



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

E.L.C.A. CASE NO. 19 OF 2019

MARIKO NDWIGA.....APPELLANT

VERSUS

EDITH MUTHANJE.....RESPONDENT

(Being an appeal against the judgement and decree of the Hon. M.N. Gicheru (C.M.) dated 24.6.2019 in Embu CMCC No. 119 of 2018)

RULING

A. THE APPELLANT'S CASE

1. By a notice of motion dated 7th July 2020 purportedly brought under **Sections 3A & 3B of the Appellate Jurisdiction Act, Rules 5(2) (b) & 47 of the Court of Appeal Rules, and all other enabling provisions of the law**, the Appellant sought a stay of execution of the eviction order made on 2nd July 2020 pending the hearing and determination of *Civil Appeal No. 40 of 2020* pending before the Court of Appeal at Nyeri.

2. The said application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the Appellant on 7th July 2020. It was contended that unless a stay was granted, the pending appeal might be rendered nugatory. The Appellant contended that he had some crops on the suit properties and that if evicted he and his family members might suffer prejudice.

B. THE RESPONDENT'S RESPONSE

3. The Respondent filed a replying affidavit sworn on 16th July 2020 in opposition to the said application. The Respondent gave a detailed history of the dispute between the parties since 1977 or thereabouts. It was contended that the Appellant had lost all previous litigation before the Magistrates' courts, the High Court, the Court of Appeal and the Environment and Land Court. The Respondent contended that since the appeal was dismissed by the court then the Appellant should have filed the instant application before the Court of Appeal. The Respondent, therefore, considered the application to be an abuse of the court process and urged the court to dismiss it.

C. THE SUBMISSIONS OF THE PARTIES

4. The said application was canvassed orally by the advocates for the parties on 27th July 2020. The Appellant's advocate submitted that the Appellant had already filed an appeal to the Court of Appeal and served a record of appeal hence he should not be evicted before it is heard and determined. It was further submitted that the pending appeal may be rendered nugatory should the stay be declined. It was further submitted that the Appellant would suffer hardship should he be evicted in the circumstances.

5. On the other hand, the Respondent's advocate submitted that the Appellant had not satisfied the requirements for the grant of stay as set out in **Order 42 Rule 6 of the Civil Procedure Rules**. It was submitted that there was no demonstration of substantial loss as required by law and that the Appellant had not offered any security for due performance of the decree. It was further submitted that the land dispute had been pending in various courts for the past 40 years or so and that the Respondent has always been the successful party.

D. THE QUESTION FOR DETERMINATION

6. The court has considered the Appellant's said application, the Respondent's replying affidavit in opposition thereto as well as the oral submissions of the parties. The court is of the opinion that the main question for determination is whether or not the Appellant has made out a case for the grant of an order of stay pending appeal.

E. ANALYSIS AND DETERMINATION

7. Although the application appears to have been wrongly grounded upon the **Appellate Jurisdiction Act** and the **Court of Appeal Rules** instead of **Order 42 Rule 6** of the **Civil Procedure Rules**, the court shall excuse that anomaly under the provisions of **Section 19 (1)** of the **Environment and Land Act** and **Article 159 (2) (d)** of the **Constitution of Kenya 2010**. The court shall consequently consider the application as if it were brought under the correct provisions of the law.

8. The court has considered the entire material on record on whether or not the Appellant has demonstrated the elements of substantial loss. Whereas the court is inclined to accept that the risk of the pending appeal being rendered nugatory may constitute substantial loss, there is no material on record from which it may be concluded that the pending appeal shall be rendered nugatory unless the stay sought is granted.

9. The court has considered the long and chequered history of the dispute between the parties. Both parties are contending to be legitimate owners even though the suit properties are currently registered in the name of the Respondent. There is no allegation by the Appellant that there is a risk of alienation or other dealing with the suit properties so as to make them unavailable upon conclusion of the appeal. The material on record further shows that the Appellant caused certain encumbrances to be registered against the suit properties a long time ago hence it would be impossible for the Respondent to unilaterally deal with them.

10. In the case of **Stanley Kangethe Kinyanjui V Tony Keter & 5 Others [2013] eKLR** it was held, *inter alia*, that:

“ix) The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. Reliance Bank Ltd V Norlake Investments Ltd [2002] 1 EA 227 at page 232

x) Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.”

11. In the case of **Permanent Secretary Ministry of Roads & Another V Fleur Investments Limited [2014] eKLR**, the term ‘trifling’ was described as follows:

“A trifling appeal is one of very little importance, one whose determination is of little or no legal consequence because of a past event(s) or an earlier finding by a court of law.”

12. The court does not see how the pending appeal can be rendered worthless, futile, invalid or trifling if the stay sought is not granted. The primary dispute between the parties is the ownership of the two properties which are currently registered in the name of the Respondent. In the event of the Appellant succeeding on appeal the suit properties shall be registered in his name and if he will have been evicted by then he could still be put back into possession. The court is thus of the opinion that there is no risk of the appeal being rendered nugatory in the absence of a stay order.

13. The next aspect for consideration is whether the application for stay was filed without unreasonable delay. Although the Appellant filed his application for stay of eviction expeditiously, the court is of the opinion that he is not entitled to such order because he has failed to demonstrate the element of substantial loss. It is also strange that the Appellant sought a stay of the orders made on 2nd July 2020 whereas he does not appear to have appealed against them. The material on record shows that the pending appeal, that is, *Nyeri Civil Appeal No. 40 of 2020* is an appeal against the judgement and decree of this court dated 16th January 2020. It is not an appeal against the eviction order made on 2nd July 2020. It is also strange that the Appellant never found it fit to seek any interim protective orders since the dismissal of his appeal on 16th January 2020.

14. The court has also noted that in his certificate of urgency dated 7th July 2020, the Appellant raised some new issues which were not the subject of the appeal and previous proceedings before the various courts. It was contended that the Appellant had been in uninterrupted possession of the suit properties for over 12 years hence he was entitled to adverse possession. The question of adverse possession was never pleaded by the Appellant in the appeal before this court or even before the Chief Magistrates’ court. In the premises, the issue cannot aid the Appellant in his application for stay pending appeal.

F. CONCLUSION AND DISPOSAL ORDER

15. The upshot of the foregoing is that the court finds no merit in the Appellant’s notice of motion dated 7th July 2020. Accordingly, the same is hereby dismissed in its entirety with costs to the Respondent. It is so decided.

RULING DATED and SIGNED in Chambers at EMBU this 30TH DAY of JULY 2020 and delivered via Microsoft Teams platform in the presence of Mr. Mathenge for the Appellant and in the absence of the Respondent.

Y.M. ANGIMA

JUDGE

30.07.2020.