



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO.14 OF 2009

FRANCIS KUIRA WAINAINA.....APPLICANT

VERSUS

LUCY WAIRIMU WAINAINA.....RESPONDENT

RULING

1. This ruling is in respect of the application dated 5th July, 2016. By way of a notice of motion, Francis Kuira Wainaina (hereinafter the applicant) seeks orders:

a) Spent

b) Spent

c) That pending the hearing and determination of the intended appeal in the Court of Appeal, this honourable court be pleased to issue a temporary injunction restraining the respondents by themselves, their servants or agents or any one acting under them from evicting the Defendant/Applicant and his family, disposing off, selling, re-charging, transferring, alienating or in any other way interfering with the land parcel No.Rare/Teret Block 1/116.

d) Spent

e) That there be stay of execution of the aforesaid judgment/decreed pending the hearing and determination of the intended appeal, Nakuru CACA No..... of 2016 (sic) preferred therefore in the Court of Appeal.

f) That the costs hereof be borne by the plaintiff in any event.

2. The application is premised on the affidavit of the applicant sworn on the 25th July, 2016 and on grounds:

(a) That in a judgment dated 14th June, 2016, this court ordered the Defendant/Applicant to be evicted from the parcel of land number Rare/Teret Block 1/116.

(b) That this is the land the Defendant/Applicant and his family have called home for the last 32 years since the year 1984.

(c) That the Defendant/Applicant has preferred to appeal against the said judgment in the Court of Appeal

and has filed the requisite notice of appeal.

(d) That the Defendant/Applicant has satisfied the legal requirements for granting of injunction pending appeal:

i. This intended appeal is not frivolous

ii. It will inflict greater hardship if the injunction is not given as the Defendant and his family will be evicted.

iii. The intended Appeal will be nugatory and it will serve no purpose as the Defendant and his family will be rendered homeless making the appeal an academic exercise.

iv. The Defendant has satisfied the principles in **Giella V. Cassman Brown.**

e) That the intended appeal in the Court of Appeal as per the annexed draft memorandum of appeal raises the following issues:

i. The Defendant has capacity to institute the suit on behalf of the Estate of Annah Wambui Wainaina - deceased having taken out letters of administration *Ad Litem* and is thus one of the legal representatives.

ii. The plaintiff's suit was statute barred as the consent she sought to rely on had been set aside by Ouko, J

iii. The plaintiff has falsified documents in support of her case and the Defendant/Applicant demonstrated this court

f) That this court has unfettered jurisdiction to grant an injunction pending appeal pursuant to **Order 46 rule 6(6)** of the **Civil Procedure Rules.**

3. It is the applicant's case that he has preferred an appeal against the judgment of court dated 14th June, 2016. The intended appeal would be rendered nugatory should the applicant and his family be evicted from the suit land as per the orders of this court thus rendering the appeal an academic exercise.

4. The intended appeal, it is urged, is not frivolous and that the applicant has satisfied the principles in the **Giella V. Cassman Brown.** The applicant reiterates that this court has unfettered jurisdiction to grant an injunction pending appeal pursuant to **Order 46 rule 6(6)** of the **Civil Procedure Rules.**

5. The application is opposed and in a replying affidavit Lucy Wairimu Wainaina (hereinafter the respondent) avers that the suit land is not the applicant's family home or that it has been his home for the last 32 years.

6. She annexes a copy of the official search for Land title No.Nakuru/Rare Teret/352 which shows the applicant was the registered owner.

7. It is denied that the applicant will be rendered homeless as he owns plot No.28 (Kiratina and Nakuru/Rare Teret/352).

8. It is urged that the application be dismissed.

9. In a supplementary affidavit, the applicant further avers that he has lived on parcel No.Rare/Teret Block 1/116, first, with his mother and secondly, since her death in 1987. He once lived on parcel No. Nakuru/Rare Teret/352 until the demise of his brother John Kamonjo Wainaina who died in 1984.

10. He adds that plot No.28 Kiratina is a rental plot which has tenants since 2001 and he has never resided

there at any one time.

11. It is stated that since the respondent acknowledged that the applicant has resided on the land since 1984, it causes no harm were the applicant and his family to continue residing there pending the determination of the intended appeal.

12. It is urged that the respondent has a house at plot No.70 Bahati Centre (Mugumoini) and a photograph is exhibited.

13. Directions were taken that the application be disposed off by way of written submissions. Both parties complied.

14. I have had occasion to consider the application, the supporting affidavit/supplementary affidavit, the replying affidavit and the submissions on record.

15. The prayers that remain alive for determination are the prayers for an injunction pending appeal and the prayer for a stay of execution of the decree herein pending the hearing and determination the intended appeal.

16. The issues emerging for determination are:

- a) Whether this court has jurisdiction to grant an order for a temporary injunction pending appeal.
- b) If in the affirmative, whether the applicant has met the necessary threshold for the grant of such an injunction.
- c) Whether the applicant has satisfied the necessary conditions for a stay of execution pending appeal.

17. At this point, I acknowledge with commendation the efforts of counsel in their learned submissions in addressing the issues herein. I have considered every aspect of the said submissions at length even on points which I may not necessarily recast here.

18. On issue No.(i) above, the prayer for an injunction is brought pursuant to **Order 42 rule 6(6)** of the **Civil Procedure Rules**. **Sub rule 6** provides:

"Notwithstanding anything contained in sub rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with." (Emphasis added)

19. It is submitted for the respondent that the above provision applies where the High Court is exercising its appellate jurisdiction. This is in regard to appeals from a subordinate court or tribunal. It is urged that this does not obtain in this case. The court has no jurisdiction to grant a temporary injunction in a matter it has fully heard and determined on merits. Its *functus officio*. The applicant is faulted for attempting to argue his appeal in this court through the application herein.

20. On their part, the applicant argues that the principles of granting injunction pending appeal as set out in **Naresh Dabar V. Thore Archads & 2 others** [2008] eKLR and in **Aglican Church of Kenya V. Secretary Muranga County Government & Another** [2015] eKLR.

21. It is urged that the applicant has to satisfy the following legal principles:

- a) That the intended appeal is not frivolous
- b) It will inflict greater hardship if the injunction is not given.

c) That the applicant must show that to refuse the injunction will render the appeal nugatory.

d) The court should be guided by the principles if **Giella V. Cassman Brown.**, [1975 E.A. 358]

22. With profound respect to counsel and on the material before me, it is manifestly clear that the prayer for an injunction is based on a misapprehension of the import or **order 42 rule 6(6)**.

23. I agree with counsel for the respondent that the injunction envisaged under **order 42 rule 6(6)** will be one sought at the appellate stage and not at the trial court. The trial court having heard and determined the suit on merit, it is not open for the court to re-open the litigation and redetermine the merits.

24. Quite clearly, the applicant has gone to great lengths arguing the intended appeal, a matter which ought to be the preserve of the appellate court.

25. Indeed, the authorities cited by the applicant on this point being **Naresh Darbar V. Thara Orchards Limited & 2 others** [2008] eKLR and **The Anglican Church of Kenya V. Secretary Muranga County Government & Another** [2015] eKLR. are clear cases where injunctions were being sought at the appellate level (High Court) after dissatisfaction with the findings of the magistrate's court.

26. In view of the above the prayer for an injunction as sought must remain elusive and unavailable to the applicant.

27. As to the question whether the applicant has met the conditions for the grant of a stay of execution, **Order 42 rule 6(2)** provides the 3 mandatory conditions for a stay of execution. It states:

"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."

28. The applicant has spent some considerable effort both in the application and in the submissions in trying to show that the appeal is not frivolous and is arguable. This was unnecessary. Other than the prayer for a stay of execution in the notice of motion, the applicant has not supported the prayer on the grounds in support nor in the annexed affidavit.

29. The first time such support or explanation is found is in counsels submission where he summarizes the conditions for stay provided for in **Order 46(2)**.

30. Faced with similar circumstances this court Ringera, J in **Lalji Bhinji Saghani Builders and Contractors V. Nairobi Golf Hotels (Kenya), Ltd**, Nbi HCCC 1900 of 1995 (unreported) had this to say:

"At the hearing of the application, Miss Karanja appeared for the defendant/applicant and Mr. Rustan Hira appeared for the plaintiff/respondent. Both counsel embarrassed me by addressing me as if I was a Court of Appeal considering whether the decree of the High Court should be stayed pending the appeal. They laid much emphasis on the arguability or otherwise of the intended appeal and on whether or not such appeal would be rendered nugatory unless as stay is granted. Both were wrong on their approach as the criteria for the exercise of the discretion to order stay of execution of a decree are different in the High Court and the Court of Appeal.

In the latter court, the test as laid down by the court itself in several rulings is whether the applicant has an arguable appeal and such appeal would be rendered nugatory unless stay is

granted. In the High Court the test as laid down by rule 4(2) of Order XLI of the civil Procedure Rules is whether:-

- a) the applicant may suffer substantial loss unless the order is made; and
- b) whether the application has been made without unreasonable delay; and
- c) whether the applicant has given such security as the court may order for the due performance of the decree order which may ultimately be binding on him."

31. It is urged for the respondent that the applicant has not satisfied the conditions for a stay of execution.

32. And, what are those conditions? The Court of appeal in Halai & Another V. Thorton & Turpin (1963) Limited, 1990 KLR 365 restated the applicable law at page 367 as follows:

"The application before the Superior Court was made under Order XLI rule 4. In sub-rule (1) the Order provides that the court appealed from may for sufficient cause (emphasis is ours) order stay of execution of a decree or order made or passed by it. Before the superior court can exercise its discretion in favour of an application for a stay of execution, the applicant must first establish a sufficient cause, subrule (2) of the same rules reads:

'(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 his has been given by the applicant.'

Thus, the Superior Court's discretion is fettered by the three conditions. Firstly the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security. The application must, of course, be made without unreasonable delay."

33. It was incumbent upon the applicant to show through affidavit evidence, grounds and submissions that the three (3) conditions above are met.

34. By failing to lay a basis by way of evidence to demonstrate that the three (3) conditions are met in the applicant's affidavit, the applicant not only failed his own case but denied the respondent the opportunity for a rejoinder. Raising the issues in submissions cannot suffice.

35. This is so because as held in the case of Trust Bank Limited V. Ajay Shah & 3 Others, [2012] eKLR at page 22, Order 42(6)(2) is couched in mandatory terms by the use of the word "*shall not*" and for a stay to be granted an applicant must satisfy three (3) requirements namely that the application has been made timeously, that the applicant shall suffer substantial loss if the stay is not granted and must give security for the due performance of the decree or order sought to be stayed.

36. The court at page 23 went on to state:

"The conditions set out in Order 42 Rule 6(2) (a) and (b) are cumulative. All the three must be satisfied before a stay can be granted. the Applicant only satisfied one condition and failed to satisfy the others. For the foregoing reasons, I find that the Plaintiff's Notice of Motion dated 24th April, 2012 it without merit."

37. It is incumbent upon the applicant to satisfy the (three (3) conditions above. The applicant did not do so. Instead, the applicant misdirected his arsenal to evidence in support of misplaced injunction and an

attempt to argue the appeal.

38. From the record, it is quite clear that the application herein was filed timeously. But that is as far as the rosy side of the applicant's case goes.

39. Regarding substantial loss, this court has held that this has to be proved by evidence and details and particulars of the loss to be suffered must be given. In **Kenya Shell Limited V. Benjamin Karuga Kibiru**, (1986) eKLR page 16 paragraph 3, the court held:

"It is not sufficient by merely stating that the sum of Shs.20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. 'What sort of loss would this be?' In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that *status quo* should remain as it were before judgment. What assurance can there be of appeal succeeding? On the other hand, granting the stay would denying a successful litigant of the fruits of his judgment. The applicant has not given to court sufficient materials to enable it to exercise its discretion in granting the order of stay."

40. Even if this court were to take the averments in the affidavit evidence in support of the injunction application as supporting the prayer for stay of execution, the alleged long habitation in the land is not necessarily a basis for substantial loss.

41. In **Wellington Lusweti Baraza and 47 Others V. Lands Limited & Another**, [2015] eKLR at page 33, the court held:

"On substantial loss the applicants state that they have occupied the land for the last 50 years and therefore have nowhere to go. They have cultivated the land which has been their only source of livelihood. However, it is alleged by the decree holder that some of the squatters have left the land. Other than cultivating on the land and judgment debtors have not shown any substantial loss they are likely to suffer. I do find that living on the land and cultivating food crops is not sufficient reason for the grant of stay pending appeal. In *Charles Wahome Gethi V. Angela Wairimu Gethi*, Court of Appeal Civil Appeal No. Nai.302 of 2007 the Court of Appeal held that it is not enough for the appellants to say that they reside or live on the suit land and that they will suffer substantial loss. The applicants must go further and show the substantial loss that the applicants should suffer if the respondent executes the decree in this suit against them."

42. Again, I note no security for due performance of the decree has been offered. The continued stay of the applicant on the land would no doubt occasion loss in terms of *mesne* profits or change of the character to the land. Should the appeal fail, the respondent is not cushioned against such loss in the absence of a security.

43. On this aspect, the court had this to say in **Trust Bank Limited V. Ajay Shah** (supra):

"As regards security for the performance of the decree, no security has been offered by the Plaintiff. In *Stephen M'ikunywa M'Imathiu & Another V. Rev. Elijah Mwirigi* (2006) eKLR, Hon. Lenaola J. delivered himself thus:

"For discretion to be exercised in favour of the Appellant, the court is enjoined to do so upon a security being given by the Appellant or the court would otherwise create other terms as it deems fit for granting the stay of execution. In the instant application, it is from the bar that Mr. Kariuki for the Appellant has offered security which is unclear. Why was that matter not deposed to in an Affidavit by the Appellant....."

44. For the above stated reasons, I cannot agree more with counsel for the respondent that in our instant suit, the applicant has only satisfied one condition for stay of execution and that is the timeous filing of

the application. As held in the Trust Bank case (supra), the conditions set out in order **42 rule 6(2) (a) and (b)** are cumulative. All the three (3) must be satisfied before a stay can be granted.

45. With the result that the application herein fails in its entirety. I dismiss the same with costs to the respondent.

Orders accordingly.

Dated Signed and Delivered at Nakuru this 12th day of July, 2017.

A. K. NDUNG'U

JUDGE