REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 569 OF 2008

STEPHEN KIMOTHO KARANJA.....PLAINTIFF

VERSUS

PAUL WANDATI MBOCHI.....DEFENDANT

RULING

On 30th April, 2019, judgment was entered herein for the plaintiff against the defendant in which the defendant was ordered to remove forthwith certain obstructions or barriers that he had placed on a passage to the plaintiff's residence and to pay to the plaintiff Kshs. 5000/- as general damages for trespass. The defendant was also ordered to pay the costs of the suit.

What is now before me is the defendant's application brought by way of Notice of Motion dated 5th July, 2019. In the application that was filed by the firm of Akoto & Akoto Advocates who are not on record in this suit for the defendant, the defendant has sought the following orders;

1. THAT pending the hearing and determination of the intended Appeal to the Court of Appeal an injunction does issue restraining the respondent from obtaining and executing the decree in ELC suit No. 569 of 2008.

2. THAT pending the hearing and determination of the intended Appeal herein, there be a stay of the judgement issued in ELC suit No. 569 of 2008 on 30th April, 2019.

3. THAT this Honourable court do give directions on the expeditious filing and hearing of the intended appeal.

4. THAT cost incidental to this application do abide the outcome of the Appeal.

The application was brought on the grounds set out on the face thereof and on the supporting affidavit of the defendant, Paul Wandati Mbochi sworn on 5th July, 2019. The defendant averred that the plaintiff filed the suit herein seeking a mandatory injunction compelling the defendant to remove any obstruction that was on the passage to his homestead and, a permanent injunction restraining the defendant from entering into a parcel of land known as L.R No Limuru/Ngecha/2004 pending the determination of the suit. The defendant averred that he filed a defence dated 22nd November, 2012 to the plaintiff's claim in which he contended that the passage that was in contention between him and the plaintiff was a private path for accessing his mother's grave and that the right to use the same could not have been transferred to the plaintiff. The defendant averred that the suit was heard and judgment delivered against him. The defendant averred that he filed a notice of appeal against the said judgement on 10th May, 2019 as he was aggrieved with the same. The defendant averred that the court totally disregarded his statement of defence and did not consider his evidence. The defendant averred that the respondent was in the process of extracting and executing the decree from the said judgment and if the orders sought were not granted, the intended appeal would be rendered nugatory. The defendant averred further that the appeal was arguable as evident from the draft memorandum of appeal attached to the application. The defendant averred that it was in the interest of justice that the orders sought be granted.

The application was opposed by the respondent (hereinafter referred to only as "the plaintiff") through a replying affidavit sworn on 17th September, 2019. The plaintiff averred that the application was not made in good faith and that it was aimed at denying him a chance to enjoy the fruits of his judgement. The plaintiff averred that the defendant had not demonstrated any substantial loss that he would suffer if the stay sought was not granted. The plaintiff contended that the suit had dragged on for over 10 years and that justice demands that litigation must come to an end. The plaintiff averred that he had never enjoyed quiet possession of the suit property and that if a stay was granted, his right to security, privacy and quiet possession of the suit property would continue to be jeopardised by the actions of the defendant. The plaintiff averred that the grant of a stay was a matter for the court's discretion and should not be granted to the detriment of the plaintiff. The plaintiff averred that in the event that the court was inclined to grant the orders sought, the court had to direct the defendant to furnish security.

The application was argued on 24th September, 2019. The defendant's advocate, Ms. Awuor submitted that if the stay was not granted, the

intended appeal by the defendant would be rendered nugatory. She submitted further that the defendant would suffer substantial loss because he would not be able to access his mother's grave. On the issues of security, she submitted that the defendant was ready to deposit a title deed in court.

Ms. Nakato who appeared for the plaintiff submitted in reply that the application was incompetent as it was filed contrary to Order 9 rule 9 of the Civil Procedure Rules. She submitted that the firm of Akoto and Akoto Advocates was not properly on record for the defendant as there was no notice of change of advocates filed by the firm. She submitted that the plaintiff was entitled to enjoy the fruits of the judgment that was entered in his favour and that the defendant had not satisfied the grounds set out under Order 42 rule 6 of the Civil Procedure Rules for granting a stay of execution. On security, she submitted that the defendant had not furnished the court with a copy of the title deed sought to be deposited in court as security. She urged the court to dismiss the application. In a rejoinder, the defendant's advocate admitted that the firm of Akoto and Akoto Advocates was not properly on record in the matter.

I have also considered the defendant's application and the affidavit filed by the plaintiff in reply thereto. I have also considered the submissions of counsels from both sides. The defendant's application was brought principally under Order 42 Rule 6 of the Civil Procedure Rules. From the heading and the way in which the reliefs sought were framed, it is apparent that the defendant had intended to file the application in the Court of Appeal. That would explain why the defendant had cited the Court of Appeal Rules in the heading of the application. The defendant was represented in this suit by the firm of Agnes W. Njoroge & Company Advocates up to the time judgment was delivered in the matter on 30th April, 2019. As mentioned earlier, the present application was brought by the firm of Akoto & Akoto Advocates. This latter firm is not on record in this matter as it has not filed a notice of change of advocates neither has it sought leave of the court to take over the conduct of the case from Agnes W. Njoroge & Company Advocates. I am in agreement with the plaintiff's advocates that the application before the court that was brought by a firm of advocates that is not on record is incompetent.

On the merit of the application, Order 42 Rule 6(2) of the Civil Procedure Rules that has been invoked by the defendant as the basis of the application provides that:

> **"(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 ultimately be binding on him has been given by the applicant."**

In the case of Kenya Shell Limited *v* Karuga (1982 – 1988) I KAR 1018 the court stated that:

> **"It is usually a good rule to see if order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay."**

I had at the beginning of this ruling set out the nature of the judgment that was entered against the defendant. I am not satisfied from the material before the court that the defendant would suffer substantial loss if the stay sought is not granted. There is no evidence that the passage that was in dispute between the parties was the only way through which the defendant could access his mother's grave. There is also no evidence that the defendant would have any difficulty in raising the payments that were awarded as general damages and costs of the suit or that if the said payments are made, the defendant would not be able to recover the same from the plaintiff.

Due to the foregoing, I find no merit in the application dated 5th July, 2019. The application is dismissed with costs.

Delivered and Dated at Nairobi this 5th day of March 2020

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

Mr. Gichuhi h/b for Mrs. Koech for the Plaintiff

Ms. Njoroge h/b for Mr. Akoto for the Defendant

Ms. C. Nyokabi-Court Assistant