



REPUBLIC OF KENYA
IN HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 37 OF 1984

REPUBLIC.....APPLICANT

VERSUS

DIRECTOR OF LAND ADJUDICATION.....1ST RESPONDENT

MURATHA MICHEU2ND RESPONDENT

EX-PARTE

STANELY MBIUKI

RULING

The ex-parte Applicant, Stanley Mbiuki was granted leave in 1984 to commence judicial review proceedings in respect of some land. The said leave was also directed to operate as stay. The substantive notice of motion has never been heard to date.

Sometimes in 2009 the 2nd Respondent filed an application seeking to dismiss the substantive notice of motion. In the alternative he sought that the order of stay be vacated and/or set aside. After hearing the parties, Justice Mbogholi Msagha delivered a ruling on 23rd February 2011 in which he lifted and vacated the order of stay.

The ex-parte Applicant being aggrieved by the said ruling filed a notice of intended appeal and through the notice of motion application dated 22nd March, 2011, he now seeks a stay of the decision of 23rd February, 2011 pending the hearing and determination of the intended appeal. The application is supported by the grounds on its face and an affidavit sworn by the Applicant on 22nd March, 2011.

The Applicant's case is that the lifting of the stay order will affect a family of more than 200 people. The Applicant averred that the subject matter of these proceedings is ancestral land and if the occupants are removed before the determination of the pending appeal the same will be rendered nugatory. Further, that since the family of the Applicant occupies the land the balance of convenience should tilt in his favour. The Applicant indicated that he is ready and willing to offer security for any loss that may be occasioned by the granting of the stay order.

It is the Applicant's case that although he has been blamed for the delay in the disposal of the matter the blame should be shared with the 2nd Respondent who did not come on record for a long time. The Applicant avers that the court record shows that on several occasions he attempted to prosecute the matter

but the court always insisted that as this was a land matter, it was important for every party to be given an opportunity to be heard.

The Applicant deposed that his advocate had informed him that he had filed a Notice of Appeal and had already applied for proceedings and a certified copy of the order.

The application was opposed through the replying affidavit sworn on 28th June, 2011 by Japeth Muyundi Kibanga who identified himself as one of the personal representatives of the estate of the late Muratha Micheu, the 2nd Respondent. It is the 2nd Respondent's case that the matter is *res judicata* as the court has made a decision lifting the stay and the ex-parte Applicant cannot therefore be allowed to rely on the same facts to make another application.

The 2nd Respondent's case is that the suit land is not ancestral land and neither do over 200 persons reside on it. Mr. Japhet Muyandi Kibanga averred that the suit premises was the ancestral property of the original 2nd Respondent, the late Micheu Muratha and this was confirmed by the decision of the 1st Respondent, the Director of Land Adjudication. He avers that the ex-parte Applicant has other parcels of land which he has developed and on which he resides with members of his family. It is Mr. Kibanga's case that the ex-parte Applicant only settled on the suit property after the stay order was granted in 1984. Further, that the ex-parte Applicant has continued wasting the suit property by cutting trees growing on the land.

It is Mr. Kibanga's case that these proceedings have been used to oppress the 2nd Respondent's family and that the stay orders should not be reinstated. Further, that the Applicant has not offered any security and/or undertaking as to damages as a condition precedent to being granted an order of stay pending appeal.

The ex-parte Applicant swore a further affidavit on 2nd December, 2011 and insisted that he has occupied the suit land since the adjudication period. He avers that he bought another parcel of land after the dispute over the suit land had started. He averred that he planted the trees he is said to have cut and Mr. Kibanga does not even know who planted those trees. He intimated that he is ready and willing to provide any security the court may deem just in the circumstances.

In **ANDREW NKIIRI THIRINJA & 20 OTHERS v DIRECTOR OF PUBLIC PROSECUTIONS & ANOTHER [2014] eKLR** the Court of Appeal stated that:

“This application is brought under rule 5 (2) (b) of this Court's Rules, where the requirements to obtain the orders as sought are undoubtedly well settled. It is original and discretionary. For an applicant to succeed, twin guiding principles must be satisfied, first, that the intended appeal is arguable, and it is not frivolous and second, that unless a stay is granted, the appeal or as in this case, the intended appeal, if it eventually succeeds, will be rendered nugatory - see the cases of Githunguri vs. Jimba Credit Corporation Ltd. (No. 2) (1988) KLR 838, J.K. Industries Ltd. vs. Kenya Commercial Bank Ltd. (1982-88) 1 KAR 1688, Reliance Bank Limited (In Liquidation) vs. Norlake Investments Limited – Civil Application No. Nai. 98 of 2002 (unreported) and Al-Mahra Limited vs. Premier Foods Industries Limited – Civil Application No. Nai. 163 of 2006.

Contrary to the view taken by Mr. Wandugi that since the application is unopposed it must succeed, we hasten to reiterate that, for the applicant to succeed the twin limbs must be fulfilled, and that the fulfilment of one condition without the other is not sufficient.”

It follows therefore that for the Applicant to succeed he must demonstrate that he has an arguable case and if stay is not granted the appeal will be rendered nugatory. Both limbs must be satisfied.

Is the Applicant's appeal arguable? It is difficult for this court to assess whether the Applicant has an arguable appeal. There is inherent danger in attempting to answer this question as it may appear as if I

am sitting on appeal over the decision of a fellow Judge of the High Court. The intended appeal will be made to the Court of Appeal and it is only just and fair that the assessment as to whether the proposed appeal is frivolous or not be left to the appellate court. In order not to prejudice the Applicant, it is safe to proceed on the assumption that he has an arguable appeal.

The other question is whether the appeal would be rendered nugatory if the stay order is not granted. It is noted that this matter was filed in 1984 and for thirty years it has never been heard. The ex-parte Applicant appears to blame the court and the 2nd Respondent for this delay. The 2nd Respondent, on the other hand, blames the Applicant for the delay in the prosecution of the case. In my view, whoever or whatever is to blame for the delay is not important at this stage. It is only important to note that this matter has taken thirty years in court and this is not a short period of time by any standard.

The 2nd Respondent does indeed concede that the ex-parte Applicant is in possession and has put up structures. Although the ruling which the ex-parte Applicant seeks to stay was delivered in 2011, nothing has happened since then. The ex-parte Applicant remains in possession of the land. I do not see anything happening before this matter is heard and determined. Even if the ex-parte Applicant is evicted, the appeal will not be rendered nugatory as he can always be put back in possession and any loss of property can be quantified and compensated. Sustaining a stay order for over 25 years, even where the same is deserved, is unjustifiable and morally wrong. It amounts to one party enjoying fruits of judgement without a hearing. I therefore find that the intended appeal will not be rendered nugatory if the ruling in question is not stayed. The application therefore fails and the same is dismissed with costs being in the cause.

What the parties need to do is to focus their energies on the disposal of the substantive notice of motion. This court has a duty to ensure that this matter is heard and concluded as soon as is justly possible. In the circumstances I give directions as follows:

1. The ex-parte Applicant to file further submissions, if any, in respect of the substantive notice of motion within seven (7) days from today's date.
2. The respondents are at liberty to respond to the same within seven (7) days from the date of service.
3. The ex-parte Applicant will then have three (3) days from the date of service within which to file supplementary submissions, if any.
4. The date for highlighting submissions to be fixed at the time of the delivery of this ruling.

Dated, signed and delivered at Nairobi this 5th day of November , 2014

W. KORIR,

JUDGE OF THE HIGH COURT