



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. APPEAL NO. 30 OF 2019

MARCO OBITA.....APPELLANT/APPLICANT

VERSUS

BENJAMIN KITHEE CHAMIA.....1ST RESPONDENT

PATRICIA MWENDE NZILU.....2ND RESPONDENT

(Being an Appeal from the Ruling of Senior Principal Magistrate's Court at Mavoko in Civil Case No. 906 of 2015 delivered on 13th June, 2019 by Hon. L. Kassan, Snr. Principal Magistrate)

RULING

1. In the Notice of Motion dated 4th July, 2019 and filed on the same day, the Appellant has sought for the following orders:

a. That the Honourable Court be pleased to issue interim stay of the orders issued by Hon. Kassan on the 13th June, 2019 pending the hearing and determination of the Appeal.

b. The Honourable Court set aside and/or vary the orders issued on the 13th June, 2019 by Hon. Kassan.

c. Any other relief that this Honourable Court may deem fit to grant.

d. That costs of the suit be provided for.

2. The Application is supported by the Affidavit of the Appellant who has deponed that in the year 2015, the Plaintiffs/Respondents filed a suit in the lower court for vacant possession in respect of land known as Mavoko Town Block 3/32201; that on 13th June, 2019, the lower court directed him to vacate the suit property and that the orders that were issued by the lower court are prejudicial to him.

3. According to the Appellant, both himself and the Respondents bought their respective shares of the suit land from the registered owners; that they have been co-existing peacefully on the land and that the Respondents proceeded to secure a title to the entire suit property without first establishing their respective portions of land on the ground.

4. According to the Applicant, the matter in the lower court required the court to hear parties orally and order the Surveyor to determine the correct location of their respective parcels of land and that he has massively invested in the parcel of land since 2006.

5. In his Replying Affidavit, the 1st Respondent/Plaintiff deponed that on 21st October, 2015, they filed an Application seeking orders that a mandatory injunction compelling the Appellant to demolish the illegal structures erected on land known as Mavoko Town Block 3/32201 do issue; that the Respondents are the registered proprietors of the suit property and that they have never co-existed with the Appellant on the suit property as alleged.

6. According to the 1st Respondent, in his Report dated 13th October, 2015, the Surveyor confirmed that the illegal structures put up by the Appellant were on the suit property and that the Applicant did not produce any other Surveyor's report contradicting the report produced before the trial court.

7. The 1st Respondent finally deponed that the Applicant has not proved that he would suffer any loss if the orders sought are not granted and that the Application was filed after inordinate delay.

8. In his Further Affidavit, the Appellant deponed that he bought a portion of the suit land from one Damian Musyoka; that he will be

prejudiced if evicted from the suit property and that he has heavily invested on the suit land.

9. In his written submissions, the Appellant's advocate submitted that the trial court gave final orders requiring the Appellant to vacate the suit property; that the Appellant has been in possession of the suit property since the year 2007 and that due process ought to have been followed by taking *viva voce* evidence of the parties before the orders of eviction could issue.

10. The Respondents' advocate submitted that the Appellant has not shown that he resides on the suit land, or that he will be rendered homeless if the orders he has sought are not granted; that the Appellant has no title to the suit land and that the Appellant has not shown the substantial loss he will suffer.

11. Counsel submitted that the Appellant has failed to show that he filed the Application without inordinate delay and that in any event, the Appellant has not offered any security.

12. The Respondents' counsel finally submitted that the Appellant's Appeal does not raise triable issues; that the Appellant has not shown how he purchased the suit property and that the Sale Agreement exhibited by the Appellant was between himself and one Damian Musyoka and not with Teresia Nduku Mualuko, the registered owner of the land.

13. The record shows that vide a Complaint dated 21st October, 2015, the Respondents sued the Appellant in Mavoko SPMCC No. 906 of 2015. In the Complaint, the Respondents alleged that they are the registered proprietors of parcel of land number Mavoko Town Block 3/32201 and that without their permission, the Appellant trespassed on the said land between December, 2014 and February, 2015.

14. The Respondents prayed for a declaration that they are entitled to exclusive unimpeded right of possession and occupation of the suit property and a mandatory injunction compelling the Defendant to demolish or remove the illegal structures erected on the suit property.

15. The Appellant filed a Defence in which he averred that he purchased the suit property from one Damian Musyoka and that the suit property is registered in the name of Teresia Nduku Mualuko, the mother of Damian Musyoka.

16. Together with the Complaint, the Respondents filed a Notice of Motion dated 21st October, 2015 in which they prayed for "a mandatory injunction compelling the Defendant to demolish and/or remove the illegal structures erected on the property known as Mavoko Town Block 3/32201 and deliver up vacant possession of the suit property to the Plaintiffs failure to which he be forcefully evicted."

17. After hearing the Respondents' Application dated 21st October, 2015, the learned Magistrate held as follows:

"From the foregoing, I find as it is in evidence that the Plaintiff is the registered owner of the land No. Block 3/32201 as in his Application. The alleged Sale Agreement between the Defendant and one Mr. Damian is too feeble to challenge a Title Deed. This is a case that required instant justice and to that effect, I allow the Application as prayed."

18. The Appellant, aggrieved with the above decision filed his Memorandum of Appeal in which he averred that the learned Magistrate erred in law by granting mandatory injunctive orders without taking *viva voce* evidence of parties herein and that the learned Magistrate erred by assuming that since the Plaintiffs had a title, they were in an advantageous position to the Appellant who had been in possession of the land since the year 2007.

19. The current Application is seeking for an order of the court staying the execution of the order of the court pending the hearing of the Appeal.

20. The law pertaining to a stay of execution of an order or decree is stipulated under Order 42 Rule 6(2) of the Civil Procedure Rules 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."

21. The Applicant has deposed that he has developed the suit land, and that if he is evicted before his Appeal is heard, he will suffer substantial loss. Indeed, the 1st Respondent has admitted in his Replying Affidavit that the Appellant has "*illegal structures*" put up by him within the boundaries of the suit land.

22. The admission by the Respondents that the Appellant has structures on the suit land, and the fact that the court has ordered that the said structures be demolished is enough to show that the Appellant will suffer substantial loss if the order of stay of the order of the court is not granted.

23. The Application by the Appellant was filed by the Appellant within two (2) months of the Ruling of the lower court. A delay of two (2) months in my view cannot be said to be unreasonable.

24. Considering that the Respondents are in possession of the Title Deed for the suit land, and the suit property being an immovable asset, an order for security for the due performance of the order is not necessary.

25. For the reasons I have given above, I allow the Application dated 4th July, 2019 as follows:

a. An order of stay of execution of the order of Hon. Kassan delivered on 13th June, 2019 be and is hereby granted pending the hearing and determination of the Appeal.

b. Each party to bear his own costs.

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

O.A. ANGOTE

JUDGE