



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 416 OF 2017

STEPHEN KIBOWEN.....PLAINTIFF

VERSUS

RUTH NJOKI WAWERU.....1ST DEFENDANT

CATHERINE WANGARI WAWERU.....2ND DEFENDANT

EUNICE WAIRIMU WAWERU.....3RD DEFENDANT

DAVID KIMANI WAWERU.....4TH DEFENDANT

MARJORIE WANJIRU MURIUKI.....5TH DEFENDANT

AMOS KUGWA MWANGI.....6TH DEFENDANT

NICHOLAS THEURI KAMAMIA.....7TH DEFENDANT

EVANS OMBONGI NYAKONGO.....8TH DEFENDANT

RULING

1. The Court delivered judgment in favour of the plaintiff in this matter on 3rd December 2019. The Defendants being aggrieved by the judgment filed a Notice of Appeal on 5th December 2019 through the firm of M/s Nancy Njoroge & Co Advocates. On 6th December 2019 the defendants filed a Notice of Motion application seeking stay of execution of the judgment, pending the hearing and determination of the intended appeal to the Court of Appeal.

2. On 5th February 2020 when the application for stay came up for hearing inter partes the Court upon hearing the parties granted stay of execution of the decree on the terms that the applicants were to file and serve their record of Appeal within a period of 90 days from the date of the order. The costs of the application were to abide the outcome of the intended appeal. That disposed of the application for stay before this Court.

3. The defendants apparently did not file and serve the Record of Appeal as directed within the 90 days period which meant the stay granted lapsed. It is on account of this failure to comply with the terms upon which the stay was granted that the defendants filed the Notice of Motion dated 27th May 2020 which is the subject of this ruling seeking to have the stay granted on 5th February 2020 restored and extended for such period as deemed fit pending the filing and serving of the Record of Appeal.

4. The defendants applicants explained that owing to the outbreak of Covid-19 pandemic soon after the stay was granted, they had not been able to file and serve the Record of Appeal as directed due to the disruption occasioned by the pandemic. The defendants stated that the plaintiff had taken advantage of the pandemic and had moved into, and taken possession of the parcels of land which he had fenced off. The Court considered the defendants/applicants application dated 27th May 2020 exparte on 4th June 2020 when it was filed and certified the same urgent and extended the order of stay of execution until 21st July 2020 when the application was to be heard interpartes.

5. The plaintiff upon being served with the defendants Notice of Motion dated 27th May 2020 filed grounds of opposition dated 15th July 2020 and a replying affidavit sworn by the plaintiff on 15th July 2020. Interalia the plaintiff contended that the firm of Karanja Mbugua &

Company Advocates were irregularly on record having purported to have taken over the brief on behalf the defendants after judgment from the firm of M/s Nancy Njoroge & Co Advocates who on record for the appellants during the trial of the matter. The plaintiff stated it was the firm of M/s Nancy Njoroge, Kairu & Company Advocates that was on record for the defendants during the conduct of the trial. The plaintiff thus contends the Notice of appeal lodged in Court on 5th December 2019 was by a firm who had never been on record for the defendants and was null and void and of no legal effect.

6. The plaintiff further deponed that the stay of execution granted by the Court was on the condition that the defendants were to file and serve upon the plaintiff the record of appeal within 90 days from 5th February 2020. He stated that after the stay granted lapsed by 5th May, 2020 he proceeded as from 10th May 2020 and took possession of the suit land, ploughed, fenced and planted crops as exhibited in the photographs attached to the replying affidavit. The plaintiff consequently asserted that the Court judgment/decreed had been executed and that the position that existed on 5th February 2020 when stay was granted no longer subsisted. Before 5th February 2020 the land the subject of the suit was vacant undeveloped and unoccupied whilst after the lapse of the order of stay, the plaintiff has taken possession, fenced the land and ploughed for purposes of planting crops. Essentially the plaintiff has had the Court's judgment executed, albeit partially.

7. The defendants Notice Motion dated 27th May 2020 sought an order restoring the order of stay granted on 5th February 2020 and extending the same for such period as would be deemed fit for the defendants to file and serve the record of appeal. Evidently even the defendants concede the plaintiff has moved onto the suit property. Under ground 3 in support of the application the defendants state as follows:-

“That the plaintiff has taken advantage of the existing circumstances and have now moved in and fenced the subject parcels of land which had been made ready for cultivation”

8. The situation cannot be reversed without having to evict the plaintiff from the land. The plaintiff has in his favour a valid judgment, at least until the same is set aside and/ or varied by the Court of Appeal. As the plaintiff entered onto the land after the stay order had lapsed there was not in force any valid order barring him from taking possession and utilising the land in furtherance of the judgment rendered in his favour. In the premises the defendants Notice of Motion dated 27th May 2020 was overtaken by events as the Court cannot order stayed that which had already occurred.

9. Having come to the conclusion that the defendants application dated 27th May 2020 was overtaken by events, as the plaintiff had taken possession of the suit properties in furtherance of the judgment, I think that is sufficient to dispose of the application and that I need not consider the other issues raised by plaintiff in opposing the application. The plaintiff has for instance challenged the appointment of M/s Karanja Mbugua & Co Advocates to act for the defendants as irregular and has contended the Notice of Appeal filed on 5th December, 2019 to be incompetent for having been lodged by a firm of Advocates that was not on record for the defendants. Further, the plaintiff has argued the failure by the defendants to file the record of appeal within 60 days of lodging the Notice of Appeal rendered the Notice of Appeal invalid as the same was deemed as having been withdrawn. These are issues that can be appropriately taken up in the Court of Appeal when an opportunity presents itself as they clearly challenge the competency of the appeal which without doubt is within the province of the Court of Appeal to decide

10. The upshot is that the Notice of Motion dated 27th May 2020 by the defendants is disallowed with each party bearing their own costs of the application.

11. Orders accordingly.

Ruling dated signed and delivered virtually at Nakuru this 29th day of October 2020.

J M MUTUNGI

JUDGE