



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT NAKURU

CASE NO. 238 OF 2013

PETER NJUGUNA NJONGE.....PLAINTIFF

VERSUS

JULIUS NARANKAIK OLOGOLIMOT.....DEFENDANT

RULING

1. This ruling is in respect of Amended Notice of Motion dated 20th September 2019 filed by the defendant. The following orders are sought in the application:

a) Spent

b) Spent

c) Spent

cc) Spent

ccc) *That the honourable court be pleased to grant orders of stay of implementation of the consent dated 31st October 2018 pending hearing and determination of the intended appeal.*

d) Spent

e) *That the defendant's/applicant application dated 9th August 2019 be heard on merits.*

ee) *That the defendant application dated 9th August 2019 be wholly withdrawn.*

f) *That costs of this application be provided for.*

2. The application is supported by an affidavit sworn by the defendant. He deposed that he has filed an application before the Court of Appeal being Civil Application No. 43 of 2019 seeking leave to file and serve Notice of Appeal and Record of Appeal out of time. Further that he received a letter dated 14th August 2019 indicating that the land registrar would visit the suit property on 21st August 2019 to resolve boundary dispute and another letter dated 2nd September 2019 requiring him to surrender the title of the suit property. He added that he has developed the suit property extensively and that his application before the Court of Appeal will be rendered an academic exercise.

3. The plaintiff opposed the application through a replying affidavit in which he deposed that the application is res judicata and that there is no evidence that the defendant has filed any appeal.

4. The application was canvassed through written submissions in which parties basically reiterated the positions taken in their respective affidavits. I have carefully considered the application, the affidavits and the submissions.

5. I am at a loss as to the import of prayers e) and ee) since the former seeks hearing of application dated 9th August 2019 while the latter seeks its withdrawal. In any case, if what is intended is that the application be heard, one wonders why a date for that purpose cannot be fixed at the registry. If on the other hand what is sought is withdrawal of the application, the defendant can achieve that by filing a notice of withdrawal. Owing to the ambiguity, I will not grant any of the said prayers.

6. Under prayer ccc) the applicant essentially seeks stay of execution of the consent dated 31st October 2018 pending hearing and determination of an intended appeal. The plaintiff has argued that the prayer is res judicata in view of the ruling delivered on 12th June 2019. A perusal of the said ruling however shows that it was in respect of defendant's Notice of Motion dated 12th November 2018 and that it only dealt with the question of setting aside of the consent dated 31st October 2018. Whereas prayer 2 of the application sought stay of execution, the prayer was spent as at the date of inter parte hearing since stay sought was only pending inter parte hearing. Res judicata does not therefore apply since there was no determination on the merits.

7. The law relating to stay of execution pending hearing and determination of an appeal from a decision of this court is **Order 42 rule 6 (1), (2) and (4)** of the **Civil Procedure Rules, 2010** which provide:

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.

...

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

8. Under **rule 75** of the **Court of Appeal Rules, 2010**, an appeal to the Court of Appeal is to be filed by filing a Notice of Appeal within fourteen days of the date of the decision against which it is desired to appeal. It is not clear what decision the defendant intends to appeal against. I have perused the record and I have not seen any Notice of Appeal either in respect of the order of 31st October 2018 or that of 12th June 2019. There is thus as yet no appeal. The outcome of the application before the Court of Appeal seeking leave to file and serve Notice of Appeal and Record of Appeal out of time could go either way. In the circumstances, I cannot grant stay pending hearing and determination of a non-existent appeal.

9. I find no merit in Amended Notice of Motion dated 20th September 2019. The application is dismissed with costs to the plaintiff.

10. 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 21st day of May 2020.

D. O. OHUNGO

JUDGE