



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL APPEAL NO. 201 OF 2015

BERNARD KYALO NZIOKAAPPELLANT

VERSUS

AGRICULTURAL FINANCE CORPORATIONRESPONDENT

(Being an appeal from the ruling and order of the Senior Resident Magistrate I.M. Kahuya delivered on 30th November, 2015 in the Chief Magistrate's court at Machakos Civil Case No. 23 of 2013)

RULING OF THE COURT

The Application

1. This is the ruling on the application dated 7th December, 2015 which prays for the following orders;
 - a. That this honourable court be pleased to certify this application as urgent and fit to be heard *ex parte* in the first instance.
 - b. That leave be granted to the appellant to change advocate from the firm of P.N. Musila & Company Advocates to F.N. Mulwa Advocates.
 - c. That there be interim stay of execution of the orders in the Ruling of the Chief Magistrate's Court in Machakos CMCC No. 23 of 2013 delivered on 30th November, 2015 and all the consequential orders thereto pending the inter-partes hearing and determination of this application.
 - d. That there be a stay of execution of the orders in the Ruling of the Chief Magistrate's Court in Machakos CMCC No. 23 of 2013 delivered on 30th November, 2015 and all the consequential orders thereto pending the hearing and determination of the appeal herein.
 - a. e. That the costs of this application be in the cause.

2. The application is founded on the grounds that the appellant who was the plaintiff in Machakos CMCC No. 23 of 2013 is aggrieved by the ruling of the subordinate court in application dated 16th July, 2015 dismissing his application to set aside dismissal of a suit for non attendance and has opted to appeal the entire decision. The appellant has filed this appeal against the subordinate court's ruling. The appellant's suit was dismissed for non attendance, despite the fact that there was existing interlocutory injunction order the fate of which was not addressed by the court. Subsequent to that dismissal, the respondent has

embarked on a *sub judice* exercise of taking steps to auction the property of the subject matter when an interlocutory order of injunction was still in force and the appellant is apprehensive that the respondent is likely to embark on the said auction any time from now and thus the appellant is likely to suffer irreparable injury if the application is not heard on priority basis and the application and the entire appeal may be rendered nugatory. The applicant states that the appeal raises fundamental issues of law which ought to be heard by this court and which call for status quo to be maintained by means of an order of stay of execution of the orders in the ruling of the trial court. The intended appeal is said to have high chances of success, and that the respondent will not suffer any prejudice or damage that cannot be compensated by costs should the appeal be unsuccessful. The applicant's case is that it is in the interest of justice that the subordinate court's decision be stayed pending the hearing and determination of the appeal herein.

3. The application is supported by an affidavit sworn by the applicant. The applicant's case is that he was the plaintiff in CMCC. No. 23 of 2013(Machakos) whilst the respondent herein was the defendant. On 29th June, 2015 the suit came up for hearing before the Chief Magistrate Court but the applicant was not able to attend due illness. The applicant later learned that his then advocate also failed to attend court. The suit was then dismissed for non-attendance whereupon the applicant applied to court *inter alia*, for the setting aside of the dismissal. The learned trial magistrate after hearing the parties to the suit proceeded to dismiss the applicant's application with the effect that the applicant's suit stood dismissed. The subject matter of the suit is land wherein stands the applicant's permanent residence. Before the said dismissal on 30th November, 2015 there was existing an interlocutory injunction order the fate of which the trial magistrate did not address. The applicant's case is that while the said order was in force, and even before the applicant's application was dismissed, the respondent had embarked on a *sub judice* exercise of taking steps to auction the suit property. In view of the foregoing, the applicant states that his rights to property are likely to be violated unless an order of stay of the ruling and order of the trial court is stayed pending the hearing and final determination of the appeal herein. The applicant believes that the discretion of the trial magistrate in dismissing his application for reinstatement of his case was not exercised either within reason or judicially.

The Response

4. The application is opposed by the respondent vide Grounds of Opposition filed herein on **16th December, 2015**. The respondent opposes the application on the grounds that the appellant is not entitled to the orders sought, and that the appellant's application is misconceived, mischievous brought in bad faith, is frivolous and vexatious.

Submissions and Analysis

5. Parties filed submissions which I have considered, together with the application. The only issue I raise for consideration is whether this court should under **Order 42 rule 6(1)** stay these proceedings pending appeal. **Order 43 rule (1) (h) of the Civil Procedure Rules** gives an automatic right to appeal for a party who is aggrieved by orders issued pursuant to an application made under **Order 12 rule 7 of the Rules**. The appellant's Chamber Summons seeking to set aside the dismissal were under **Order 12 rule 7** of the rules and thus he is perfectly entitled to appeal before this court.

6. **Order 42 rule 6(1)** of the rules grants this court power to order stay of execution if sufficient cause is shown. Rule (2) thereof lays down the conditions to be fulfilled for the stay orders to be given. These conditions were outlined in the case of **Aggrey Maula Malungu v. Joseph Sanya Mwakavi [2015] eKLR**, where court noted *inter alia* that:-

“For a stay of execution to be granted, an applicant must satisfy three conditions stated in rule 6(2) to the effect that:

a) The application for stay must be made without unreasonable delay from the date of the decree or order to be stayed;

b) The applicant must show that he will suffer substantial loss if the orders of stay is not granted, and

c) The applicant offers such security as the court may order to bind him to satisfy any ultimate orders the court may make binding upon him.

The Court went further to state that;

“The essence of an application for stay pending appeal is to preserve the matter of litigation to avoid a situation where a successful appellant only gets a paper judgment”

7. The appellant submitted that he has met the above threshold. On the first issue, the appellant submits that his application was brought without unreasonable delay in that the ruling was delivered on 30th November, 2015 in the absence of parties but nevertheless the appellant made efforts to know the outcome and even sought services of another advocate and in a week’s time, he was able to file his appeal together with the application at hand.

8. With regard to the issue that the applicant must show that he will suffer substantial loss if the order of stay is not granted, the applicant in his grounds and also in his supporting affidavit has demonstrated that the respondent has embarked on a *sub judice* exercise of taking steps to auction the property of the subject matter when an interlocutory order of injunction was still in force. The appellant is apprehensive that the respondent is likely to embark on the said auction and dispose the subject property.

9. On the third issue, the applicant submitted that he is ready and able to abide by the conditions that this court may give upon grant of stay and that he is ready to offer security as the court may order should need arise.

10. This court also takes notice of the fact that the claim in subordinate court involves land. Reliance is placed in the case of *Philip Kimutai Langat v. Job Kibet Maina [2007] eKLR*, where the court noted that:

“I have taken into consideration that the subject matter of the suit is land. The Court of Appeal has directed courts to hear and determine matters dealing with disputes involving land, in so far as possible, on its merits...”

Determination

11. From the foregoing, it is the finding of this court that a stay pending appeal is justified to enable the applicant have the issue, which concerns a land on which he has build a house, be determined in the envisaged appellate proceedings.

12. The application is allowed as prayed.

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E.K.O. OGOLA

JUDGE

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 15TH DAY OF FEBRUARY, 2017

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DAVID KEMEI

JUDGE

In the presence of:

Kimeu – for Kyalo for Appellant