



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELCA NO. 13 OF 2018

STEPHEN NDIGA KAMURU.....APPELLANT

VERSUS

NANCY MUTHONI MURAGE.....1ST RESPONDENT

BENSON MWANGI MURIITHI.....2ND RESPONDENT

THE LAND REGISTRAR KIRINYAGA.....3RD RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....4TH RESPONDENT

RULING

By a Notice of Motion dated 30th July 2018, the Applicant is seeking an order of temporary injunction restraining the 1st and 2nd Respondents, their servants, relatives, agents and/or anybody else claiming through them from selling, charging or transferring L.R No. NGARIAMA/NYANGATI/973 pending the hearing and determination of this application or further orders of the Court.

The Applicant is also seeking similar order pending the hearing and determination of the appeal. From the grounds in support shown on the face of that application, the Applicant averred that he was aggrieved and dissatisfied with the judgment of Hon. E.O. Wambo – S.R.M delivered in C.M.C.C No. 256 of 2017 (Kerugoya) and has preferred this appeal. The Appellant further contends that in the impugned judgment, there was no order of eviction or permanent injunction orders issued as against the Appellant yet the 2nd Respondent has been sending hired goons to destroy crops and properties belonging to the Appellant in an attempt to unlawfully and illegally evict him from the suit property registration No. NGARIAMA/NYANGATI/973. In his affidavit in support of the said application, the Applicant deponed that the land parcel No. NGARIAMA/NYANGATI/973 was gifted to his mother Nancy Muthoni Murage by his grandmother but his mother deserted while he was about three (3) months and went to live at unknown place. He deponed that his mother returned recently only to find that he has done extensive developments on the suit land. He stated that his mother expressed intention of selling the land and he placed a caution. His mother then filed P.M.C.C No. 3'B' of 2016 (Gichugu) claiming absolute ownership and that the caution he had placed should be lifted. A false affidavit was filed in Court purporting that he had been served with summons. Pursuant to that false affidavit of service, the matter proceeded ex-parte and judgment delivered in her favour by lifting of the caution. He later got wind of the said fraudulent order and instructed his lawyer to file an application to set aside the ex-parte judgment. Upon hearing his application inter-partes, the Court set aside the ex-parte judgment and issued a prohibitory order against the title to the suit land. The Court granted him leave to file his defence. After the suit was heard, the Court dismissed the same noting that his mother should involve them on matters attending title to the suit land as he had an interest over the same. The Applicant further stated that sometime after the judgment in Gichugu Court, he saw the 2nd Respondent visit the suit land. He approached him and asked what he was looking for. He advised him that if he wanted to buy their land, the same was not for sale. Sometime in December 2017, he decided to do a search in the Lands office and to his surprise, he learnt that the prohibitory order he had registered against the title had mysteriously been removed by the Land Registrar in cahoots with the 1st and 2nd Respondents herein and the land registered in the name of the 2nd Respondent. He then moved to Court where he sought for an injunction order which was granted. In the process of exchanging documents, he learnt that after the judgment in Gichugu Law Courts, on 30th June 2017, the 1st and 2nd Respondents entered into a written sale agreement on 26th September 2017 and the prohibitory order was unlawfully removed on 13th November 2017. The matter came up for hearing in C.M.C.C No. 256 of 2017 but the State Counsel and the Land Registrar failed to attend Court to explain the circumstances under which the prohibitory order was lifted. It was only the 1st and 2nd Respondents who testified in that case. In his judgment, the trial magistrate held that the 2nd Respondent was an innocent purchaser and that there were no encumbrances on the land at the time of sale and that the Appellant failed to satisfy the Court on the required standard thereby dismissing his suit. On 26th January 2018, the 2nd Respondent came to his house and left word that he should vacate from the suit land as judgment was given in his favour. On 27th July 2018, hired goons descended on his home and cut into pieces his water tanks and demolished cow shed and chicken pen. They also cut down several banana stems and other crops. He stated that he has an arguable appeal with chances of success.

In his response, the 2nd Respondent filed a replying affidavit in which he stated that the Applicant is seeking temporary injunction pending hearing and determination of the appeal yet no appeal has been annexed. He stated that the supporting affidavit only consists of facts already

determined upon in the lower Court. In conclusion, the 2nd Respondent deponed that the application does not satisfy the ingredients of granting an injunction pending appeal. In a further affidavit filed on 6th November 2018, the Applicant attached a copy of his Memorandum of Appeal dated 30th July 2018.

I have considered the affidavit evidence both in support and in opposition to this application. I have also considered the submissions filed by counsels appearing for the parties and the applicable law. The Applicant's application is brought under **Order 42 Rule 6 (6) CPR and Section 3A CPA**. The relevant orders obtained under that provision of the law is a stay pending appeal. The applicant in this application is seeking an order of injunction pending the hearing of the appeal. In an application for stay pending appeal, this Court has rendered itself on the principles to be satisfied before the orders are granted. In the cases of **Kiplagat Kolnut Vs Rose Jebor Kiprigok (2015) e K.L.R, Kenya Commercial Bank Limited Vs Suncity Properties Limited & 5 others (2012) e K.L.R and Kenya Shell Limited Vs Kibiru**, the common denominator was that a stay of execution would not normally be granted unless the conditions in **Order 42 Rule 6 CPR** are satisfied.

Order 46 Rule 6 (2) CPR, 2010 provides that an applicant who is seeking a stay of execution pending appeal must demonstrate the following:

- (1) Substantial loss may result to the applicant unless the order was made;**
- (2) The application was made without unreasonable delay; and**
- (3) 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.**

From the facts enumerated in the supporting affidavit and the submission by counsel for the Applicant, the subject matter of this appeal is a parcel of land where the 1st Respondent is said to have sold to the 2nd Respondent and the Applicant purports to have used substantial amount towards developing it. The Applicant has submitted that unless the orders being sought are granted, he stands to suffer irreparable loss through illegal eviction from the only place where he has lived since he was young. I find that the Applicant has satisfied the first ground for stay pending appeal. On the second ground, **Section 79 G of the Civil Procedure Act** provides that an appeal from a subordinate Court to the High Court (read Courts of equal status) shall be filed within a period of thirty (30) days from the date the decree or order appealed from was issued. The judgment and decree of the trial Court was issued on 20th July 2018 and this application was filed on 30th July 2018. I am also satisfied that the application has been made without undue delay. As regards the third condition, the subject matter of appeals in Environment and Land Court cases (ELC) unlike the High Court and other Court of equal status is the occupation and use of land. As such, the requirement for security for the due performance of a decree or order may not be necessary provided that the Court ensures that the subject matter of the appeal is preserved so that the appeal is not rendered nugatory.

The upshot of my analysis is that the application dated 30th July 2018 is merited and the same is hereby allowed in terms of prayer 3 thereof. The costs of the application to abide the event. It is so ordered.

READ and SIGNED in open Court at Kerugoya this 15th day of February, 2019.

E.C. CHERONO

JUDGE

15TH FEBRUARY, 2019

In the presence of:

- 1. Mr. Kagio for the Appellant*
- 2. Mr. Mwai holding brief for Mr. Ngangah for the Respondents*