



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KERUGOYA**

**ELCA CASE NO. 19 OF 2019**

**STEPHEN MWANGI WANJOHI.....APPELLANT**

**VERSUS**

**NYAGA JEREMIAH WAKAHIO..RESPONDENT**

**RULING**

The Appellant/Applicant vide a Notice of Motion dated 16<sup>th</sup> June 2020 brought under Order 42 Rule 6(6) Civil Procedure Rules and Section 3 Civil Procedure Act sought the following orders:-

1. Spent.
2. That there be a stay of execution of the judgment delivered on 24<sup>th</sup> October 2019 by the Honourable Court pending hearing and determination of the intended appeal already filed.
3. That an order of temporary injunction do issue restraining the respondent, his servants, relatives, agents and/or anybody claiming through him from selling, dealing, charging or transferring L.R. SAGANA/KIINE/311 pending the hearing and determination of this application or further orders of this Court.
4. That an order of temporary injunction do issue restraining the respondent, his servants, relatives, agents any anybody claiming through him from selling, dealing, charging or transferring L.R. No. SAGANA/KIINE/311 and/or evicting or interfering with the appellant's occupation and cultivation of L.R. No. SAGANA/KIINE/311 pending the hearing and determination of this appeal.
5. Any other orders the Court feels so obliged to grant.

The application is based on the following grounds:-

- a. The appellant was aggrieved and dissatisfied with the judgment of Hon. A. Ithuku Chief Magistrate delivered in Kerugoya CMCC No. 229 of 2014 and has filed this appeal.
- b. That in the impugned judgment, there was an order of eviction or permanent injunction issued against the appellant yet the respondent has been hiring and sending goons to destroy the crops and the properties of the appellant in an attempt to unlawfully and illegally evict the appellant from the suit land number Kerugoya CMCC 229 of 2014.
- c. The respondent has refused to attend and/or neglected to attend the Land Control Board for sub-division of land parcel No. GICHUGU/SETTLEMENT/SCHEME/4404.
- d. That the applicant stands to suffer irreparably unless the Deputy Registrar of this Honourable Court signs all the documents necessary to give to the decree herein.
- e. It is in the interest of justice that the Deputy Registrar of this Honourable Court signs all the necessary documents necessary to give effect to the decree.

**Applicant's Statement of Facts**

The applicant in his supporting affidavit stated as follows:-

- i. That he bought land parcel No. SAGANA/KIINE/311 from the respondent way back in 2009 at a consideration of Ksh. 1,500,000/= which he paid a deposit of Ksh. 1,200,000/=.
- ii. That as part of the agreement, the respondent was supposed to transfer the land to him and be paid the balance upon transfer but the respondent failed to honour the terms of the agreement and started harassing him.
- iii. That the respondent developed an interest in the suit land claiming that he was the absolute owner of the land and the caution he had placed on the suit property was fraudulently removed.
- iv. That to his surprise, the trial magistrate in his judgment made a finding that his persistence for transfer, he breached the contract when the respondent failed to book Land Control Board to effect the transfer and that he had failed to satisfy the Court and judgment was entered in favour of the respondent.
- v. That after the judgment was pronounced, the respondent invaded his land and asked him to vacate from the land.
- vi. That the respondent has been hiring goons who have descended his crops and demolished the fence.
- vii. That he has an arguable appeal with high chances of success and that the suit property should be preserved and that he should not be illegally removed.
- viii. That there is an urgent need for this Court to intervene to avert the action that may precipitate into a breach of the peace.

### **Respondent's Statement of Facts**

The respondent filed a replying affidavit in opposition thereto and stated as follows:-

1. That he has been advised by his advocate on record that the application dated 16<sup>th</sup> June 2020 is incompetent, bad in law and an abuse of the Court process.
2. That the applicant has couple of similar applications pending in the lower Court, being:-
  - a. Amended Notice of Motion dated 9<sup>th</sup> January 2020.
  - b. Chamber Summons dated 24<sup>th</sup> January 2020.
3. That in the lower Court, the applicant was represented by the firm of Ngigi Gichoya & Co. Advocates and since leave has never been granted to him to act in person, his application is incompetent and bad in law.
4. That there is no competent appeal that has ever been filed and he has never been served with a Memorandum of Appeal.
5. That in the amended Notice of Motion dated 9<sup>th</sup> January 2020 in the lower Court, the applicant indicated that he intended to appeal against the judgment made on 24<sup>th</sup> October 2019 and that the 30 days period had lapsed.
6. That the applicant in is counter-claim before the lower Court did not seek to remain on to have L.R. No. KIINE/SAGANA/311 transferred to him but sought for payment in the sum of Ksh. 1,616,000. He cannot therefore seek an injunction against him being the registered absolute proprietor of the land.
7. That in its judgment made on 24<sup>th</sup> October 2019, the trial Court found that it was the applicant who breached the agreement and that he was ordered to vacate the suit land immediately he harvested the crop that he was tending which has now been harvested.
8. That he was ordered to pay the applicant Ksh. 847,500/= and not 1,616,000/=
9. That the only lawful appeal he can lodge against the judgment of the trial Court is a prayer for payment of Ksh. 1,616,000/= instead of Ksh. 847,500/= awarded.

### **Applicant's Submissions**

The counsel for the applicant did not file submissions within the timelines given.

### **Respondent's Submissions**

The counsel for the respondent filed submissions on the following issues:-

**i. Whether there has been unreasonable delay in filing the application?**

The counsel for the respondent submitted that the applicant filed the Notice of Motion under certificate of urgency dated 16<sup>th</sup> June 2020. He submitted that the applicant filed the application after 7 months and 14 days. He argued that the delay for 7 months 14 days is unreasonable delay as he is delaying the respondent from enjoying the fruits of the judgment delivered on 24<sup>th</sup> October 2019. He cited the case of **SELESTICA LIMITED VS GOLD ROCK DEVELOPMENT CIVIL APPEAL NO. 48 OF 2015** where **Judge R.E. Aburili** referred to the decision by **Munyao J.** in **JABER MOHSEN ALI & ANOTHER VS PRISCILLA BOIT & ANOTHER E & L No. 200 of 2012 (2014) e K.L.R.** The learned counsel also cited the case of **KENYA COMMERCIAL BANK LIMITED VS JOHN BENJAMIN WANYAMA CIVIL APPEAL No. 97 of 1999** where **Judge Njoki Mwangi** referred to the case of **VISHYRAM RAVJI HALAI VS THORNTON & TURPIN CIVIL APPLICATION No. 15 of 1990 (Nairobi) e K.L.R 365.**

**2. Whether the applicant has satisfied the conditions for the grant of stay pending appeal?**

The learned counsel submitted that the application for stay is pre-mature and that no sufficient reasons has been offered to explain the delay in filing the appeal within the stipulated period and that the applicant has not invoked the provisions of *Section 79C Civil Procedure Act*. The learned counsel also submitted that the applicant failed to file the application in time but has brought the same after 7 months, 14 days. He submitted that the application is an after-thought as no sufficient documentary evidence of urgency of filing an appeal out of time. Counsel also cited the following cases in opposition of the application:

1. Kenya Shell Limited Vs Benjamin Karuga Kibiru & Another Civil Application No. 97 of 1986 (Nairobi).
2. Kenya Hotel Properties Limited Vs Wutesden Investments Limited, Civil Application No. 322 of 2006 (U.R 178/06).

Lastly the learned counsel submitted that the applicant has not made out a prima facie case with probability of success to warrant the grant of stay of execution and that the application should be dismissed with costs.

**Legal Analysis**

I have considered the Notice of Motion and the supporting affidavit. I have also considered the contents of the replying affidavit and the submissions. The applicant is seeking orders of stay pending appeal. He is also seeking injunctive orders restraining the respondent from selling, dealing, charging or transferring the suit property L.R. No. SAGANA/KIINE/311 pending the hearing and determination of the intended Appeal.

**Order 42 Rule 6(2) Civil Procedure Rules** sets out the grounds under which the orders sought are granted and states as follows:-

**(2) No order for stay of execution shall be made under sub-rule (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.**

**6. Notwithstanding anything contained in sub-rule (1) of this rule, the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate Court or tribunal has been complied with”.**

The three principles for the grant of stay pending appeal are:-

1. The application must be brought without unreasonable delay
2. The applicant will suffer substantial loss unless the orders of stay are granted and
3. Security has been given.

From the facts contained in the affidavit evidence, the impugned judgment by the trial Court was given on 24<sup>th</sup> October 2019. The time given by Statute to an aggrieved party is usually 30 days from the date of judgment under *Section 79 G of the Civil Procedure Act Cap. 21* laws of Kenya. However, a party can be allowed to file appeal outside the stipulated period upon production of a certificate of delay showing that the delay was occasioned by the Court in typing, proof-reading and certifying of the proceedings. No such certificate of delay has been produced by the applicant. There is no explanation given by the applicant why he did not file the application for more than seven (7) months from the date of judgment. Such a period of time without explanation in my view is inordinate and unacceptable.

The second ground for stay pending appeal is that the applicant must show that he will suffer substantial loss. In the case of **KENYA SHELL LIMITED VS BENJAMIN KARUGA KIBIRU & ANOTHER CIVIL APPLICATION No. 97 of 1986 NAIROBI (Reported in 1986) K.L.R 410**, the Court of Appeal stated:-

**“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence**

of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence, it is difficult to see why the respondents should be kept out of their money..... The applicant has not shown why Court should grant the order sought while the applicant has not stated the loss it would suffer if the money is paid to the respondents ..... On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgment. The applicant has not given to Court sufficient materials to enable it to exercise its discretion in granting the orders of stay”.

I agree with the decision of the superior Court which is also binding on me.

The third and last ground for the grant of stay pending appeal is security for the due performance of the decree. The applicant has not given any security or undertaking. As regards the orders for injunction, the applicant has not satisfied the test for the grant of the orders. He has not established a prima facie case. He has not also shown that he will suffer irreparable loss which cannot be compensated by an award of damages.

In the upshot, I find the application dated 16<sup>th</sup> June 2020 unmeritorious and the same is hereby dismissed with costs. It is so ordered.

**READ, DELIVERED and SIGNED in open Court at Kerugoya this 23<sup>rd</sup> day of October, 2020.**

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**E.C. CHERONO**

**ELC JUDGE**

In the presence of:-

1. Ms. Githaiga holding brief for Mr. Magee
2. Appellant – present
3. Mbogo, Court clerk – present.