



REPUBLIC OF KENYA
THE HIGH COURT OF KENYA

AT NAKURU

HCC. NO.339 OF 2001

HARON MUGO KABUCHI.....PLAINTIFF

-VERSUS-

DAVID KARIUKI & OTHERS.....DEFENDANTS

RULING

1. The background to the present application is a judgment delivered by Kimaru J in ***HCC No.335 of 2001 on 5th September 2012***. The said judgment was in favour of the defendant/respondents as the court ruled that the plaintiffs (now applicants) had failed to establish that they were entitled to the parcels of land which they claimed to hold title. The applicants were aggrieved by the judgment and filed a notice of appeal on 10th October 2012 and the present application also dated 10th October 2012 seeking the orders inter alia:-

i. Spent

ii. THAT pending the hearing and determination of this application this honourable court be pleased to stay the execution of the judgment entered against the applicants herein in HCC No.335 of 2001 by the honourable Judge Luka Kimaru on 5th September 2012.

iii. THAT pending the hearing and determination of this application the defendant/respondents be restrained by way of temporary injunction from entering, re-surveying and/or interfering with the plaintiffs/applicants quiet enjoyment of the suit property.

iv. That pending the hearing and determination of the intended appeal the defendant/respondents be restrained by way of temporary injunction from entering, re-surveying and/or interfering with the plaintiffs/applicants quiet enjoyment of the suit property.

v. THAT costs of this application be provided for.

2. The application is brought on grounds inter alia:-

i. That if the application herein is not allowed and execution of the judgment stayed as prayed, the applicants stand to suffer irreparable loss and may lose the subject matter of the appeal and the appeal shall be rendered nugatory.

ii. If the applicants have an arguable appeal which ought to be heard and determined and such

is only possible if execution of the judgment is stayed.

3. The **supporting affidavit** is sworn by **Haron Mugo Kabuchi**. His averments are to the effect that the applicants were aggrieved by the judgment of **Kimaru J** delivered on **5th September 2012** and were set to appeal, the said Judgment. That if the judgment was not stayed the respondents would re-survey the suit premises and issue new titles rendering the appeal nugatory. Further he deposes that the application has been brought without undue delay.

4. The application is opposed by the respondents. In a **replying affidavit** sworn on **23rd November 2012** and filed in court on **27th November 2012** **Jeremia Kinuthia Mahugu** avers that the application was incompetent and an abuse of the legal process; that the intended appeal had no merit since the title deeds that were purportedly issued to the plaintiffs do not exist in the land office and the plaintiff/applicants were trespassers on the suit premises. He further deposes that the title documents held by the plaintiff refer to a parcel of land held by a **3rd** party not party to the proceedings and that the respondents would suffer substantial loss since the grant of a stay of execution would deny the respondents their rightful share of the suit properties which the applicants have illegally occupied with no genuine title.

5. The application was filed under **certificate of urgency** and upon consideration; **Ouko J** on **11th October 2012** granted an order that the status quo be maintained pending hearing and determination of the application.

6. The application came up for hearing before me on **23rd September 2017**. The applicants were represented by **Mr. Kibet** while neither respondents nor their counsel on record attended court. Upon evidence of service of the notice of hearing served upon **Kirundi & Co. Advocates**, I allowed the applicant to prosecute the application in the absence of the respondent as allowed by **Order 12 Rule 2 Civil Procedure Rules**.

7. In urging the application, **Mr. Kibet** relied on the supporting affidavit. He submitted that the subject matter of the application was land and that the applicants had filed a notice of appeal to appeal the judgment in issue. He urged that if the stay was not granted then the respondents might move and resurvey the land currently occupied by the applicants. He observed that the replying affidavit had not addressed the issue of stay. Counsel further submitted that the applicants were willing to abide by any conditions granted by court. He explained that the delay in prosecuting the application was occasioned by other applications filed and which had to be determined by the court. He prayed that the application be allowed.

8. I have considered the rival affidavits and the submissions in this application. The application is expressed to be brought under **Order 42 rule 6** of the **Civil Procedure Rules**. It provides:-

“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.”

9. An applicant who wishes to be granted stay must under **Order 42 rule 2** show that substantial loss may result if the order is not made; that the application is made without unreasonable delay; and that he is willing to provide security for due performance of such decree as may ultimately be binding on him.

Substantial loss

10. The applicants argue that if the stay was not granted then the defendants/respondents would invite the

surveyors to resurvey the land and that they would be put out of possession. In that respect they would suffer substantial and irreparable loss. On the other hand, the respondents state at paragraph 7 and 10 of the replying affidavit **Hon. Justice Kimaru's** judgment clearly held that the RIM from which the Plaintiffs obtained their titles, being RIM in respect of parcels of L.R. No.Elburgon/Elburgon Block 8, were no-longer in existence at the Survey of Kenya which is the sole custodian of all RIMS in respect of all parcels of land registered under the Registered Land Act (RLA)(now repealed). That the instant application cannot be granted since the title deeds and/or documents which the Plaintiffs are in possession of relate to a totally different parcel of land belonging to a third party. They further depose at paragraph 16 that it is the respondents who would suffer loss since the grant of stay of execution would deny the members of the 1st Defendant their rightful share in the suit properties which the Applicants have illegally occupied with no genuine title documents and that the application should be dismissed with costs.

11. From the above averments and submissions, it is apparent that the land dispute between the parties is far from over. While the applicants have attempted to demonstrate that they are already in occupation of the land and that they would suffer loss if the said land was resurveyed and titles issued to the defendants, the defendants have endeavoured to show that no valid titles exist. I however consider that the issue of validity of the titles in question is a matter for consideration in the appeal. It does not do much to assist in showing the substantial loss to be suffered by the defendant as deposed in the replying affidavit.

12. On the other hand, I am persuaded that the applicants, already being in possession of the disputed parcels would suffer substantial loss if they were removed from the land without having had a chance to appeal. Their appeal would also be rendered nugatory if the land would have been resurveyed and redistributed. In the event that they were successful the substratum of the appeal would have been destroyed. **See Swanya Limited V. Daima Bank Limited, Nairobi HC Civil Application No. 45 of 2001.**

Whether the application was brought timeously

13. As earlier stated, the present application was filed on 10th October, 2012. Judgment was delivered on 5th September 2012. I would consider that the intervening period does not constitute inordinate delay and that the application was brought timeously as required by the rules. What I would consider inordinate delay is the time it has taken the applicants to prosecute the application. It appears that the moment they obtained status quo orders, they went to sit on their laurels. It is also baffling that the respondents never moved to have the application dismissed for want of prosecution nor have the status quo orders lifted. Be that as it may, I am satisfied that the application having been filed one month after judgment was brought timeously.

Whether the applicant has offered security

14. The applicant stated in submissions by counsel that they were willing to abide with any conditions. An applicant is required under Order 42 Rule 2 to provide security. While it is arguable that the court may exercise discretion in a proper case, it is the rule that security be furnished. In affirming the mandatory nature of the Rule, the court of appeal in **Vishram Ravji Halai & Another Vs. Thornton & Turpin (1963) Limited, Civil Application 15 Of 1990** (Unreported) stated that:-

“In our judgment, it is manifestly clear that the judge erred in failing to make an order for security for the due performance of the decree.”

15. In the premises, I grant the order of stay pending appeal on condition that the applicants shall within 30 days deposit into court the Kshs 500,000 or provide a bank guarantee in lieu as security and that applicants shall take all necessary steps to file the appeal.

16. On the prayer for costs, I exercise my discretion not to award the applicants costs in this application in consideration of the inordinate delay in prosecuting the application.

Ruling delivered, dated and signed in open court this....8th..day of ...June...2017

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R. LAGAT KORIR

JUDGE

In the presence of:

C/A Ochieng

Ms. Gitau holding brief for Kibet for applicants

N/A.....for respondent