REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 25 OF 2012

JOEL KIPROTICH KURGAT ..... APPLICANT

VERSUS

SYLVESTER K. BIWOTT ..... RESPONDENT

(Being an appeal from the Judgment of Hon. David Kemei (Senior Principal Magistrate) delivered on 1st March, 2012 in Eldoret Chief Magistrate's Civil Case No. 308 of 2003)

RULING

The Appellant who is the Applicant herein has moved the court by Notice of Motion dated 18th May, 2012. He prays for an order of stay of execution of the decree pending the hearing and determination of the appeal and for costs.

The application is based on grounds that:-

(a) That the appeal is against the entire judgment.

(b) That the court of 1st instance dismissed the initial application for stay exposing the applicant to imminent danger of execution.

(c) That there is imminent danger of the Applicant herein being evicted from the suit premises at any time, himself and his family will be rendered homeless.

(d) That subsequently the appeal shall be rendered nugatory.

(e) That the defendant will suffer serious damage and prejudice in case eviction is effected.

(f) That no form of compensation will be adequate in the circumstances.

(g) That the applicant is ready to furnish security for due performance of the decree.

It is also supported by the affidavit of Joel Kiprotich Kurgat the Applicant herein sworn on 18th May, 2012. He depones that he lost in the judgment in Eldoret Chief Magistrate's Civil Case No. 208 of 2003 in which he was the Defendant. That a similar application before the trial court was dismissed leaving his family with eminent danger of being evicted from the suit land. He states that the suit land, L.R. 8304 Simba Hill Farm belonged to his late father and he was therefore only a beneficiary. He states that his family has lived on the land for a long time and that if decree is executed he stands to suffer irreparable damage.

The Respondent, Sylvester K. Biwott has opposed the application by way of a Replying Affidavit sworn by himself on 24th May 2012. He depones that the application is premature as the decree of the lower court has not been drawn. That execution cannot also proceed as the bill of costs in respect of the lower court suit has not been filed. That the Applicant has never lived on the suit land and it is himself who has been residing and cultivating the land. That the Applicant is not a son of the late Joshua A. Bore and cannot claim to be a beneficiary of the land. That the late Joshua A. Bore had sold his share of the land to one James Tuwei and so the Applicant cannot lay any claim to the land whatsoever.

The Respondent further depones that the Applicant does not stand to lose irreparable damage since the nature of the decree is such that if the land is transferred into the name of the Respondent, in the event the appeal is determined in favour of the Applicant, the land can still be transferred back into the Applicant's name.

In rejoinder the Applicant filed a Supplementary Affidavit sworn by himself on 16th April, 2012. He states that the filing of the lower court bill of costs is not prerequisite to determination of the issues before the court. He states that this court has the discretion of determining this application guided by Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules.

The application was canvassed by way of filing written submissions. Those of the Applicant are dated 18th June 2013 and were filed on 24th June 2013 while those of the Respondent dated on 29th May, 2013 were filed on the same date. The submissions are a replica of the depositions borne in the respective affidavits sworn in support of and opposition to this application. I therefore need not duplicate them in this ruling. I would however wish to note that the Applicant has cited a Court of Appeal ruling in **NAIROBI CIVIL APPLICATION NO. 234 OF 1995 KUKYAMA MBUVI -VS- MUTISYA KISANGI**. The Respondent on the other hand has cited the reknown case of **GIELLA -VS- CASMAN BROWN & CO. LTD (1973) E.A 358**. I shall revert to this case law later on in this ruling.

This application is brought under Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules which provide as follows:-

"6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

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."

From the little information I gather from the papers provided, the Applicant was the Defendant in **Eldoret Chief Magistrate's Civil Case No. 308 of 2003** in which he was sued by the Respondent for the ownership of parcel of land **No. 8304 Simba Hill Farm.** He claims that the said land belonged to his deceased father and that he is therefore a beneficiary of it. The trial Magistrate granted judgment in favour of the Respondent. The Applicant in return filed the appeal upon being dissatisfied with the lower court judgment. He has now moved this court to stay the execution of the lower court decree as the effect of its execution would be to evict him from the suit

land.

The conditions under which an application of this nature shall be granted are clearly spell out in rule 6 (2) of Order 42. First, would the Applicant suffer substantial loss if the orders sought are not granted? According to the Applicant he has been occupying the suit land for a very long time such that his family has not known any other home. But on the other hand, the Respondent claims that he has been cultivating and residing on the suit land. The Respondent has however deponed that the effect of the execution of the decree would be to evict the Applicant from the suit land. This ultimately means that the Applicant would stand to lose a land he calls his home. For this reason, I would say, the Applicant passes the first test set by the law.

Second, has the Applicant brought this application without unreasonable delay? Judgment of the lower court was delivered on 1st March, 2012. The Applicant thereafter moved the lower court for similar orders vide the Notice of Motion dated 23rd March, 2012 annexed to the Supporting Affidavit as "JKK1'. By order of the same court issued on 8th May, 2012 and annexed to the Supporting Affidavit as JKK2', the said application was dismissed with costs. The Applicant then filed the instant application on 18th May, 2012, only ten days after dismissal of the initial application. He had also filed the latter application twenty two days after delivery of the judgment which cannot be considered as unreasonable delay. He is not thus guilty of indolence and would, unless for any other reason, benefit from the orders sought.

Third, does the Applicant offer any security in due performance of the decree? The Applicant submits himself to any orders the court shall give including depositing a security in due performance of the decree. But it must be borne in mind that security need not necessarily be in monetary terms. And the decree herein not being one in monetary terms, the court has the discretion to issue any orders as to preserve the subject matter pending the hearing of the appeal. I am also alive to the fact that, and I discern it, none of the parties herein holds the title to the land. The issues also raised in the Memorandum of Appeal are weighty and shall go into determining who between the parties is entitled to the suit land. For this reason, this court shall be focused in preserving the subject matter which is the suit land until the determination of this appeal.

Back to the cited case law, the case of **KUKYAMA MBUVI -VS- MUTISYA KISANGI (Supra)** being a Court of Appeal ruling focuses on conditions an Applicant seeking a stay of execution before the court requires to satisfy. Among those conditions are that, if the order of execution is not granted, the appeal would be rendered nugatory. The Court of Appeal also spelt out that the Appellant before the court must demonstrate that he has an arguable appeal. These observations are a departure from what Order 42 Rule 6 (2) of the Civil Procedure Rules provides. Therefore, the Appellant having filed his application under Order 42 Rule 6 ought to have cited a case law relevant to this rule.

As for the case of **GIELLA -VS- CASSMAN BROWN (Supra)**, it is an authority well known for spelling out what an Applicant seeking an Order of injunction ought to demonstrate. The instant application seeks an order of stay of execution as opposed to an order for injunction. For this reason, it is my view that the authority is not relevant to the instant application.

May I also point out that the extraction of a decree or filing of a bill of costs or admission of an appeal are not prerequisites to the filing of an application of this nature. Of cause Rule 6 (1) of Order 42 presupposes that the order or decree ought to have been extracted, but the failure to extract the same is a technical hitch that would not bar the court from considering the application on its merits. A bill of costs is filed by the party seeking to execute for the costs. The timing of filing the same is dependent on the urge by the decree holder to earn his/her costs. Further, the admission of an appeal is an administrative process governed by Sections 79B and 79C of the Civil Procedure Act. Such admission is premature if the Record of Appeal is not filed. In the instant case, the appeal is not yet ripe for admission and so cannot be heard. These are concerns that can only be raised if the appeal were fixed for hearing.

In the end, having considered the application in its entirety and the respective submissions, I allow the same in the following terms:-

1. A stay of execution of the decree in **Eldoret Chief Magistrate's Civil Case No. 308 of 2003** is hereby issued pending the hearing and determination of this appeal.

2. That the status quo prevailing on the subject matter being **L.R No. 8304 Simba Hill Farm** before 1st March, 2012, being the date prior to the delivery of the lower court judgment be maintained until the hearing and determination of the appeal.

3. That costs of this application be in the cause.

DATED and **DELIVERED** at **ELDORET** this 4th day of March, 2014.

G. W. NGENYE - MACHARIA

JUDGE

In the presence of:

Mr. Manani for the Appellant/Applicant

Mr. Cheptarus holding brief for Mr. Birech for the Respondent