



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

APPEAL No. 4 OF 2020

ESTHER CHEBOLE CHUMO.....1ST APPELLANT

CATHRINE WANJIKU NJOROGE.....2ND APPELLANT

NGARI MAHITU.....3RD APPELLANT

MARK KARIUKI KAIGANE.....4TH APPELLANT

DAVID MWANGI KARANJA.....5TH APPELLANT

RICHARD KIPROP CHONGE.....6TH APPELLANT

VERSUS

PAULINA CHEPKORIR MAIYO.....1ST RESPONDENT

EVANS KIPKOROS TUITOEK.....2ND RESPONDENT

(Being an appeal from the order of the Chief Magistrate's Court at Nakuru (Hon. B.B. Limo,

Senior Resident Magistrate) made on 17th January 2020 in Nakuru CMCC No. 105 of 2011

Paulina Chepkorir Maiyo & Another v Agricultural Development Corporation & 8 Others)

RULING

1. This ruling is in respect of the appellants' Notice of Motion dated 30th January 2020. The following orders are sought in the application:

1) ...

2) ...

3) *THAT the Honourable court be pleased to stay the proceedings in Nakuru CMCC No. 105 of 2011 and simultaneously with the ex parte order issued in Nakuru CMCC No. 105 of 2011 pending hearing and determination of the appeal.*

4) *THAT there be an order of for transfer of suit to the Environment and Land Court.*

5) *THAT Costs of this application be provided for.*

2. The application is supported by an affidavit sworn by David Mwangi Karanja, one of the appellants. He deposed that on 17th January 2020 the subordinate court granted an ex parte injunctive order in Nakuru CMCC No. 105 of 2011 Paulina Chepkorir Maiyo & Another v Agricultural Development Corporation & 8 Others and that the learned magistrate who granted the order is a Senior Resident Magistrate with pecuniary jurisdiction of KShs 7 million yet the value of the suit property is KShs 24 million. He added that the orders were made ex parte pursuant to an application dated 17th January 2020 and that the appellants filed an application dated 27th January 2020 seeking to discharge the ex parte orders but the said application has not been heard. He annexed a valuation report, the said order, the application dated 17th January 2020 and the application dated 27th January 2020. He further deposed that the ex parte orders are in the nature of an eviction.

3. The respondents opposed the application through a replying affidavit sworn by Paulina Chepkorir Maiyo, the 1st respondent. She deposed that no determination in the form of a ruling or judgment has been made by the subordinate court to warrant an appeal or even the application before this court and that the appeal herein has been filed without leave. He further denied that the suit property is valued at KShs 24 million.

4. In submissions, counsel for the applicants argued that the learned magistrate issued an ex parte order on 17th January 2020 in respect of the suit property which measures about 30 acres and whose value is more than KShs 24 million yet his pecuniary jurisdiction is only KShs 7 million. Counsel relied on a valuation report annexed to the supporting affidavit. He added that despite the appellants filing an application dated 27th January 2020 seeking review or setting aside of the order of 17th January 2020, the subordinate court directed that the main suit be heard and proceeded to give the matter a mention dated for pre-trial directions. Counsel argued that this court has supervisory jurisdiction over the subordinate court under Article 165 of the constitution and that the subordinate court acted without jurisdiction. Counsel cited the case of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR** in support of the argument that without jurisdiction a court ought not to make any further step. It was further argued that under Order 43 rule 1, the appellants have an automatic right of appeal against the order of 17th January 2020.

5. On his part, counsel for the respondents opposed the application arguing that the orders were properly made ex parte under Order 40 rule 4 and that there is no automatic right of appeal against orders made under the said rule. Counsel further argued that since the present appeal has been filed without leave, the entire appeal and the application have no basis. It was further argued that the issue of jurisdiction has never been raised in the subordinate court and that it should therefore not be raised before this court. It was also argued that the supervisory jurisdiction of this court ought not to be invoked through an appeal since the application before the subordinate court is yet to be heard inter partes. Counsel further argued that the respondents do not agree that the suit property is valued at KShs 24 million or that the subordinate court lacks pecuniary jurisdiction.

6. I have considered the application, the affidavits and the submissions. I must point out from the onset that the applicant has neither exhibited the proceedings before the subordinate court nor copies of all the pleadings that had been filed in the subordinate court. Although the applicants' counsel orally urged this court to call for and peruse the subordinate court's file, I have declined that invitation since the matter in the subordinate court is still being actively litigated and I did not want to interfere with those proceedings until such a time that this court will have reached a considered decision on such an intervention. In any case, it was incumbent upon the applicants and any other party seeking to rely on any materials to place that material before the court. There would have been absolutely no difficulty in annexing copies of all the pleadings which parties have themselves filed and exchanged. Similarly, handwritten proceedings of the subordinate court could have been availed if leave to copy them was sought from the said court.

7. From the sketchy material on record, I have gathered that the applicants herein are defendants in the suit before the subordinate court while the respondent are plaintiffs therein. On 17th January 2020 an application was placed before the subordinate court under certificate of urgency in which the respondents sought an interlocutory injunction. Upon considering the certificate of urgency, the learned magistrate made the following orders at the ex parte stage:

1. THAT this Honorable Court be and is hereby pleased to certify this matter urgent and service is dispensed with in the first instance.

2. THAT pending the hearing and determination of this application inter-partes this Honorable Court be and is hereby pleased to issue orders of temporary injunction restraining the 1st and 2nd Defendants/Respondents and the proposed 3rd to 9th Defendant/Respondent, their agents, their servants and/or any other persons acting under their authority from entering, selling, advertising, transferring and/or interfering whatsoever with the suit property known as Plot No.s 155 and 156 (also known as Plot No.s 990, 991 and 992 OI Jorrai Settlement Scheme) located within Agricultural Development Corporation 01 Jorrai Farm, Gilgil.

3. THAT the application to be served.

4. THAT the O.C.S Elementaita police station to enforce the orders.

5. THAT inter partes hearing be on 31st January 2020.

8. Aggrieved by that order, the applicants filed this appeal on 30th January 2020, on the eve of the inter parte hearing. Simultaneously with the memorandum of appeal, the applicants filed the present application. The application seeks stay of proceedings before the subordinate court and stay of the order of 17th January 2020 pending hearing and determination of this appeal. The application also seeks transfer of the case from subordinate court to this court.

9. On the issue of stay of execution pending hearing and determination of appeal, **Order 42 rule 6 (1) and (2) of the Civil Procedure Rules, 2010** provides:

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.

(2) 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.

10. The applicants have made the present application on the basis that they have already filed an appeal. In such circumstances, an order of stay of execution pending appeal will only be available from this court if a valid appeal has been filed. It would be pointless to stay execution pending hearing and determination of an appeal that is really not an appeal. In the present case the applicants are appealing against an injunctive order made by the subordinate court at the ex parte stage. Such orders are made under **Order 40 Rule 4** of the **Civil Procedure Rules** which provides:

(1) Where the court is satisfied for reasons to be recorded that the object of granting the injunction would be defeated by the delay, it may hear the application ex parte.

(2) An ex parte injunction may be granted only once for not more than fourteen days and shall not be extended thereafter except once by consent of parties or by the order of the court for a period not exceeding fourteen days.

(3) In any case where the court grants an ex parte injunction the applicant shall within three days from the date of issue of the order serve the order, the application and pleading on the party sought to be restrained. In default of service of any of the documents specified under this rule, the injunction shall automatically lapse.

(4) All applications under this order shall be heard expeditiously and in any event within sixty days from the date of filing unless the court for good reason extends the time.

11. On the other hand, **Order 40 Rules 1, 2 and 3** deal with injunctions granted upon an inter parte hearing. Did the applicants need leave prior to filing the appeal herein? One needs not look further than **Section 75** of the **Civil Procedure Act** and **Order 43 Rule 1** to see that orders made under **Order 40 Rule 4** are not among those in respect of which appeal lie as of right.

12. **Section 75** of the **Civil Procedure Act** provides as follows:

(1) An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted—

...

(h) any order made under rules from which an appeal is expressly allowed by rules.

13. **Order 43 Rule 1 (2)** and **(3)** provide:

(2) An appeal shall lie with the leave of the court from any other order made under these Rules.

(3) An applications for leave to appeal under section 75 of the Act shall in the first instance be made to the court making the order sought to be appealed from, either orally at the time when the order is made, or within fourteen days from the date of such order.

14. Thus, the applicants needed leave to appeal against the order of 17th January 2020. It has not been shown that such leave was obtained. If anything, the applicants' argument is that they do not need leave. Leave not having been sought, the present appeal cannot be a valid appeal for purposes of mounting an application for stay of execution pending hearing and determination of the appeal. The same applies to stay of proceedings pending hearing and determination of appeal. In any case, an order seeking stay of proceedings pending hearing and determination of appeal would need to be made first before the subordinate court. I have not been shown any evidence that the subordinate court was given an opportunity to consider whether or not to stay its own proceedings.

15. The applicants have also urged the court to transfer the matter pending in the subordinate court to this court for hearing and determination. The basis for that argument is that the value of the suit property, according to the applicants, is more than KShs 24 million. The respondents have challenged this valuation. Once again, the issue of whether or not the subordinate court had jurisdiction is one that ought to have been raised first before the said court. Even assuming that it is correct that the value of the suit property is more than KShs 24 million, it is important to note that the pecuniary jurisdiction of the subordinate court in civil matters is capped by **Section 7** of the **Magistrates' Courts Act, 2015** at KShs 20 million. In such a scenario, it would amount to the suit having been filed in a court without jurisdiction and this court would equally lack jurisdiction to transfer it. There are countless authorities to that effect and the Court of Appeal recently reiterated as much in **Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service [2019] eKLR**. An order of transfer is therefore not available.

16. The respondent urged the court to strike out both the appeal and the application on the ground that the appeal has been filed without leave. I am aware that striking out is a draconian remedy that should only be resorted to in the clearest of cases and where life cannot be injected into the matter in some other way. See **Uchumi Supermarkets Limited & another v Sidhi Investments Limited [2019] eKLR**.

17. The applicants herein were required by **Order 43 Rule 1 (3)** to seek leave to appeal from the subordinate court within fourteen days from 17th January 2020. No leave was sought and the time for seeking such leave lapsed. The court has not been told that there are any efforts to

obtain leave. I do not think that any life can be injected into this appeal. The applicants might well start all over again but using the right procedure. I am thus satisfied that this is a fit and proper case in which to order striking out.

18. I got the impression that the applicants impulsively rushed to this court without exhausting the avenues available before the subordinate court. Inter parte hearing was scheduled before the said court on 31st January 2020. I see no valid reason why the applicants bolted to this court on 30th January 2020 when they could have argued their case before the subordinate court the very next day. Whereas this court has supervisory jurisdiction over the subordinate court in matters falling within the jurisdiction of the court, that jurisdiction must be used judiciously and not in a disruptive manner.

19. In view of the foregoing discussion, I make the following orders:

a) This appeal as well as Notice of Motion dated 30th January 2020 are struck out.

b) Costs of both the appeal and the application to the respondents.

Dated, signed and delivered in open court at Nakuru this 27th day of February 2020.

D. O. OHUNGO

JUDGE

In the presence of:

Mr Karanja holding brief for Mr Chege for the appellants/applicants

Mr Kibet for the respondents

Court Assistants: Beatrice & Lotkomoi