



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC NO. 265 OF 2013

SPARKLE PROPERTIES LIMITED.....PLAINTIFF

VERSUS

JOHANA NGAI & 9 OTHERS.....DEFENDANTS

RULING

(Application for stay pending appeal; application filed before Notice of Appeal was filed; Notice of Appeal filed close to 60 days after judgment; Notice of Appeal requiring to be filed within 14 days of the judgment; Notice of Appeal incompetent and unable to anchor an appeal to the Court of Appeal; pointless therefore to issue an order of stay pending appeal; application dismissed)

1. The application before me is that dated 16 April 2020 filed by 1st to 7th defendants. The application as drawn, seeks the following orders :-

i. Spent – (certification of urgency)

ii. That the Honourable Court be pleased to grant leave for the firm of Sharia Nyange Njuguna & Co Advocates to come on record on behalf of the 1st to 7th defendants/applicants.

iii. That the Honourable Court be pleased to order a stay of execution pending the hearing and determination of this application inter partes.

iv. That all other consequential orders and proceedings be stayed pending the hearing and determination of this application inter partes.

v. That the costs of this application be provided for.

2. The supporting affidavit is sworn by Fatuma Mwamburi, the 2nd defendant. The application is opposed.

3. To put matters into perspective, the plaintiff sued the 1st -7th defendants/applicants, claiming that they have trespassed into the land parcel LR No. 1956/506 situated in Voi. The suit property had been sold to the plaintiff in the year 2010 by Bata Shoe Company Limited. In the case, the plaintiff sought orders to have the 1st – 7th applicants demolish their structures on the land and vacate. The plaintiff also sought an order of permanent injunction against the applicants and general damages for trespass. The applicants filed defence and counterclaim through the law firm of M/s Kadima & Company Advocates. They inter alia claimed that the sale of the suit property was illegal. They contended that the suit land was part of Sagalla Ranch. They sought cancellation of the title of the plaintiff. In their counterclaim, they sued the plaintiff and Bata Shoe Company Limited and the Attorney General on behalf of the Land Registrar. For ease of reference, Bata Shoe Company are indicated as the 8th defendant, and the Attorney General, the 9th defendant.

4. The suit was heard by my predecessor, Omollo J, and judgment delivered on 24 February 2020. The learned Honourable Judge found that the plaintiff properly purchased the suit land from the 8th defendant and is fully entitled to own the land. She dismissed the claim that the suit land was part of a Group Ranch. She ordered the applicants to give vacant possession of the suit land and also barred them permanently from interfering with the land. She ordered each applicant to pay the sum of KShs. 150,000/=, in total KShs. 1,050,000/=, as damages for trespass. The judgment was delivered in the presence of Mr. Ojwang' holding brief for Mr. Kadima for the applicants, and Mr. Oloo for the plaintiff. Nothing happened in the matter until this application was filed on 16 April 2020 by the law firm of M/s Sharia Nyange Njuguna & Company Advocates.

5. It will be seen firstly, that the law firm seeks leave to come on record in place of M/s Kadima & Company Advocates who were previously on record for the applicants. I see no issue on the grant of the order seeking leave for the law firm of M/s Sharia Nyange Njuguna & Company Advocates to come on record in this matter in place of the law firm of M/s Kadima & Company Advocates. Indeed, I have seen that the previous firm has executed a consent allowing the new firm to come on record. I allow that prayer, and henceforth, the 1st – 7th defendants be deemed as being represented by the law firm of M/s Sharia Nyange Njuguna & Company Advocates.

6. On the other orders in the application, although as drawn, the prayers appear to be seeking stay pending hearing only of this application, I will consider the application as one seeking stay pending appeal, as indeed, it is brought pursuant to the provision of Order 42 Rule 6, which covers stay pending appeal.

7. I need not make a lengthy ruling on the aspect of stay pending appeal, because in my view, this application cannot succeed for reason that there is not, a competent Notice of Appeal, filed in this matter. In fact, when the application was filed on 16 April 2020, there had not been filed any Notice of Appeal. The Notice of Appeal was filed on 28 April 2020 after I declined to issue interim orders vide which I pointed out that there was no Notice of Appeal filed. A Notice of Appeal, following the provisions of Rule 75 (2), of the Court of Appeal Rules, 2010, needs to be filed within 14 days of the judgment. The Notice of Appeal herein was filed about 60 days from the date of judgment. It is therefore an incompetent Notice of Appeal and it cannot anchor an appeal to the Court of Appeal.

8. Mr. Nyange, learned counsel for the applicants, in his submissions, submitted inter alia that this court has power to extend time for the filing of a Notice of Appeal. That is not contested. But there is no application to have time for filing the Notice of Appeal extended. Further in his submissions, he did submit that the applicants have elected to proceed to the Court of Appeal for extension of time. Well, until the order of extension of time is granted, the Notice of Appeal remains incompetent. I cannot therefore see how it can be argued that there is a valid intention to appeal. There being no competent Notice of Appeal, it would be pointless to grant a stay pending appeal when no appeal can be presented before the Court of Appeal.

9. For these reasons, the application for stay pending appeal is dismissed with costs. The result is that the plaintiff is at liberty to execute the judgment.

10. Orders accordingly.

DATED AND DELIVERED THIS 22 DAY OF JULY, 2020

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA