



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

JUDICIAL REVIEW APPLICATION NO. 32 OF 2015

(FORMERLY KERUGOYA ELC JR. NO. 3 OF 2013)

REPUBLIC.....APPLICANT

VERSUS

MINISTRY OF LANDS AND SETTLEMENT.....1ST RESPONDENT

DISTRICT COMMISSIONER MBEERE NORTH.....2ND RESPONDENT

JOHN NGARE MWANIKI.....3RD RESPONDENT

D. EUTON NJUKI.....4TH RESPONDENT

KAHARERI BURI KARUGU.....EX-PARTE APPLICANT

AND

EFUREITH IRIMA MUGO.....INTERESTED PARTY/APPLICANT

RULING

A. INTRODUCTION

1. By a judgement dated and delivered on 19th December 2019 the court allowed the *ex-parte* Applicant's application for judicial review dated 3rd October 2012. By the said judgement, the court quashed the proceedings and decision of the Minister in Minister's Appeal Case No. 206 of 1999 by which the Interested Party's late father was awarded *Title No. Mbeere/Kirima/733 (the suit property)*. Being aggrieved by the said judgement, the Interested Party filed a notice of appeal dated 19th December 2019 followed by an application for stay pending appeal dated 20th December 2019.

B. THE INTERESTED PARTY'S APPLICATION

2. By the said notice of motion dated 20th December 2019 brought **under Order 42 Rule 6** of the **Civil Procedure Rules (the Rules)** the Interested Party sought an order for stay of execution of the said decree pending the hearing and determination of the appeal against it. The said application was based upon the grounds set out in the body of the motion and the contents of the supporting affidavit sworn by the Interested Party on 20th December 2020.

3. The Interested Party contended she was occupying about 10 acres out of the original suit property and that she had built a dwelling house thereon and cultivated various crops which were her means of livelihood. She was apprehensive that unless a stay was granted she would suffer substantial loss and the pending appeal would be rendered nugatory. She exhibited various photographs of the developments she contended she had undertaken on the portion of the suit property she was occupying.

C. THE EX PARTE APPLICANT'S RESPONSE

4. The *ex parte* Applicant filed grounds of opposition dated 20th January 2020 and a replying affidavit sworn on 20th January 2020 in

opposition to the said application. It was contended that the Interested Party was not the registered proprietor of the suit property and that the resultant sub-divisions were also non-existent. It was further contended that the decree whose stay was sought had been fully executed and perfected hence there was nothing to be stayed. The *ex parte* Applicant also contended that the Interested Party had not satisfied the requirements for granting a stay pending appeal including the element of substantial loss.

D. THE RESPONDENTS' RESPONSE

5. The Attorney General for the 1st, 2nd & 5th Respondents filed grounds of opposition dated 27th January 2020 in opposition to the said application on several grounds. First, it was contended that the said application was defective. Second, that it was frivolous and vexatious. Third, that the Interested Party had no *locus stadi* to file the instant application. Fourth, that no valid notice of appeal had been filed and served. Consequently, the court was asked to dismiss the application with costs.

E. THE INTERESTED PARTY'S REJOINDER

6. The Interested Party filed a supplementary affidavit sworn on 24th April 2020 in response to the *ex parte* Applicant's replying affidavit sworn on 20th January 2020. The Interested Party maintained that she had filed a valid notice of appeal dated 19th December 2019 which was served upon all concerned parties. It was further asserted that on 24th December 2019 she obtained an order for stay of execution of the decree which was served upon the Land Registrar Mbeere. It was asserted that the Registrar had made various irregular entries in the land register which were not supported by the decree dated 19th December 2019. It was pointed out that the Land Registrar had also cancelled a prohibitory order issued by the High Court in 2016 without any orders from the succession court.

F. THE EX PARTE APPLICANT'S FURTHER AFFIDAVIT

7. The *ex parte* Applicant filed a further affidavit sworn on 4th July 2020 in response to the Interested Party's supplementary affidavit sworn on 24th April 2020. It was contended that the decree dated 19th December 2019 was registered and acted upon by the Land Registrar on 19th December 2019 before the orders of stay were served. It was further contended that the interim stay orders had expired on 29th January 2020 after which the suit property was sub-divided and transferred to new owners. The *ex parte* Applicant, therefore, maintained that the application for stay had been overtaken by events.

G. DIRECTIONS ON SUBMISSIONS

8. When the application was listed for hearing on 30th June 2020 it was directed that the same shall be canvassed through written submissions. The parties were also granted leave to file further or supplementary affidavits and written submissions within certain timelines. The record shows that the Interested Party filed her written submissions on 29th July 2020 whereas the *ex parte* Applicant filed his on 3rd August 2020. The rest of the parties had not filed any submissions by the time of preparation of the ruling.

H. THE ISSUES FOR DETERMINATION

9. The court has considered the Interested Party's notice of motion dated 20th December 2019 and her supplementary affidavit, the *ex parte* Applicant's replying affidavit and his further affidavit, as well as the Attorney General's grounds of opposition. The court is of the opinion that the following issues arise for determination in this matter:

- a. Whether the Interested Party has made out a case for the grant of stay of execution pending appeal.
- b. Whether the Interested Party's application for stay has been overtaken by events.
- c. Who shall bear costs of the application.

I. ANALYSIS AND DETERMINATIONS

a. Whether the Interested Party has made out a case for the grant of an order of stay of execution

10. The court has considered the material on record and the submissions of the parties on this issue. Whereas the Interested Party submitted that she had satisfied the requirements for the grant of stay of execution of the decree dated 19th December 2019 the *ex parte* Applicant contended otherwise.

11. The application was based upon the provisions of **Order 42 rule 6 (2)** of the **Rules** which stipulate as follows:

“2) No order for stay of execution shall be made under subrule (1) 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 unreasonable 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.

(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.”

12. The Interested Party submitted that she had been in occupation of part of the suit property for several decades and that she had established her homestead thereon. She had also cultivated a variety of crops thereon which were her means of livelihood. She was apprehensive that if evicted before her pending appeal was heard and determined she would become homeless and her appeal might be rendered nugatory. She relied upon the cases of **Elena Korir V Kenyatta University [2014] eKLR; Butt V Rent Restriction Tribunal [1979] eKLR; Antoine Ndiaye V Africa Virtual University [2015] eKLR; and Victory Construction V BM (a minor suing through next friend one PMM) [2019] eKLR.**

13. The *ex parte* Applicant, on the other hand, submitted that the Interested Party had failed to demonstrate the element of substantial loss within the meaning of **Order 42 Rule 6 (2)** of the **Rules**. He relied upon the case of **Masisi Mwita V Damaris Wanjiku Njeru [2016] eKLR** and the case of **Richard Kibondo V Ndungu Waweru [2019] eKLR** in support of that submission.

14. In the case of **Leonardo Mambo Kuria V Ann Wanjiru Mambo [2017] eKLR** the test of whether or not an appeal may be rendered nugatory was considered as follows:

“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.”

15. Similarly, 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.”

16. In the case of **Butt Vs Rent Restriction Tribunal [1979] eKLR**, the Court of Appeal while considering an application for stay held, *inter alia*, that:

“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise discretion in a way so as not to prevent the appeal, if successful from being nugatory. per Brett LJ in Wilson Vs Church (No 2) 12 Ch. D ([1879] 454 at P 459. In the same case, Cotton LJ said at P 458:

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.”

17. The court is satisfied on the basis of the material on record that the Interested Party has demonstrated the element of substantial loss. The Interested Party has demonstrated that the pending appeal might be rendered nugatory in the sense that the suit property might be kept out of her reach should her intended appeal to the Court of Appeal be successful. There is already material on record indicating the suit property is already being dealt with. The court is of the opinion that the risk of unavailability of the property upon conclusion of the appeal constitutes substantial loss. The court is further of the opinion that given that the Interested Party is already in occupation she would suffer substantial loss if she were to be evicted before her appeal is heard and determined.

18. There is no doubt from the material on record that the Interested Party filed the instant application expeditiously. The application was filed on 20th December 2019 whereas the impugned judgement was delivered on 19th December 2019. There was no delay in filing it at all hence the Interested Party has satisfied the requirements of **Order 42 Rule 6 (2)** as to speed.

19. The court is further of the opinion that no security for the due performance of the decree would be required from the Interested Party given the nature of the decree in the matter. The remedy which was granted to the *ex parte* Applicant was an order of *certiorari* which would stand reactivated should the Interested Party’s appeal fail. There is no material on record to demonstrate that she may deal with the suit property in any adverse manner since the evidence on record suggests that her registration as proprietor was called by the Land Registrar.

b. Whether the instant application for stay has been overtaken by events

20. Whereas the *ex parte* Applicant contended that the instant application has been overtaken by events the Interested Party contended otherwise. The *ex parte* Applicant was of the opinion that the decree dated 19th December 2019 has been fully executed and perfected hence there was nothing to be stayed.

21. The court has considered the entire material on record and the submissions on record on this issue. There is no doubt that changes on ownership of the original suit property has been effected in the land register. There is some documentary evidence to demonstrate that the suit property was sub-divided and some portions thereof transferred to third parties who are not parties to the suit or application. The

Interested Party appeared to acknowledge those changes but she questioned the legality and propriety thereof. The Interested Party further contended that there was a subsisting prohibitory order made by the succession court at the time of the sub-division and transfers took place.

22. The court is of the opinion that the legality or propriety of the said sub-divisions and transfers do not fall for adjudication in the instant application for stay of execution. Those are issues to be determined by the court before which the appeal is pending. Accordingly, save to find that the application for stay of execution of the decree dated 19th December 2019 has been overtaken by events the court shall not determine the legality or propriety of the impugned sub-divisions and transfers.

c. Who shall bear costs of the application

23. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Jammohammed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**. Since there is a pending appeal arising from the decree dated 19th December 2019 the court is of the opinion that costs of the application should abide the outcome of the appeal.

J. CONCLUSION AND DISPOSAL ORDER

25. Although the court has found that the Interested Party has satisfied the formal requirements for the grant of an order of stay pending appeal, the court is not inclined to grant a stay because the material on record indicates that the decree in question has already been executed and portions of the suit property transferred to third parties. It is a well known principle of law that a court of law should not make orders in vain. However, the court has inherent jurisdiction under **Section 3A of the Civil Procedure Act (Cap. 21)** to make such order as may be necessary to meet the ends of justice. Accordingly, the court is inclined to make an order preventing the eviction of the Interested Party from the portion of the suit property which she is currently occupying and cultivating until her appeal is heard and determined.

25. In the event, the court makes the following orders for disposal of the notice of motion dated 20th December 2019:

- a. The Interested Party's prayer for stay of execution is hereby declined since it has been overtaken by events.
- b. The Interested Party shall not be evicted from the portion of the suit property she is currently occupying and cultivating until her pending appeal is heard and determined by the Court of Appeal.
- c. Costs of the application shall be costs in the appeal.

Orders accordingly.

RULING DATED and SIGNED in Chambers at **EMBU** this **24TH DAY** of **SEPTEMBER 2020** and delivered via Microsoft Teams platform in the presence of Mr. Ombachi for the *Ex parte* Applicant, Mr. Siro for the 1st, 2nd & 5th Respondents, Ms. Rose Njeru for the Interested Party and in the absence of the 3rd & 4th Respondents.

Y.M. ANGIMA

JUDGE

24.09.2020