



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
LANDS AND ENVIRONMENTAL DIVISION
ELC NO.659 OF 2011

DAVID CHEGE.....PLAINTIFF

VERSUS

ANN NYAMBURA KARIRUKI.....1ST DEFENDANT

ACUMEN HOLDING LIMITED.....2ND DEFENDANT

THE LAND REGISTRAR THIKA DISTRICT.....3RD DEFENDANT

THE COMMISSIONER OF LANDS.....4TH DEFENDANT

RULING

The application for determination before this court is the Notice of Motion dated the 21st December 2012, it's brought under and section 1A, 1B, 3 & 3A of the Civil Procedure Act, Order 42 Rule 6, and Order 51 Rule1 of the Civil Procedure Rules 2010.

The application is filed by the plaintiff applicant. He seeks a stay of execution of this court's ruling and order made on the 13th of December 2013. He also seeks a restraining order against the defendants from claiming interests, rights or in any way dealing with or trespassing onto or continuing further trespass onto Land titles Thika Municipality Block 19/2199, Thika Municipality Block 19/2198 and Thika Municipality Block 19/154 and or interfering with the plaintiff's right of quiet possession, occupation and enjoyment thereof pending the hearing and determination of the intended appeal.

The application is based on six grounds stated on the face of the application together with the supporting affidavit of the plaintiff applicant dated the 20th of December 2012.

The application was opposed. The 2nd respondent filed Grounds of Opposition dated the 15th March 2013.

Parties filed written submissions which I have read and carefully considered.

The applicant in his affidavit states as follows; that he will suffer substantial loss if execution proceeds as it will result in his interests in L.R Thika Municipality Block 19/2199, Block 19/2198 and 19/1594 being

extinguished and defeated despite his constitutional and statutory safeguard and protection; that L.R. 19/2199 is utilised for large scale poultry farming as a joint family venture for the benefit of the 1st Respondent and his children, that he has no alternative land to establish an alternative home and move over the 800 chicken; that the Respondent had not filed a counter claim and that the 2nd Respondent seeks to irregularly evict him; that he is willing to give any security as the Court may direct for the due performance of the Order of the Court; that he has filed the notice of appeal and that his appeal will be rendered nugatory and he will suffer loss should execution proceed; that the respondent will not suffer any prejudice if the orders are granted; that the application was made without delay.

The 2nd Respondent did not file a replying affidavit. The grounds of opposition are as follows: that there is no decree or order that has been issued that is capable of being stayed or capable of being executed; that the applicant is merely presenting his earlier application dated the 22nd of November 2011 which this court considered; that the application is fatally and incurably defective and incapable of grant; that the properties listed in the application dated the 21st December 2012 are different for the properties listed in the application dated the 22nd of November 2012; that the applicant is asking this Court to sit in appeal on its own orders and that the prayers sought can only be considered by the Court to which the appeal is preferred; that the appeal has no chance of success and that the applicant has not satisfied the conditions set out in Order 42 for grant of stay of execution.

I have considered the submissions filed. For this application am guided by the provisions of order 42 rules 6 which provide as follows that;

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.***

I note that the application was filed without delay. The applicant states that he will suffer loss as the properties are used for poultry farming and that he has nowhere else to establish an alternative home. These reasons in my view do not show the substantial loss he will suffer. He talks of a possible eviction and yet there is no such order from the court. The applicant has in his submissions argued his grounds of appeal at length, but has failed to show the loss he will suffer. I agree with the respondents submissions that the applicant is trying to obtain the injunctive order he was denied by the court. He has failed to show that he is now entitled to the injunctive orders. Lastly, on security the applicant states he is ready to offer security, in my view offering security alone without demonstrating the substantial loss is not adequate.

I therefore find no merit in the application and dismiss with costs to the Respondents. I do apologies for the delay in delivering this ruling, this is because of the heavy workload I have had from April 2013.

Orders accordingly.

Dated, signed and delivered this 7th day of **March** 2014.

R. E. OUGO

JUDGE

In the presence of:-

.....For the Plaintiff/ Applicant

.....For the 1st Defendant/ Respondent

.....For the 2nd Defendant/Respondent

.....For the 3rd Defendant/ Respondent

.....For the 4th Defendant/Respondent