



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

APPEAL No. 20 OF 2019

FREDRICK MARITIM.....1ST APPELLANT

MARGARET JEROTICH.....2ND APPELLANT

JOHN MARITIM.....3RD APPELLANT

NANCY JEPKORIR MARITIM.....4TH APPELLANT

VERSUS

EKEGORO PROPERTY MANAGEMENT LTD.....1ST RESPONDENT

PETER KINYANJUI KIBE..... 2ND RESPONDENT

(Being an appeal from the judgment and decree of the Chief Magistrate's Court at Nakuru

(Hon. J.B. Kalo, Chief Magistrate) delivered on the 27th August 2019 in CMCC No. 1183 of 2017

Ekegoro Property Management Ltd & another v Fredrick Maritim & 7 others)

RULING

1. Being aggrieved by the judgment and decree of the Chief Magistrate's Court at Nakuru (Hon. J.B. Kalo, Chief Magistrate) delivered on the 27th August 2019 in **CMCC No. 1183 of 2017 Ekegoro Property Management Ltd & another v Fredrick Maritim & 7 others**, the appellants filed this appeal. Simultaneously with the Memorandum of Appeal, the appellants filed Notice of Motion dated 16th September 2019 pursuant to which they seek stay of execution of *"the judgment and orders made on 28th August, 2019"* pending hearing and determination of the appeal.

2. The application is supported by an affidavit sworn by Fredrick Maritim who deposed that in the subject judgment the learned magistrate ordered the appellants to vacate the parcels of land known as Njoro/Ngata Block 2/4816 and Njoro/Ngata Block 2/4817 (the suit properties). He added that the respondents have issued an eviction notice dated 5th September 2019 and that the appeal will be rendered nugatory if the eviction proceeds. He annexed copies of the judgment and the eviction notice.

3. The respondents opposed the application through a replying affidavit sworn by Kinaro Kimaiga Ndubi who described himself as the Managing Director of the 1st respondent company. He deposed that no appeal had been served upon their advocates on record, that the application refers to unknown orders, that the appeal lacks merit, that the application is an abuse of the court process since the applicants did not seek stay before the subordinate court and that the appellants will not suffer irreparable loss if the decree is executed since they do not reside on the suit properties but are merely occupying it through proxies.

4. The application was canvassed through written submissions. The applicants dwelt at length in their submissions on the merits of the appeal. Since that is not a relevant consideration at this stage, I have decided not to rehash those aspects of the submissions. Suffice it to state that the applicants argued that they will suffer irreparable damage if stay is not granted. They thus urged the court to allow the application.

5. The respondents argued in their submissions that by not seeking stay in the first instance before the subordinate court the applicants have put the cart before the horse and disregarded rules of procedure thus rendering the application premature. The case of **Abraham Lenauia Lenkeu v Charles Katekeyo Nkaru [2016] eKLR** was cited to buttress that argument. The respondents also attempted to give a historical

background in the submissions of the circumstances in which the hearing in the subordinate court proceeded leading to the judgment. Since those are matters of fact which cannot be introduced through submissions and since they also go to the merits of the appeal, I have disregarded them. The respondents further argued while relying on the cases of **Carol Construction Engineers Ltd v Naomi Chepkorir Langat [2016] eKLR** and **Wachu Ranch (D.A.) Company Limited v Alex Mwalimu Baya & 549 others [2017] eKLR** that since they are the registered proprietors of the suit properties, the applicants have not demonstrated how they will suffer substantial loss by being removed from the properties. Regarding the limb of delay, the respondents conceded that the application has been brought without unreasonable delay. Regarding the aspect of security, the respondents argued that the applicants have not deposited or even proposed any security. They therefore urged the court to dismiss the application with costs.

6. I have considered the application, the affidavits and the submissions. The applications seek stay of execution pending appeal. The application is brought, among other provisions, under **Order 42 rule 6 (1) and (2)** of the **Civil Procedure Rules, 2010** which provide as follows:

6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(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 may ultimately be binding on him has been given by the applicant.

7. Consequently, an applicant seeking stay of execution pending hearing and determination of an appeal under the foregoing rule must satisfy the court that substantial loss will result to him if stay is not granted and that the application has been made without unreasonable delay. As Platt Ag JA (as he then was) stated in **Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] eKLR**, substantial loss is the corner stone of the jurisdiction to grant stay of execution pending appeal. In other words, it is virtually impossible for such an application to succeed when an applicant fails to demonstrate that he will suffer substantial loss if stay is not granted.

8. The applicants contend that they are on the verge of being evicted from the suit properties since the respondents have issued an eviction notice dated 5th September 2019. The respondents on the other hand contend that the applicants are not in occupation of the suit properties. A perusal of the judgment of the subordinate courts shows that Kinaro Kimaiga Ndubi who testified as PW1 told the court that the respondents had “*encroached on the parcel of land and are using [it] for storage for themselves ...*” A similar statement was made by PW2 in his testimony. In the judgment, the subordinate court granted a permanent injunction restraining the applicants, their agents, servants, employees, workers and or representatives from encroaching onto or trespassing into the suit properties. In view of the testimonies tendered at the trial by the respondents, it seems to me that contrary to the position they have taken in this application, the applicants have some form of interest in the suit property that they would lose if the decree is enforced. Needless to state, it is not for this court to determine at this point if the appeal has any merit. I am therefore satisfied that the applicants have demonstrated that they will suffer substantial loss if stay is not granted.

9. The respondents also argued that the application seeks stay of unknown orders since it refers to “*the judgment and orders made on 28th August, 2019*” and further that the applicants should not be granted stay by this court since they did not first seek stay before the trial court. I take the position that reference to judgment delivered on the 28th August 2019 as opposed to 27th August 2019 is a minor error that cannot stall the court’s overall mission to do substantive justice since all parties herein are aware of the correct date of judgment. No prejudice has been occasioned to the respondents by that minor error. Regarding the argument that stay ought first to have been sought before the trial court, while agree that it would be prudent and tidier to first seek stay from the court from which an appeal is preferred, **Order 42 rule 6 (1)** does not make it mandatory.

10. Since the respondents conceded that the application has been brought without unreasonable delay, the only other issue I have to determine is that of security for the due performance of the decree. In that regard, I consider it adequate that the applicants deposit in court such sum as will be determined as the party and party costs of the suit before the subordinate court.

11. In view of the foregoing discourse, I am satisfied that the applicants have made a case for granting the orders sought. So as to ensure that the appeal is prosecuted timeously, I will further limit the duration of the stay orders. I therefore make the following orders:

i) I hereby grant stay of execution of the judgment and decree of the Chief Magistrate’s Court at Nakuru delivered on the 27th August 2019 in CMCC No. 1183 of 2017 Ekegoro Property Management Ltd & another v Fredrick Maritim & 7 others pending hearing and determination of this appeal.

ii) The stay is conditional on the applicants depositing in the subordinate court such sum as will be determined as the party and party costs of the suit before the subordinate court. The deposit to be made within 21 (twenty one) days of the costs being determined. In default, the stay orders shall automatically lapse.

iii) The stay orders shall, if the applicants timeously comply with the condition in (ii) above, remain in force for a period of only 8 (eight) months from the date of delivery of this ruling, unless otherwise extended.

iv) Costs of the application shall be borne by the applicant.

12. This ruling is delivered remotely through video conference and e-mail pursuant to the Honourable Chief Justice's "Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, other Court Users and the General Public from the Risks Associated with the Global Corona Virus Pandemic" (Gazette Notice No. 3137 published in the Kenya Gazette Vol. CXXII—No. 67 of 17th April, 2020).

Dated, signed and delivered at Nakuru this 30th day of April 2020.

D. O. OHUNGO

JUDGE