



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. APPEAL NO. 38 OF 2019

ANNA SYOMBUA.....1ST APPELLANT

COLLINS MUSAU.....2ND APPELLANT

ERIC MUSEMBI.....3RD APPELLANT

VERSUS

JOSPHAT KING'OO MUSAU.....RESPONDENT

(Being an Appeal from the Ruling of Principal Magistrate's Court at Kithimani

in ELC. Civil Suit No. 20 of 2019 delivered on 14th August, 2019

by Hon. P.W. Wambugu, Senior Resident Magistrate)

RULING

1. The Appellants approached the court with the instant Application vide a Notice of Motion dated 16th August, 2019, brought under Order 10 Rule 11 of the Civil Procedure Rules and Sections 1A, 1B & 3A of the Civil Procedure Act. The Appellants are seeking for the following orders:

a) That this Honourable Court be pleased to order a stay of the Ruling and Orders issued on 14th August, 2019 pending the hearing and determination of the Appeal herein.

b) That this Honourable Court be pleased to order a stay of proceedings of Kithimani ELC No. 20 of 2019 pending the hearing and determination of the Appeal herein.

c) That the costs of this Application be provided for.

2. The Application is supported by the Affidavit of Anna Syombua, the 1st Appellant who deponed that the Respondent sued the Appellants vide a Plaint dated 30th June, 2019 seeking for a temporary and mandatory injunction in relation to the house and stores on land parcel Masinga/Masinga/1019.

3. The 1st Appellant deponed that the Respondent also filed an Application seeking for temporary and mandatory injunction pending the hearing of the suit; that the Application was heard; that a Ruling was delivered by the lower court on 14th August, 2019 where orders were issued to the effect that the Appellants should be evicted from the suit property, which is their family home and that the mandatory injunction issued by the court ought not to have been issued at the interim stage.

4. The 1st Appellant deponed that they were aggrieved by the order of the court and lodged an Appeal in this court and that they stand to suffer substantial loss unless they are granted the prayers sought.

5. The Respondent deponed that a mandatory injunction was issued by the lower court pending the hearing and determination of the main suit; that the Appellants vacated the suit property; that the 2nd Appellant broke into his house on 20th August, 2019 and was charged with the offence of breaking into a building with intent to commit a felony, contrary to Section 307 of the Penal Code and that the Appellants had no

right to invade the suit property without his permission.

6. The Respondent deponed that he used to cohabit with the 1st Appellant until 1995 when she voluntarily left the union and that on 22nd May, 2019 the 1st Applicant invaded the suit property with her sons.

7. It was deponed that by dint of Order 42 Rule 6 of the Civil Procedure Rules, the Appellants had not demonstrated the substantial loss that they would suffer if the orders sought are not granted; that the 1st Applicant had lived elsewhere for a period of 24 years since the year 1995; and that the 2nd and 3rd Appellants were also living elsewhere since the year 2013.

8. According to the Respondent, he is the one who constructed the current house in which he lives with his wife Caroline Ndinda, and that they have three children. The Respondent deponed that the Appellants have never contributed towards the construction of the house in question and therefore cannot allege that they would suffer any substantial loss if the orders sought were not granted.

9. It was deponed that it is the Respondent and his family who would suffer substantial loss if the orders sought were granted because the suit land was his only matrimonial home and that in any event, the Application was incompetent because it offends the provisions of Order 9 Rule 7 of the Civil Procedure Rules.

10. The Application was canvassed by way of written submissions. Counsel for the Applicants filed submissions on 29th November, 2019 whereas the Respondent's counsel filed submissions on 21st November, 2019.

11. Learned counsel for the Applicants cited the provisions of Order 42 Rule 6(1) of the Civil Procedure Rules and the case of *Butt vs. Rent Restriction Tribunal (1982) KLR 417* and stated that the nature of a mandatory injunction that was issued by the lower court was final.

12. Counsel cited the case of *Kenya Breweries Ltd & Another vs. Washington O. Okeyo (2002) eKLR* and submitted that an interlocutory mandatory injunction is only given in special and exceptional circumstances; that there was no special circumstance that warranted the grant of the interlocutory mandatory injunction by the trial court and that the suit land being Masinga/Masinga/1019 was matrimonial property belonging to the 1st Applicant who had been married to the Respondent since 1989 and had three children with him

13. The Applicants' counsel submitted that the 1st Applicant had never divorced with the Respondent; that the 1st Applicant contributed money to purchase the suit property; that the eviction of the Appellants from the suit land would be prejudicial to them and that if the orders sought are not granted, then the intended Appeal will be rendered nugatory.

14. The Appellants' counsel finally submitted that that the Appeal as filed has overwhelming chances of success; that the instant Application was filed two (2) days after the impugned Ruling of the trial court and that there was no unreasonable delay in preferring the instant Application. Learned counsel for the Appellants urged the court to allow the Application.

15. In his submissions, learned counsel for the Respondent cited the case of *Sammy Some Kosgei vs. Grace Jelel Boit [2013] eKLR* where the court, while dealing with the issue of stay of execution pending Appeal stated;

"I therefore need first to interrogate if the applicant really will suffer substantial loss if stay is not granted. But even in this interrogation, I must be alive to the tenet that a successful party is entitled to the fruit of his judgment and there must be demonstrated good reason why he ought not to consume the fruit of his judgment, at least just yet. In Machira t/a Machira & Co vs. East African Standard No.2 (2002) 2 KLR 63, It was stated as follows." It is not enough merely to state that substantial loss will result, or that the appeal if successful will be rendered nugatory. That will not do. If the applicant cites, as a ground, substantial loss, the kind of loss likely to be sustained must be specified, details or particulars thereof must be given, and the conscience of the court, looking at what will happen unless a suspension or stay is ordered, must be satisfied that such loss will really ensue and that if it comes to pass, the applicant is likely to suffer substantial injury by letting the other party proceed further with what may still be remaining to be done or in execution of an award or decree or order, before disposal of the applicant's business (e.g. Appeal or intended Appeal)."

16. Counsel for Respondent also cited the case of *James Ndonyu Njogu vs. Muriuki Macharia [2017] eKLR* where the court quoted the provisions of Order 42 Rule 6(2) of the Civil Procedure Rules and further relied on the principles set out in the case of *Butt vs. Rent Restriction Tribunal [1982] KLR 419* where it was held as follows:

"It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule out to exercise its best discretion in a way not to prevent the appeal if, successful from being nugatory...The court will grant a stay where special circumstances of the case so require."

17. The Respondent's counsel also cited the case of *Michael Wanjihia Onesmus vs. Francis Karanja Waihiga [2017] eKLR* where the court, while dealing with the issue of stay of execution pending Appeal, quoted the provisions of Order 42 Rule 6(2) of the Civil Procedure Rules and further relied on the decision of *Kenya Shell Ltd vs. Benjamin Karuga Kabiru [1988 – 1988] 1 KAR 1018* where it was held as follows:

"The second issue is substantial loss. It has been said before that substantial loss is the cornerstone upon which an application for stay of execution pending appeal is anchored (See the case of Kenya Shell Limited vs Benjamin Karuga Kigibu & Another (1982-1988) 1 KAR 1018). The court needs to strive to protect the appellant, so that he does not end up having a paper judgment, in the event that his appeal is successful. But even then, the court also needs to balance the interests of the successful respondent for he is

also entitled to the fruits of his judgment (See the case of *Port Reitz Maternity vs James Karanga Kabia*, Civil Appeal No. 63 of 1997).”

18. It was counsel’s submission that the learned Magistrate applied the proper principles of the law in granting the mandatory injunction against the Appellants in *Kithimani ELC No. 20 of 2019* and that the instant Application lacks merit.

19. The issue for determination is whether the Appellants are entitled to an order for stay of execution and stay of proceedings.

20. Order 42 Rule 6 of the Civil Procedure Rules provides for stay of execution pending Appeal. The conditions to be met by an Applicant in order to be entitled to an order for stay of proceedings and execution pending Appeal are laid out in that Rule in the following terms:

“6. (1) No Appeal or second Appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.

(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.”

21. The record shows that the Respondent herein sued the Appellants in the Principal Magistrate’s Court ELC No. 20 of 2019. In the Plaintiff, the Respondent alleged that he started cohabiting with the 1st Appellant in 1989; that in the process, they were blessed with two children who are the 2nd and 3rd Appellants and that they terminated the said union in 1995.

22. According to the Respondent’s Plaintiff, and the Affidavit in support of his Application for injunction, after dissolving their union, the 1st Appellant got married to one Caroline Ndinda with whom they were blessed with three children and that on 22nd May, 2019, the three Appellants forcefully and without his permission gained entry into his house.

23. In the Application that was filed alongside the Plaintiff in the lower court, the Respondent sought for a mandatory injunction to remove the Appellants from the houses and stores build on the suit property.

24. While responding to the Application, the 1st Appellant deponed that he was married to the Respondent; that after bearing the burden of upbringing the children of the marriage alone, he left the Respondent’s home in the year 2003 and that she went back to the Respondent’s home after the Respondent abandoned the 2nd and 3rd Appellants and relocated to Masinga Town. After hearing the Application, the learned Magistrate allowed it and ordered for the eviction of the Appellants pending the hearing of the suit.

25. The Appellants have filed an Appeal challenging the decision of the lower court. In the meantime, they are seeking for a stay of execution pending the hearing of the Appeal. That being the case, it is not in the province of this court at this stage to pronounce itself on the merits of the Appeal, which this court will hear.

26. In the case of *Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000*, Ringera J (as he was then) stated as follows:

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the Court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”

27. The 1st Applicant has admitted that as at some particular time, she stopped living with the Respondent, and only went back after realizing that the Appellant was no longer taking care of their two children. In her Replying Affidavit in the lower court, the 1st Appellant deponed that the 2nd and 3rd Appellants are now grown up children. Indeed, the 1st Appellant annexed the copies of the identity cards of the two children showing that they were born in 1990 and 1997 respectively.

28. Considering that the Appellants are adults, and in view of the obvious dangers of forcing the Respondent to live with the Appellants under one roof, the Appellants will not suffer substantial loss if they get another place for accommodation pending the hearing of the Appeal.

29. Indeed, for the purposes of ensuring that the dispute between the Appellants and the Respondent is heard expeditiously, I decline to stay

the proceedings of the lower court.

30. For those reasons, I dismiss the Application dated 16th August, 2019 but with no order as to costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 30TH DAY OF JULY, 2020.

O.A. ANGOTE

JUDGE