nd Defendant/Applicant herein has sought for the following Reliefs;

i. This Honourable Court be pleased to issue an order directing the Officer Commanding Police Division, Limuru Police Division to provide security to the surveyor M/s Geomeasure Surveyors limited to survey and subdivided L.R No. 165/9 (original No. 165/1/3.

ii. Costs of the Application be provided for.

2. The subject Application is premised and/or anchored on the grounds enumerated at the foot thereof and same is further supported by the Affidavit of the sworn by one David Kibutiri Njau, namely the 2nd Defendant/Applicant, sworn on the 11th December 2020.

3. Upon being served with the subject Application, the Plaintiff herein filed a Replying Affidavit sworn on the 10th March 2021, in respect of which the Plaintiff/Respondent stated that the orders sought ought not to be granted.

4. On the other hand, the 1st Defendant/Respondent has filed Grounds of Opposition dated the 23rd April 2021, as well as the Replying Affidavit sworn on the 13th July 2021. For clarity, both the grounds of opposition and the Replying affidavit, object to the granting of the order sought.

DEPOSITIONS BY THE PARTIES

THE 2ND DEFENDANT/APPLICANT'S CASE

5. Vide the Supporting Affidavit sworn on the 11th December 2020, the 2nd Defendant/Applicant herein has averred that judgment in respect of the subject matter was delivered on the 31st July 2015, and thereafter an Appeal was filed to the Court of Appeal challenging the said judgment.

6. It is further averred that the Appeal before the Court of Appeal was heard and disposed of vide judgement rendered on the 25th September 2020, whereby the Court of Appeal ordered and/or directed that *L.R No. 165/9 (original No. 165/1/3)*, be subdivided to and/or in favor of the parties in accordance with the stipulated ratios.

7. Further, the 2nd Defendant/Applicant has averred that pursuant to the judgment of the court of appeal, the parties were to receive the following acreages;

a. Plaintiff 6.35 acres being her entitlement from James share.

b. 1st Defendant to receive 57.15 acres

c. 2nd Defendant to receive 63.5 acres

8. It is further averred by the 2nd Defendant/Applicant that upon the delivery of the judgment by the Court of Appeal, same had made request to the Plaintiff and the 1st Defendant respectively, for the appointment of a joint surveyor to facilitate the survey and the subdivision of the suit property, but same had been reluctant to concede to the request.

9. It is further averred by the 2nd Defendant/Applicant that arising from the failure of the Plaintiff and the 1st Defendant/Respondent to accede to a joint surveyor, the decree issued by the Court of Appeal, has not been executed and/or otherwise enforced.

10. In any event, the 2nd Defendant/Applicant has further averred that given the reluctance by the Plaintiff and the 1st Defendant/Respondent, the decree of the Court of Appeal is likely not to be enforced and such failure may prejudice and/or otherwise affect the rights of the 2nd Defendant/Applicant.

11. On the other hand, the 2nd Defendant/Applicant has also averred that the execution and/or implementation of the decree of the Court of Appeal which require the services of a surveyor, may not also be realizable if no such security is provided by the National Police Service.

12. In view of the foregoing, the 2nd Defendant/Applicant, has thus implored the Honourable court to consider the merit of the subject Application and grant same, so as to enable same to benefit from and/or otherwise appropriate the fruits of the subject litigation.

RESPONSE BY THE PLAINTIFF

13. Vide the Replying Affidavit sworn by one, David Muthii Kibutiri, the Plaintiff/Respondent has averred that though the Court of Appeal issued and/or rendered a judgment on the 25th September 2020, the said judgment is the subject of an intended Appeal.

14. It is further averred that upon the delivery in question, the Plaintiff/Respondent instructed her Advocates to file an Application for leave to Appeal in the Supreme Court.

15. Further, it is averred that pursuant to the instructions by the Plaintiff, an Application for leave to Appeal to the Supreme Court was duly filed and same is still pending hearing and determination to date.

16. Owing to the foregoing, the Plaintiff/Respondent therefore opposes the implementation of the judgement of the Court of Appeal and by extension the subject Application.

RESPONSE BY THE 1ST DEFENDANT

17. Similarly, the 1st Defendant/Respondent herein has also averred that the judgment of the Court of Appeal is a subject of an Application for leave to Appeal to the Supreme court. For clarity, it is averred that the said Application for leave remains pending to date.

18. It is further averred by the 1st Defendant/Respondent that to the extent that there is a pending Application for leave to Appeal, such pending Application for leave to Appeal should operate as an order of stay.

19. In any event, it is further averred that the 2nd Defendant/Applicant herein is not exposed to suffer any prejudice, if the subject Application is declined.

20. In the premises, the 1st Defendant/Respondent joins the Plaintiff/Respondent in contending that the subject Application ought to be dismissed.

SUBMISSIONS BY THE PARTIES

21. The Notice of Motion Application dated the 11th December 2020, came up for hearing on the 11th November 2020, on which date the Advocates for the parties sought directions to the effect that the subject Application be canvassed and/or be disposed of by way of written submissions.

22. Pursuant to and in line with the request, the Honourable Court gave directions and/or otherwise ordered that the subject Application be canvassed by way of written submissions, to be filed and exchanged within 14 days.

23. Subsequently, the matter was fixed for mention on the 22nd November 2021, to confirm and/or authenticate the filing and/or exchange

the written submissions and on the said date, it transpired that all the parties had filed and/or exchanged their submissions. Consequently, the subject matter was reserved for delivery of Ruling on the 2nd December 2021.

ISSUES FOR DETERMINATION

24. I have reviewed the Notice of Motion Application dated the 11th December 2020, together with the Supporting Affidavit thereto, on one hand, and I have similarly considered and/or appraised the content of the Replying Affidavits filed on behalf of the Plaintiff/Respondent and the 1st Defendant/respondent, respectively.

25. On the other hand, I have also considered and taken into account the submissions filed by the parties herein, which submissions forms part and parcel of record of the Court.

26. Having reviewed the Application, the Affidavits filed in support and Opposition thereto, and having reviewed the submissions filed, I am of the considered opinion that only two issues arise for determination as hereunder;

i. Whether there is a subsisting appeal against a judgment and decree of the court of appeal or better still whether an application for leave to appeal to the supreme court constitute to an appeal and if so, whether same operates as an order of stay.

ii. Whether there is any bar to the Implementation of the Decree of the court of Appeal and if no,t whether the execution thereof requires reasonable security.

ANALYSIS AND DETERMINATION

ISSUE NUMBER ONE

27. It is common ground that the Honourable Court of Appeal delivered its judgment in respect of the subject matter on the 25th September 2020, and thereby brought the dispute herein to a close.

28. On the other hand, it is also worthy to observe that whereas the Honourable Court of Appeal is the final Appeal Court for matters other than those falling within the purview of **Article 163(4) of the Constitution 2010**, there is however a window to Appeal to the Supreme Court, *albeit* on certification by the Court of Appeal that the matter in question involves a matter of general public importance.

29. The Plaintiff/Respondent and the 1st Defendant/Respondent herein have averred that same have since filed an Application for leave to Appeal to the Supreme Court. However, it is conceded that the said Application for leave to Appeal, has not been heard and/or disposed of.

30. Be that as it may, it is imperative to observe that prior to and/or before the grant of leave to Appeal, no Appeal can be filed and/or constituted before the Supreme Court, or at all. ***See the Decision in the case of NICHOLAS KIPTOO ARAP SALAT VERSUS INDEPENDENT ELECTORAL AND BOUNDARIES COMISSION AND OTHERS, [2014]Ekr.***

31. In view of the foregoing, it is common ground that no Appeal therefore has been filed, to warrant a contention by the 1st Defendant/Respondent that there is a subsisting Appeal against the judgment and decree of the Court of Appeal. Clearly, the statement by and/or on behalf of the 1st Defendant/Respondent, is therefore misleading.

32. Nevertheless, even assuming for arguments sake, that there was a subsisting Appeal before the Supreme Court (*which is not the case*), the subsistence of an Appeal per se, does not operate as an order of stay, either as imagined by the Plaintiff/Respondent and the 1st Defendant/Respondent, respectively or at all.

33. To my mind, the foregoing position is explicit, express and unequivocal. Nevertheless, it may still be necessary to draw the attention of Counsel for the Plaintiff/Respondent and the 1st Defendant/Respondent to the provisions of **Order 42 Rule 6(1) of the Civil Procedure Rules 2010**, which provides as hereunder;

6. Stay in case of appeal [Order 42, rule 6.]

(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

34. Based on the said provisions of the law, it is my finding and holding that the pendency of the Application for leave to Appeal to the Supreme Court, does not constitute and/or operate as an order of stay.

ISSUE NUMBER TWO

35. The judgment and decree of the Court of Appeal, which was rendered on the 25th September 2020, and which has neither been

challenged, reviewed and/or rescinded, remains alive and therefore deserving of implementation.

36. On the other hand, it is also apparent that the suit property, to which the judgment and decree relates, is expansive and same measures 127.1 acres. Consequently, the survey and subdivision of the subject parcel of land in line with the decision of the court of appeal would entail a great deal of survey work, which may take slightly more than one day.

37. Besides, given the history of the subject matter and the time that same has taken before being concluded, there is a likelihood of animosity and tension arising and/or tempers flaring during the subdivision and incidental survey works.

38. It is not lost on the Court, that land is unemotive issue and that unless suitable measures and/or mechanism are put in place, harm, injury and/or death, may arise and/or ensue, during survey works and particularly, in a matter where the dispute has grazed the Corridors of justice for more than two decades.

FINAL DISPOSITION

39. Having dealt with and/or addressed the issues enumerated herein before and taking into account the circumstances surrounding the subject matter, I am compelled to find and hold that the Application dated the **11th December 2020 is merited.**

40. Consequently, the Notice of Motion Application dated the 11th December 2020 be and is hereby allowed as prayed.

41. Costs of this Application be and are hereby awarded to the 2nd Defendant/Applicant.

42. It is so Ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 2ND DAY OF DECEMBER, 2021

HON. JUSTICE OGUTTU MBOYA

JUDGE

ENVIROMENT AND LAND COURT.

MILIMANI.

In the Presence of;

June Nafula Court Assistant

Mr. Ndungu for the Plaintiff/ Respondent.

N/A for the 1ST Defendant/ Applicant