



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. APPEAL NO. 29 OF 2019

JOSEPH NDAMBUKI KIOKO.....APPELLANT

VERSUS

STANLEY MUIA MAKAU.....RESPONDENT

(Being an Appeal from the Judgment of Chief Magistrate's Court at Machakos

in Civil Case No. 17 of 2018 delivered on 4th April, 2019

by Hon. I.M. Kahuya, Principal Magistrate)

RULING

1. In the Notice of Motion dated 2nd July, 2019, the Appellant is seeking for the following orders:

a. That the Honourable Court be pleased to grant an order of stay of execution of the Judgment, any consequential orders and/or any subsequent proceedings arising from C.ELC 17/2018 pending the hearing and determination of the Appeal.

b. That costs of the Application be borne by the Respondent.

2. According to the Appellant, he is aggrieved by the decision of the trial court and has lodged an Appeal; that the Respondent has commenced execution of the Judgment and that he is likely to suffer substantial loss unless the Application is allowed.

3. In his Replying Affidavit, the Respondent deponed that the Appellant never defended the suit in the lower court; that the Appellant is in contempt of court process and that the Appellant has indicated he is willing to open the access road.

4. In his submissions, the Appellant's advocate submitted that failure to grant an order of stay of execution will occasion the Appellant substantial loss; that the Appellant is old and is facing contempt proceedings and that unless an order of stay is granted, the Respondent will create an access road through the suit land and destroy food crops. The Respondent's advocate did not file submissions.

5. The law governing Applications for stay of execution is 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.”

6. In considering if the Appellant will suffer substantial loss unless an order of stay of execution is granted, I am guided by the decision of the Court of Appeal in *Kenya Shell Limited vs. Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988) 1 KAR 1018* in which the court stated as follows:

“It is usually a good rule to see if Order 41 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.”

7. I have perused the Judgment of the learned Magistrate dated 4th April, 2019 and the Order (sic) of the same date. According to the extracted order, which is actually a Decree, the learned Magistrate directed as follows:

a. That the Government Surveyor to visit the land and re-opens the survey access road that passes through parcel number Kalama/Muumandu/2160 to 2079.

b. That the permanent injunction to issue restraining the Defendant by himself or his servant from interfering or blocking the access road on parcel number Kalama/Muumandu/2160 to 2079.

8. The Decree of the court only directed the opening up of an access road. Considering that this court, upon hearing the main Appeal, will either agree with the decision of the learned Magistrate, or not, the court, if the Appeal succeeds, will order for the closure of the opened access road.

9. Indeed, there is no substantial loss that will be occasioned with the opening up of an access road, which can still be closed by an order of this court. Furthermore, the Appellant did not annex any photographs to show that there are crops which will be destroyed during the opening up of the access road.

10. Having not shown the substantial loss that he will suffer if the order of stay is not granted, I dismiss the Application dated 2nd July, 2019 but with no order as to costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 15TH DAY OF MAY, 2020.

O.A. ANGOTE

JUDGE