



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

ELC APPEAL NO. 137 OF 2013

DAVID KIHARA MURAGEAPPELLANT

VERSUS

JACINTA KARUANA NYANGI1ST RESPONDENT

MUTHII NYANGI2ND RESPONDENT

(AN APPEAL FROM THE JUDGMENT DELIVERED ON 17TH JULY, 2013 BY HON. J. NG'ENO – C.M. AT KERUGOYA SENIOR PRINCIPAL MAGISTRATE'S COURT CIVIL CASE NO. 225 OF 2009)

RULING

The appellant/applicant has moved this Court through his application dated and filed herein on 19th November 2013 citing **Section 3 of the Civil Procedure Act** and **Order 42 Rule 6 (1) of the Civil Procedure Rules** seeking orders that there be a stay of execution of the judgment delivered in the Chief Magistrate's Court Civil Case No. 225 of 2009 Kerugoya on 18th July 2013 and all subsequent orders pending the hearing and determination of this appeal. He also seeks costs of the application.

The application is supported by the applicant's seventeen (17) paragraph affidavit and is based on the grounds that being dissatisfied with the Chief Magistrate's judgment aforesaid, he has filed this appeal and since the subject matter is land registered in his names which he bought for value and has been in occupation thereof since 2008, he is likely to suffer irreparable loss if execution is not stayed.

The application was opposed by the 1st respondent who, in her replying affidavit, deponed, inter alia, that she has a decree in her favour issued in KERUGOYA PMCC NO. 302 of 2008 to the effect that one acre out of land parcel No. MUTIRA/KANYEI/1483 be transferred to her. However, in an attempt to frustrate that decree, the 2nd respondent who is her son conspired with the applicant and sold the land to him in circumstances that demonstrated fraud. Further, whereas the applicant has another parcel of land where he resides with his family, the parcel of land NO. MUTIRA/KANYEI/1483 is the 1st respondent's only property where she lives and works.

When the parties appeared before me on 4th December 2014, Mr. Njeru holding brief for Mr. Magee for the 2nd respondent stated that the said respondent was not opposing the application.

Submissions have been filed both by Ms Wambugu for the applicant and Mr. Kagio for the 1st respondent.

I have considered the application, the rival affidavits and other annexures as well as the submissions by both counsels.

The genesis of this application is that the 1st respondent is mother to the 2nd respondent and the parcel of land No. MUTIRA/KANYEI/1483 is a subdivision of the original parcel of land No. MUTIRA/KANYEI/301 which had been registered in the names of the 2nd respondent to hold in trust for himself and the entire family of his later father NYANGI MWANIKI. However, the 2nd respondent subdivided the said land into three portions and sold parcel No. MUTIRA/KANYEI/1483 to the appellant. The 1st respondent moved to Court in KERUGOYA PMCC NO. 302 of 2008 which ordered that one acre out of MUTIRA/KANYEI/1483 be transferred to her but in attempt to defeat that order, the 2nd respondent transferred the parcel of land No. MUTIRA/KANYEI/1483 to the applicant herein on the same day that the judgment was delivered. The 1st respondent then moved the Court in KERUGOYA SPMC Civil Case No. 225 of 2009 (the subject of this appeal) seeking orders that the transfer of land parcel No. MUTIRA/KANYEI/1483 from the 2nd respondent to the applicant was fraudulent and deliberately done to undermine the execution of the orders granted in KERUGOYA PMCC NO. 302 of 2008 and an order seeking that one acre out of MUTIRA/KANYEI/1483 be transferred to her. The lower Court found in her favour in a judgment delivered on 17th June 2013 giving rise to this appeal and application.

Order 42 Rule 6 (2) of the Civil Procedure Rules provides as follows:-

“No order for stay of execution shall be made under sub-rule 11) 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 un-reasonable 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”.

It is clear therefore that the power donated to the Court to grant stay of execution pending an appeal is a discretionary power and the same is available to the applicant who satisfies the Court that:-

(a) Substantial loss may result to him unless the stay order is made

(b) The application has been made without reasonable delay, and

(c) Such security as the Court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given.

This rule in (c) above is therefore dependent on whether or not the Court has granted the orders of stay of execution sought. If no order of stay is granted, there would be no purpose to be served by making such an order. However, it is important that in the supporting affidavit the applicant should state that he is ready and willing to abide by such orders as the Court may make on security as that is a requirement under **Order 42 Rule 6 (2) of the Civil Procedure Rules**. Nowhere in this seventeen (17) paragraph supporting affidavit has the applicant deposed as such. Nonetheless, that omission is not fatal to the application.

Has the applicant moved the Court without un-reasonable delay? The judgment subject of this application was delivered on 18th July 2013. On 20th August 2013, the applicant filed an application for stay in the subordinate Court which was denied. It is not clear when the application for stay in the lower Court was rejected because although the applicant has stated in his supporting affidavit that the ruling was annexed as “**DK V**”, no such ruling was attached to his supporting affidavit. However, considering that the application for stay in the subordinate Court was filed on 20th August 2013 and the applicant had to await the outcome of that ruling before moving this Court on 19th November 2013, I am prepared to

find on those facts that he moved this Court without un-reasonable delay.

Has the applicant demonstrated that unless the order of stay is granted, he may otherwise suffer substantial loss? To justify the grant of an order of stay, the applicant must show or establish facts to satisfy the Court that if execution is allowed to proceed, it will result in a state of affairs that will substantially affect or negate the very essential core of the applicant's case as the successful party in the appeal – see **SILVERSTEIN VS CHESONI 20002 1 K.L.R. 867** and also **MUKUMA VS ABUOGA 1988 K.L.R. 645**. In the **MUKUMA** case (supra) the Court emphasized the centrality of substantial loss by stating that it is the cornerstone of the jurisdiction for stay since that is what has to be prevented. It is important to observe that under **Order 42 Rule 6 (2) of the Civil Procedure Rules**, it is not a requirement that the Court considers the merits or otherwise of the appeal. This Court cannot therefore look at the strength or otherwise of the applicant's appeal as the law does not require it to do so. This Court must therefore only confine itself to whether or not the applicant has established that he will suffer substantial loss.

In his supporting affidavit, the nearest that the applicant has gone to demonstrate substantial loss is in paragraph 15 where he has deponed as follows:-

“That the matter involves land and I am bound (sic) to suffer irreparable loss if execution is not stayed”

That is a bare pleading which does not demonstrate what substantial loss, if any, he will suffer if no stay is granted. The applicant ought to have placed beyond the Court facts to show to the satisfaction of the Court that if no stay is granted, he will suffer a loss that is substantial. The mere fact that land is concerned does not make any loss substantial. In his supporting affidavit, the applicant has deponed that he is the registered proprietor of the suit land for the last four (4) years and has extensively developed it and occupies the same. But the 1st respondent has countered this in her replying affidavit by stating that the parcel of land No. MUTIRA/KANYEI/1483 is the only land that she lives and works whereas the applicant has another parcel of land where he is settled. There was no further affidavit to rebut the 1st respondent's averment. On the material placed before me, there is nothing to show what substantial loss the applicant will suffer if stay of execution is not granted. The applicant has therefore not satisfied the requirements of **Order 42 Rule 6 (2) of the Civil Procedure Rules** to warrant the grant of stay.

In the circumstances, the applicant's Notice of Motion dated 19th November 2013 is hereby dismissed with costs to the 1st respondent.

B.N. OLAO

JUDGE

6TH MARCH, 2015

6/3/2015

Before

B.N. Olao - Judge

Gichia – CC

Ms Wanjiru for Appellant – absent

Mr. Kagio for 1st Respondent – present

Mr. Abubakar for 2nd Respondent – present

COURT: Ruling delivered this 6th day of March 2015 in open Court

Ms Wanjiru for Appellant absent

Mr. Kagio for 1st Respondent present

Mr. Abubakar for 2nd Respondent present.

B.N. OLAO

JUDGE

6TH MARCH, 2015