



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC CIVIL APPEAL NO. 10 OF 2019

(FORMERLY HCA 31 OF 2019)

VISION AFRIKA HOUSING CO-OPERATIVE SOCIETY LTD.....APPELLANT

VERSUS

STEPHEN KAMAU MWANGI.....1ST RESPONDENT

LAND REGISTRAR, NAIVASHA.....2ND RESPONDENT

REGIONAL SURVEYOR RIFT VALLEY.....3RD RESPONDENT

THE HON. ATTORNEY GENERAL.....4TH RESPONDENT

RULING

1. The Court on 20th February 2020 delivered judgment on an appeal by the appellant and partially allowed the appellant's appeal. The effect of the order allowing the appeal was to require the Land Registrar and the Surveyor to refix and re-establish the boundaries of land parcels **Gilgil/Karunga Block 2/257** and **Gilgil/Karunga Block 2/258** owned by the Appellant and the Respondent respectively. The 1st Respondent being aggrieved by the order/judgment filed a Notice of Appeal signifying his intention to appeal to the Court of Appeal against the judgment on 4th March 2020.

2. The 1st Respondent simultaneously with the Notice of Appeal filed a Notice of pursuant to the provisions of Order 42 Rule 6 (1) of the Civil Procedure Rules praying for an order of stay of execution of the judgment pending the hearing and determination of the intended appeal. The Court on 12th March 2020 granted a temporary stay of execution pending the hearing and determination of the application. The Court further directed the parties to canvass the application by way of written submissions.

3. In support of the application the 1st Respondent/applicant averred that if the orders emanating from the judgment were to be implemented the eventual result would be the eviction of the 1st Respondent without according him a fair hearing. The applicant further contended the implementation of the judgment would be in disregard of the established laws that boundary disputes are not necessarily conclusively determined by application of section 18 of the Land Registration Act 2012. The applicant thus argues if the execution of the judgment was not stayed the intended appeal would be rendered futile. The applicant averred that he stood to suffer prejudice if the execution of the judgment was not stayed as the appellant was bound to seek to evict him. The applicant contended the boundary of his parcel of land **Gilgil/Karunga Block 2/258** has been at the same position ever since he took possession of the land in 1982 and the same has never been altered.

4. In the filed written submissions the applicant contended that he stood to suffer substantial loss if stay was not granted as execution of the judgment would result in his removal from the portion the appellant claimed he had encroached onto in the adjacent parcel of land. The applicant argued the appellant/ respondent had purchased land parcel **Gilgil/Kakamenga Block 2/257** on the basis of the boundaries that existed and that it was only after the appellant sought to have the land subdivided that they realized the size on the ground was smaller than that provided on the RIM. The applicant contended that the RIM in case of boundary disputes did not necessarily constitute conclusive authority in regard to boundaries. In support of his submissions, the applicant has placed reliance on the case of **Karim Amirali Abbany –vs- Ivan R & Another (2017) eKLR** and **Azzuri Limited –vs- Pink Properties Ltd (2017) eKLR** where the Courts respectively held a purchaser of land ought to carry out due diligence to establish the acreage of land before purchasing and that maps (such as the RIM) are not authorities on boundaries unless the boundaries are fixed boundaries. Hence in instances one has to go beyond the RIM in solving the dispute.

5. The applicant further submitted he had brought the application without undue delay and was ready to abide with any conditions the Court may impose if stay of execution was granted.

6. The Appellant/Respondent filed a replying affidavit sworn by its chairman in opposition to the applicant's application for stay. The Respondent contended that the applicant had not satisfied the conditions under which the Court may grant stay under Order 42 Rule 6 (2) of the Civil Procedure Rules. The Appellant/Respondent averred that the appellant owns land parcel **Gilgil/Karunga block 2/257** which is adjacent to the 1st Respondent's land parcel **Gilgil/Karunga Block 2/258** and argued that the Court order only required the Land Registrar and the surveyor in exercise of their mandates under the Land Registration Act 2012 to reestablish and fix the boundary between the two parcels of land. The Appellant argued the Land Registrar would be executing a statutory mandate conferred under the Act, and that no substantial loss would be occasioned to the applicant if the order was executed.

7. In the submissions filed the respondent has argued that the applicant has not demonstrated that he stood to suffer substantial loss if the decree/order was executed. The Respondent has placed reliance on the cases of **Balala & Others -vs- Githere & Others (2005) 2 EA 25 (CAK) and Machira t/a Machira & Advocates -vs- East African Standard (No2) KLR 63** where the Courts respectively underpinned the necessity to prove substantial loss and the fact that a successful party is entitled to enjoy the fruits of his judgment unimpeded unless there is good reason demonstrated such as likelihood of substantial loss being occasioned. In the Machira case (*supra*) the Court went on to observe that it was not enough for an applicant to merely state that substantial loss will result and stated the applicant ought to provide specific details and particulars of the loss.

8. The Respondent further in the submissions has pointed out the Appellant's appeal to the Court of Appeal would be a second appeal and consequently would be required to be on a point of law and within the provisions of Section 72 (1) of the Civil Procedure Act. Without the benefit of any draft Memorandum of Appeal it is not possible to determine whether the intended appeal would satisfy the conditions spelt out under section 72 (1) of the Civil Procedure Act. It is nonetheless not within the province of this Court to determine whether the intended appeal would be arguable and/or frivolous. That will be the preserve of the Court of Appeal. The Court of Appeal in the case of **Lekishon Olegeem -vs- Peter Nkoidilia & 7 others (2009) eKLR** in dismissing an application for stay arising on a second appeal stated as follows:-

“The intended appeal to this Court would be a second appeal and so only a point of law may be taken. See section 72 of the Civil Procedure Act. But, the draft memorandum of appeal incorporated in the record of the motion has set out seven grounds which mainly attack the learned judge for having “misunderstood and misconceived the circumstance obtained in the application before him and consequently, arrived at an erroneous decision” With respect we do not, without any further elaboration, read any point of law in those grounds of appeal.”

9. The court of Appeal further in the case stated thus:-

“ We have carefully considered the grounds of appeal contained in the draft memorandum, the materials made available to us and submissions both by Mr. Ogutu and Mr. Lengangule for the applicant and the respondents respectively. We have little difficulty in reaching a conclusion that the legal arguments to be canvassed in the intended appeal ex-facie to have no merit. Having found the intended appeal not arguable, we need not consider the second limb of the application”.

10. I have set out the rival positions and submissions of the parties and I now turn to consider whether the applicant has made out a case to warrant the exercise of this Court's discretion to grant stay of execution of the decree emanating from this Court's judgment delivered on 20th February 2020. The conditions that an applicant is required to satisfy in an application for stay pending appeal are set out under Order 42 Rule 6(2) and include; that the application is made without undue delay; that substantial loss may result to the applicant unless the order of stay is granted and that if required the applicant provides security for the due performance of the decree or order.

11. In the instant matter there is no dispute that both parties, the applicant and the Respondent own adjacent parcels of land. In the suit pending before the lower Court, the appellant /plaintiff contended the 1st Respondent had encroached onto their (plaintiff's) land parcel to the extent of 0.17 Hectares and sought an order for the refixing and the reestablishment of the boundary in conformity with the Registry Index Map (RIM). In the judgment I delivered on the appeal on 20th February 2020 I held that the dispute between the parties involved a boundary dispute and that being the case, the person mandated under the law to establish, determine and fix boundaries was the Land Registrar under the provisions of Section 18 and 19 of the Land Registration Act, 2012. The two parcels of land were of distinct sizes and were represented in the RIM that was used to define the boundaries and process the title documents.

12. I fail to appreciate how by the Land Registrar and the Surveyor establishing and fixing the correct boundary that would occasion substantial loss to the applicant. The Land Registrar and the Surveyor would merely be correcting an anomaly in the positioning of the boundary between the two adjoining parcels of land in case there be an anomaly.

13. It is not apparent to me what grounds of appeal the appellant will put forth in his memorandum of appeal and I am therefore not able to ascertain whether the appeal being a second appeal would satisfy the conditions in regard to second appeals set out under section 72 of the Civil Procedure Act.

14. The applicant in my view has not demonstrated before this Court that he stands to suffer substantial loss unless the execution of the decree/order is stayed .

15. I find no basis upon which I can grant stay of execution of the decree. I order the Notice of Motion dated 4th March 2020 dismissed with costs to the Respondent.

Ruling dated signed and delivered virtually at Nakuru this 30th day of September 2020.

J M MUTUNGI

JUDGE