



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL CASE NO. 43 OF 2008

KENYA ANTI-CORRUPTION

COMMISSION.....PLAINTIFF/RESPONDENT

-VERSUS-

SAMMY SILAS KOMEN.....1ST DEFENDANT/APPLICANT

HILLARY KIPKORIR MWAITA...2ND DEFENDANT/APPLICANT

RULING

1. There are two applications before me dated the **6th May 2016** filed by the **2nd defendant** and the other dated **11th December 2016** filed by the **1st Defendant**. On the **6th February 2017** this court directed that both applications be consolidated for hearing and determination.

2. Judgement in the suit was delivered on the **7th April 2016** that

1. The allocation and issuance of leases to the 2nd defendant by the 1st defendant of Land Parcels Nakuru Municipality block 13/245 and 13/246 is null and void.

2. The registration of the 2nd defendant as Lessee of the said parcels of land is hereby cancelled.

3. The defendants are permanently enjoined from entering or interfering with the possession of the said parcels.

3. The defendants by leave of court file dated **7th April 2016** filed a Notice of Appeal on the **18th April 2016** challenging the whole of the Judgment. The Record of Appeal - is yet to be filed.

I have noted that the proceedings are now typed.

4. By the application dated the **6th May 2016** the **2nd defendant** pursuant to provisions of Order 42 Rule 6 CPR sought an order of stay of execution of the judgment pending hearing and determination of the Appeal.

5. On the face of the application is stated the main ground that if no stay is ordered the appeal will be rendered nugatory, that the applicant will suffer irreparable loss and that the applicant is willing and ready to abide by conditions or directives that the court may grant. There is a supporting affidavit sworn by the applicant on the **6th May 2016**.

6. The **1st Defendant's** application dated **11th May 2016** is brought under Order 45 Rules 1 and 2 of the CPR.

This party seeks stay of execution of the decree pending hearing and determination of the **Review** application that seeks to set aside or vary the decree and all orders emanating therefrom. It also seeks a further order to have the suit transferred to the Environment and Land Court which it states, has exclusive jurisdiction on the land case. Grounds in support and affidavit by the **1st Defendant** have been filed.

7. The respective Respondents in each application filed their affidavits in opposition to the applications and their respective submissions. The **2nd defendant** sought to adopt the **1st Defendant's** submissions.

8. ORDER FOR STAY OF EXECUTION PENDING HEARING AND DETERMINATION OF APPEAL BY THE 2ND DEFENDANT

The power to grant such orders under Order 42 CPR is discretionary. The court has to balance all the parties interests and must be satisfied that a denial will cause substantial loss to the applicant –vs **James Wangalwa & Another – Agnes Nalaka Cheseto (2012) e KLR.**

Gikonyo J in the suit stated

“---The applicant must establish factors which show that the execution will create a state of affairs that will irreparably affect or neglect the very essential core of the applicant as the successful party in the Appeal...”

9. Thus a party is under an obligation to satisfy and demonstrate to the court that indeed substantial loss shall be occasioned by a denial of the stay orders. In land matters, it is important that the court considers where the scale of justice lies so as not to render the Appeal nugatory and thus cause irreparable loss. The purpose is to preserve the subject matter in dispute so that the appellant if successful will not find it wasted - **Suleiman –vs- Amboseli Court Ltd (2004) 2 KLR.**

10. The Respondent is of the view that there is nothing to stay as the suit properties have at all material times being in possession of the Department of Survey.

I have noted that in the trial judgment, the court issued a permanent injunction directed to the defendants. I agree with the plaintiff that an order of stay of execution pending appeal would be unnecessary and of academic value due to the permanent injunctive orders.

11. The Defendants never had possession of the suit parcels and therefore no eviction or adverse action would be taken against them, thus no loss would occur pending hearing and determination of the appeal - See paragraph 21 of the Judgment - when the court observed that the Survey Department was in actual possession as early as from 1957 and 1963.

12. To that extent, I find no merit on this application.

The best way for the applicant is to wait for the hearing and determination of the appeal that would determine in finality the applicants claim over the suit lands. This application dated 6th May 2016 is dismissed with costs to the plaintiff.

13. REVIEW APPLICATION OF THE COURT’S JUDGMENT BY THE 1ST DEFENDANT DATED 11TH MAY 2016

The main ground put forth by the applicant is that the High Court lacked jurisdiction to entertain, hear and determine the suit as it is purely a Land case, and thus upon review an order should be issued directing that the judgment be set aside and the suit transferred to the Environment and Land court for hearing and determination.

14. **Order 45(7)(a) CPR** gives a party an option of either to appeal or apply for review of judgment but not both. By the 2nd Defendant supporting the 1st Defendants application for Review when it has filed an appeal is not in tandem with coming to court in good faith. It cannot have both. It is a matter of collusion, hoping that either of the two applications would be allowed, in which case both defendants would benefit.

15. I have noted that the matter of jurisdiction of the trial judge, Hon. Wendo J was raised and urged before the said Judge. By a ruling dated 14th December 2014, the court declined to transfer the suit to the Environment and Land Court.

16. **Order 45 Rule 6 CPR** bars a party from bringing a subsequent application for review. It states

Rule 6: No application to review an order made on an application for a review of a decree or order passed or made on a review shall be entertained.

17. The applicant had an option to appeal against the said review order which he never did. It is therefore outside my jurisdiction to entertain the application in view of Rule 6 Order 45 CPR as to make orders on the said application would in effect be sitting on appeal against the order of a judge of equal status with myself which is against the hierarchy of the courts under the Judicature Act.

18. Consequently both applications dated 6th May 2016 and 11th May 2016 are devoid of merit and are dismissed with costs to the plaintiff.

Dated, signed and delivered this 7th Day of February 2019.

J.N. MULWA

JUDGE