



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. APPEAL NO. 34 OF 2019

JOHNSTONE MUTUA MBWIKI.....APPELLANT/APPLICANT

VERSUS

COSMAS MUINDE KIVUVARESPONDENT

(Being an Appeal from the Ruling of Senior Principal Magistrate's Court

at Kangundo in Civil Case No. 36 of 2019 delivered on 19th June, 2019 by

Hon. D. Orimba, Snr. Principal Magistrate)

RULING

1. In the Notice of Motion dated 16th July, 2019, the Appellant has prayed for the following orders:

a. That pending the hearing and determination of this Application as well as the main Appeal hereof, there be a stay of execution of the order made against the Appellant on 19th June, 2019 in land case number 36/2019 (Kangundo) - Cosmas Muinde Kivuva vs. Johnstone Mutua Mbwika.

b. That the cost of this Application be provided for.

2. The Application is supported by the Affidavit of the Appellant's Advocate who has deponed that the trial court found the Appellant guilty of contempt of court; that the court based its findings on an order that does not exist and that there is no order of the court dated 2nd November, 2018 that the Appellant allegedly disobeyed.

3. The Appellant's advocate finally deponed that the trial court committed several blunders with regard to the matters before it and ended up reaching an absurd, unfair and illegal Ruling.

4. In response, the Respondent deponed that the Appellant is guilty of contempt having disobeyed the order of the court of 30th July, 2018; that the Appellant was served with the order of the court on the same day it was issued and that the Appeal is frivolous, vexatious and an abuse of the court process.

5. The Appellant's advocate submitted that there is no order dated 2nd November, 2018 in respect of which contempt proceedings could commence against the Appellant; that the trial court erred in law and fact for finding the Appellant guilty on account of a non-existent order and that if an order of stay is not granted at this stage, the Appellant will suffer substantial loss because his constitutional right to liberty will be compromised. The Respondent did not file any submissions.

6. This Appeal is challenging the decision of the learned Magistrate dated 19th June, 2019. In the said Ruling, the learned Magistrate found the Respondent in contempt of the court order dated 2nd November, 2018. After finding the Respondent in contempt of an order of the court, the trial court directed the Respondent to appear before it in person to show cause why he should not be committed to jail for contempt.

7. The Appeal is premised on the ground that there is no order of the court dated 2nd November, 2018 that was capable of being obeyed and that the impugned Ruling is dangerous because it threatens to imperil the Appellant's freedom of movement and other panel consequences.

8. Applications for stay of execution are governed by the provisions of Order 42 Rule 6(2) of the Civil Procedure Rules which provides as follows:

“(2) No order for stay of execution shall be made under subrule (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.”

9. The Ruling of the trial court has the consequences of curtailing the Appellant’s liberty by having him imprisoned. Indeed, imprisonment of the Appellant by the lower court has the consequences of occasioning the Appellant substantial loss, which loss can neither be assessed in monetary terms nor recouped. Before the lower court makes its final decision, it suffices that the issues raised, in the Appeal are heard and determined first.

10. Indeed, the current Application was filed within two (2) months of the impugned Ruling. The Application was therefore filed without unreasonable delay. The impugned Application being in respect of contempt of an order of the court, the issue of security for the due performance of the order does not arise.

11. For the reasons I have given above, the Appellant’s Application dated 16th July, 2019 is allowed as follows:

a. That pending the hearing and determination of this Application as well as the main Appeal hereof, there be a stay of execution of the order made against the Appellant on 19th June, 2019 in land case number 36/2019 (Kangundo) - Cosmas Muinde Kivuva vs. Johnstone Mutua Mbwika.

b. Each party to bear his own costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 6TH DAY OF MARCH, 2020.

O.A. ANGOTE

JUDGE