



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CONSTITUTIONAL & JUDICIAL REVIEW DIVISION
PETITION NO. 9 OF 2014

BENJAMIN K.KIPKULEI.....PETITIONER

VERSUS

THE COUNTY GOVERNMENT OF MOMBASA.....RESPONDENT

R U L I N G

1. By a Notice of Motion dated 7/12/2016 and expressed to be brought under the provisions of Rule 19 and 32(3) of the Constitution of Kenya [Protection of rights and fundamental Freedoms] Practice and Procedure Rule, 2013, the interested party, MUSK – DEER LTD sought from Court Orders that;

1. Spent

2. Spent

3. **That pending the hearing and determination of the appeal herefrom, the Honourable court be pleased to order the stay of execution of its judgment/order made on the 6/12/2016 and all consequential orders therefrom.**

2. The application was supported by the affidavit of JOSEPH MWELA and grounded the facts that:

- **Being dissatisfied with the entirety of the decision, the applicant has preferred an appeal. The sum total of the impugned decision is that the suit property vested in the applicant will be alienated in favour of the petitioner and the title revoked thus rendering the appeal nugatory and of no consequence in that even the appellants right to appeal shall have been curtailed.**
- **The applicant undertakes not to interfere with the property by alienation and undertakes to abide by any conditions imposed by the court.**

3. Those grounds are echoed in the affidavit in support of the application with additions being that the applicant has requested the court to be supplied with the typed proceedings for the purposes of the appeal.

4. That application was opposed by the Respondent and the Petitioner who both filed ground of opposition as well as written submissions. On the part of the petitioner, the application is resisted on the grounds that the orders (a-d) are incapable of being stayed being declaratory in nature; that the

declaration terminated the vested interest of the applicant; that the findings by the court effectively vested the title to the suit property on the petitioner and that there was insufficient material to demonstrate that the appeal would be rendered nugatory.

5. For the Respondent however a position was taken that the assertion of an appeal being rendered nugatory is a preserve of the court of Appeal under the Rules of that Court and not before this court under Rule 32(3); that the declarations having been made took effect and no stay can be issued on them as the applicant is no longer the owner of the suit property and lastly that the Applicant has a remedy in a refund and nor otherwise.

6. All the parties filled list of authorities and relied on the same in submissions. For the interested party/applicants, two decisions; **Ujagar Singh vs Runda Coffee Estates Ltd** and **Olivia Da Ritta Siquiera E. Facho & Another vs Siqueira, Rodrigues & Ribeiro** were cited and quoted to court. Both are for the proposition that there is inherent power in the High Court to grant, *ex debito justiae*, stay of execution and that where the High Court is vested with such powers, the court of Appeal is equally vested.

7. For the Respondent equally, two English decisions were cited for proposition that the court must retain the power to enable it remain as a court of justice and secondly that an order issued by the court takes effect when the lips of the judge pronounces the orders.

8. For the petitioner, five(5) decisions were cited for the propositions;

First, that a declaratory order is incapable of being stayed, secondly that a nullity is void and void ab initio and no steps taken pursuant to a nullity can yield anything.

9. I have taken time to read the submissions filed together with the authorities cited and sought to relate the same with the oral submissions offered. The task before court is to determine whether or not the applicant is entitled to an order of stay pending appeal which inevitably seeks and commends the application of the known principles in granting such orders.

Analysis and determination

10. It must not be mistaken that trial court considering whether or not to grant stay of execution pending appeal has the right to consider its decision and get the chance of reviewing its own finding in the fashion of an appeal. No and far from it. The trial court in undertaking such task merely takes cognisance of the fact that it has done its part in the litigation and the litigants have the inalienable right to challenge that decision in a higher court, and the substratum of such litigation ought to be preserved and kept alive so that the appeal is not rendered worthless. It is that recognition when juxtaposed against the need for court process to be used to only achieve justice that calls upon the same court, to look at the complaint by the aggrieved party and find out whether or not there is revealed an arguable appeal. All that while the trial court must equally remind itself that the expression arguable appeal is in no way to say an appeal that must succeed. If merely means that the points intended to be raised are not frivolous, phantom or farfetched.

11. It is indeed a difficult balancing act by the trial court which is called upon to balance the right of the decree holder to access and reap the benefit of the decree against the otherwise undoubted right of the appellant to be heard on appeal and should he succeed, the outcome of the appeal is reduced in real and tangible terms. That is the task before me which I cannot escape but confront and undertake the best way my appreciation of the law guides me.

12. I entertain no doubt at all that the discretion donated to court under Rule 32(3) of the Article 22 Rules, is indeed very wide and unfettered. It cannot be likened to the discretion granted under Order 42, Rule 6 Civil Procedure Rules. It may however be likened to Rule 5(2)b of the Court of Appeal Rules. Both gives the court the power to grant stay as it deems fit. I would therefore choose to be guided by the principles set in interpreting Rule 5(2) b rather than Order 42 Rule 6. To that extent, I do not agree with

the submissions by the Respondent that the question of arguability of an appeal being rendered nugatory should stay be refused are considerations alien to this court and only applicable to the court of Appeal. I take the view that in exercising the jurisdiction to grant stay under Rule 32(3) this court must consider whether the appeal is arguable and if should stay be declined, the appeal if successful would be rendered nugatory. To this court, those two tests go together with one being dependant upon the other. The appeal being rendered nugatory is only a question that become relevant once the court is convinced that there is an arguable. Therefore, to this court, the all-important and first consideration ought to the arguability of the appeal because it is only when an appeal is proved to be arguable that the prospects of success emerge and therefore the damage to the outcome being rendered nugatory if the fruits of enforcement of the judgement cannot be restituted.

13. Having said so, I will decide this application on the basis of the test established in the court of appeal in its decision in *Madhupaper International Ltd vs Paddy Kerr [1998]KLR 890* in which the court adopted the words of *Magari J in Erinford Properties vs Chesuire County Concil[1974] 1 ALL ER 443* to the effect that:-

When a party is appealing exercising his undoubted right of appeal, the court ought to see that the appeal if successful is not rendered nugatory.

“There are cases, however where it would be wrong to grant an injunction pending appeal. These would include when the appeal is frivolous or to grant it would inflict greater hardship than it would avoid. And there will be others which we have not experienced yet”.

14. I understand the above excerpt to say that a court considering an application for stay pending appeal sets out to do justice between the parties. An order for stay like all judicial orders must not be granted at a beckon. The party applying must fit itself within the set of principles and meet its onus of proving the facts that are due for proof. That party must establish a case that merit the orders. But even having so established the facts the court retains the duty to ensure that whichever order it issues serves the justice between the parties.

15. Now before me in the matter, this court has delivered itself that the process by which the applicant, became registered as the proprietor of the suit property was flawed and null. While I am not being asked whether I could have been wrong in my appreciation of the facts pleaded and proved and the application of the law to those facts, I am well aware that even where I am overly confident of my findings, those findings are subject to the decision by the appellate court. My duty would be to safeguard and preserve the subject of the appeal. I have not seen the proposed grounds of appeal but from the submissions, the appellant suggest that this court lacked jurisdiction to entertain the matter it being about the title to the suit land. That to this court is an arguable point. And I don't need to isolate more than one point. One is just good enough. However, as said before the existence of an arguable appeal is not all. The applicant must also demonstrate that arguable is threatened with being rendered academic or illusory unless the stay is granted.

16. According to the papers filed, the applicant fears that the property may be transferred spirited away and even alienated further and therefore even if the appeal succeeds it would be impossible to reinstate the title of the applicant. That now is where the weight of the matter lies. It is to this court a grave matter touching on the right to property. In the judgment now sought to be appealed against the court found as a fact that not only the right to property had been infringed but even the right to a fair hearing and the fact that an advocate who prosecuted the process leading to acquisition of title by the applicant had denounced the process.

17. I hold the view that to stay my orders why court declared the process untenable would be to reverse the finding of this court. That would not be right nor just and it does not sit with this court to do that. This court must let the appellate court do its part in the appeal and ensure that the process is not prejudiced as the appel pends. This court is only called upon to preserve the subject of the appeal. To the court that subject can be safeguarded and preserved without an order for stay. I hold the view that to order stay of the entire judgment at this juncture would be to allow the applicant to continue enjoying the

fruit of a process declared null and void. That would amount to perpetuating an illegality already declared. It would thus inflict a greater hardship on the Respondent decree holder.

18. The flip side is that if the stay is refused, and the petitioner directed not to spirit away the property away from his control, there is no prospects of the appeal being rendered nugatory as the court of appeal if it reverses the findings by this court, would in effect declare that any rights acquired by the decision so set aside are themselves set aside. This finding brings me to the point argued by Mr. Norowjee that unless stay is granted the court of appeal will have no remedy for the applicant. I cannot but disagree. As a first appellate court, that court will be proceeding by way of a retrial. It will be clothed with all the powers this court had including the power to re-evaluate, reappraise and reexamine the entire evidence so as to come to own conclusions. See *Selle vs Associated Motor Boat Co. Ltd [1968] EA 123*.

19. In this matter, Mr. Norwejee in his submissions said, atleast 3 times, that the applicant is not seeking to protect title to the property but its right of appeal. I hold the view that stand narrows down the issues for determination. This court in seeking to do justice is of the view that the petitioner will reap the fruits of his judgment but will not seek to defeat the appellant's right of appeal by transferring the property, charging it or encumbering it in any way pending the outcome of the appeal to the court of Appeal. This however must not be upon free ride. The applicant shall enjoy these rights provided it files the Record of Appeal within 45 days from today.

20. The upshot is that the application for stay is refused but for the sake of keeping the litigation field between the parties even the petitioner will have the right to transfer the property to himself and take possession and not to alienate it further pending the determination of the appeal.

21. I order that the costs of the application be costs in the appeal. It is so ordered.

Dated and delivered at **Mombasa** this **6th day of March 2017**.

HON. P J O OTIENO

JUDGE