



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIVASHA
CIVIL APPEAL NO. 26 OF 2015
FORMERLY NAROK CIVIL APPEAL NO. 3 OF 2015
(Being an Appeal from Narok SPMCC No. 76 of 2013)

LUCIA TEEKA.....
.....APPELLANT

-VERSUS-

JOEL ZAKAYO NCHOE.....RESPONDENT

R U L I N G

1. The Appellant/Applicant, aggrieved by the judgment of the trial magistrate in Narok Civil Case No. 76 of 2013, filed a Memorandum of appeal to this court on 13/2/2015. On 17/2/2015 she also filed an application primarily under Order 42 Rule 6 (1) of the Civil Procedure Rules seeking stay of execution pending appeal.
2. On the face of the application are listed five grounds as follows:
 - “a) THAT Appellant has lodged an appeal against the judgment, Order and Decree of this Honourable Court in Narok Civil Appeal No. 3 of 2015.**
 - b) THAT in issue is ownership of Plot No. 95 Block 7 in the possession of the appellant and claimed by the Respondent herein who has now commenced the process of execution in an endeavor to evict the Appellant there from.**
 - c) THAT since the Appellant has been in possession of the disputed plot for over ten (10) years now or thereabouts, no prejudice will be suffered by the Respondent if the Orders sought are granted.**
 - d) THAT this application has been brought without unreasonably delay and that unless the Orders sought herein are granted, the Appellant will suffer substantial loss should the Respondent herein enforce the said judgment which actions would render the pending appeal nugatory.**
 - e) THAT it’s only fair and just in the circumstances of this case that this Court does stay execution of the Judgment/Decree herein pending the hearing and determination of the pending appeal.”**
3. In the support of the application she swore an affidavit expanding upon the grounds of the

- application. In particular she reiterates her fear of imminent eviction from the plot in dispute that she claims to have occupied or possessed for ten years. She depones that such eviction would subject her to “enormous loss.”
4. The Replying affidavit of the Respondent disputes the claim that the Appellant has had possession of the suit property for ten years. He asserts that the Respondent is the bonafide owner of the plot. That the Appellant trespassed thereon and erected iron sheet structures in 2007 prompting him to file a suit to remove her. The affidavit restates the evidence in support of the Respondent’s claim to the plot in a bid to demonstrate that the appeal filed is not arguable. The Respondent urges the court to dismiss the application as it has no merit.
 5. I must say from the outset that the most substantial portion of the Replying affidavit is really concerned with matters that belong to the appeal proper rather than the present application. Matters of evidence and the weight to be attached thereto cannot be canvassed at this point in an application of this nature.
 6. During the oral arguments the Appellant’s counsel Mr. Kilele emphasised that the Appellant will suffer substantial loss if she is evicted from the plot. He cited several authorities in support of his submissions and urged the court to note the intentions of the Respondent to dispossess the Appellant and develop the property in a copy of their application annexed to the Appellant’s affidavit. Such eventuality he argues will be detrimental to the Appellant’s interest in the property.
 7. Through Mr. Jaoko the Respondent took issue with the failure by the Appellant to annex a copy of the decree or Judgment to the application. He contended that the omission is fatal to the application. He submitted that the Applicant has not demonstrated that she is in possession of the disputed plot thus no proof of likelihood suffering substantial loss. He distinguished the Applicant’s authorities from the facts of this case. In his view the Respondent is entitled to develop the suit property.
 8. I have considered all the material canvassed before me. Firstly, the objection taken by Mr. Jaoko to the failure by the Applicant to annexe a copy of the judgment/decree appealed from is well taken. Ideally an application of this nature ought to be accompanied by a copy of the decree or judgment impugned. However to hold that failure to do so renders the application fatal would be giving undue regard to technicalities, in the circumstances of this case. There is no dispute whatsoever regarding the judgment and decree which is the subject of this appeal hence I am not persuaded that the application should fail.
 9. This being an application brought under Order 42 Rule 6 (1) of the Civil Procedure Rules, it behoves the Applicant to establish among other things that she will suffer substantial loss if the order sought is denied. While the application was brought without delay the Applicant should also offer security for the performance of the decree.
 10. At the heart of the present dispute is the ownership of Plot Number 95 Block 7 Narok Township which each of the parties claims to have acquired at different times, the Appellant by virtue of a purchase in 1997 and the Respondent through allocation by the defunct Narok County Council in the year 2001.
 11. Although the parties have devoted much effort to addressing the question of the party in current possession of the plot, in my view that is not necessarily a critical issue in the determination of the question of substantial loss in this case. Because, the Respondent admits that there are certain structures on the land which were erected, unlawfully or otherwise, by the Applicant prior to the filing of the original suit. And further that upon judgment being rendered in his favour, the Respondent filed an application in the lower court seeking orders allowing demolition of the said structures.

12. A copy of the said application, filed on 9/2/2015 in the lower court is annexed to the instant application and marked “LTI”. Equally, counsel for the Respondent in submissions asserted the Respondent’s right to develop the property. Thus whether the Applicant is in physical or constructive possession or not, the Respondent evinces an intention to take full control of the property to the exclusion of the Applicant. While it is true as observed by Mr. Jaoko that the Applicant has not demonstrated that she is carrying out any commercial activity on the plot, it is undeniable that the plot itself has commercial value and or potential.
13. If indeed the Respondent succeeds in demolishing the Applicant’s structures and commences development, the nature and value of the plot will certainly be altered significantly so that even if the Applicant were to succeed on appeal the substratum of the dispute would have completely changed, possibly to her detriment. Seemingly she has tenaciously clung to her alleged right to the plot for a long time based on alleged purchase in 1997.
14. On the other hand, the Respondent has a judgment in his favour. He should not be denied its fruits without good cause. However, I agree with the deposition by the Applicant that if her appeal is dismissed, the plot will be available to the Respondent. In a sense the plot itself if preserved would serve as adequate protection of the Respondent’s interests.
15. The Respondent has endeavoured in his lengthy Replying affidavit and the submission of his counsel to demonstrate that infact the Appellants appeal is not arguable. This however is not a relevant consideration before this court under Order 42 Rule 6 (2) of the Civil Procedure Rules. The application for stay pending appeal in the case of **Swanga Ltd –Vs- Daima Bank Ltd NAI 45 of 2001 [UR] 2 (2001)** cited by the Applicant, was made under Rule 5 (2) b) of the Court of Appeal Rules that require an Applicant to establish interalia, an arguable appeal.
16. Considering all relevant matters, I am satisfied that the Applicant will likely suffer substantial loss if the orders sought are denied, and secondly that the suit property preserved in its current state constitutes sufficient security for the eventual performance of the decree. Therefore, I do allow the application in terms of prayer 3 of the Notice of Motion. Costs will be in the cause.
17. Finally, in view of the fact that this dispute relates to ownership of a parcel of land, I would direct that this appeal be removed to the Environment and Land Court Registry in the High Court of Kenya at Nakuru so that the same can be handled by the Environment and Land Court Judge.

Delivered and signed at Naivasha this 10th day of July, 2015.

In the presence of:

Mr. Gichuki holding brief for Mr. Kilele for Applicant

N/A for Respondent

Court Assistant Barasa

C. W. MEOLI

JUDGE