



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC CASE NO. 26 OF 2016**

**DANSON MUNENE KIBETU.....PLAINTIFF**

**VERSUS**

**EDWARD NJERU.....1<sup>ST</sup> DEFENDANT**

**EVANS MBOGO MWANGI.....2<sup>ND</sup> DEFENDANT**

**JOYCE NJOKI KANG'ARA.....3<sup>RD</sup> DEFENDANT**

**RULING**

**Introduction**

The application before me is the Notice of Motion dated 7<sup>th</sup> May 2020 seeking the following orders:-

**(1) Spent.**

**(2) That the Honourable Court do order the plaintiff to remove his building and/or structure from title number KERUGOYA/TOWNSHIP/448 forthwith and in default the Honourable Court do order that the plaintiff, his family, tenants agents and/or servants be evicted thereon and/or the building/structure on title number TOWNSHIP/250/448 be removed by M/S PROVIDENCE AUCTIONEERS.**

**(3) That the Officer In-charge Kerugoya Police Station do provide security during the exercise.**

**(4) That the costs of this application be provide for.**

The application is based on the following grounds:-

(1) That judgment herein was entered in favour of the defendants as against the plaintiff on 30<sup>th</sup> April, 2020.

(2) That vide the aforesaid judgment, the orders of injunction issued at the interlocutory stage were discharged and vacated forthwith.

(3) That at the interlocutory stage off title number KERUGOYA/TOWNSHIP/250/448 and brought in building materials for purposes of development thereof.

(4) That on page 15 of the judgment herein, this Court held that there was an access road between the plaintiff's land parcel No. 250/173 and land parcel No. 250/448 measuring approximately 10 metres.

(5) That in the access road, the plaintiff has put up structures which have partly encroached on the 3<sup>rd</sup> defendant title number KERUGOYA/TOWNSHIP/250/448.

(6) That the 3<sup>rd</sup> defendant is desirous of having the aforesaid structure removed to allow her enjoy the fruits of the judgment herein.

(7) That the 3<sup>rd</sup> defendant is prejudiced as she continues to suffer loss and damage.

(8) That the plaintiff should be stopped from benefiting from the unlawful acts of trespass.

(9) That the plaintiff should be forcefully removed from the suit property as he has adamantly refused to vacate thereon.

The application is opposed with a replying affidavit sworn by the plaintiff on 21<sup>st</sup> May, 2020.

### **APPLICANT'S FACTUAL STATEMENT**

The applicant's in his affidavit evidence stated that judgment herein was entered in favour of the defendants as against the plaintiff on 30<sup>th</sup> April 2020. He stated that at the interlocutory stage, this Court had issued injunctive orders which in affect retained the status quo of the suit property at the material times and that after judgment was entered, the orders of injunction issued at the interlocutory stage were discharged and vacated forthwith. She further stated that in page 15 of the judgment herein, this Court made a finding that there is an access road between the plaintiff's land parcel No. 150/173 and land parcel No. 250/448 measuring approximately 10 metres which access road is blocked by an illegal structure that bears the signboard for "*Slopes Optical Limited*".

The applicant also stated that in the aforesaid access road, the plaintiff has put up a structure which has partly encroached on title No. KERUGOYA/TOWNSHIP/448 as shown in the area bearing the signboards for "*Best Hair Parlour*" and "*Stationery*". The applicant further contends that she is desirous of having the illegal structures removed to enable her proceed with the construction process as the building materials they bought with her husband have been going to waste thereby incurring losses in the process.

### **Respondent's Factual Statements**

The plaintiff/respondent opposed the application and stated that the orders being sought by the applicant are substantive in nature and cannot be determined by way of an application as the issues being raised are new which the applicant ought to have filed a separate suit. The plaintiff/respondent further stated that this Honourable Court is now functus officio and that the filing and hearing of this application amounts to re-opening the case which would amount to addressing new issues which were not subject of litigation. He contends that he was dissatisfied with the judgment of the Court delivered on 30<sup>th</sup> April 2020 and has preferred an Appeal and an application for injunction at the Court of Appeal which application is pending hearing and determination. He also stated that by allowing this application will pre-empt the findings of the Court of Appeal or at worst, conflict the orders of the Court of Appeal in the event that the said application for injunction is allowed.

### **Legal Analysis**

I have considered the application dated 7<sup>th</sup> May 2020 and the replying affidavit. I have also considered the annexures to the affidavits, both in support and the replying affidavit. The respondent in his replying affidavit has raised weighty issues which in my view necessitate this Court to frame the issues for determination in this application as follows:-

- (1) Whether the orders being sought in the Notice of Motion dated 7<sup>th</sup> May 2020 raises new matters?**
- (2) Whether the filing of an appeal acts as a stay?**
- (3) What are the appropriate orders?**
- (4) Who will bear the costs of the application?**

### **Whether the orders being sought in the Notice of Motion dated 7<sup>th</sup> May raises new matters?**

It is not in dispute that there is a valid judgment of this Court issued on 30<sup>th</sup> April 2020. It is also not in dispute that there is no order granted either by this Court or the Superior Court(s) staying the said judgment. The issues for determination in every dispute can be determined from the pleadings. In the plaint dated 26<sup>th</sup> February 2016, the plaintiff/respondent had sought the following orders:-

- (1) A declaration that the plaintiff is the owner of plot No. 215 Kerugoya.*
- (2) A declaration that the acquisition of a lease hold in respect of plot No. KERUGOYA/TOWNSHIP/250/448 was improper, un-procedural, illegal null and void ab initio.*
- (3) An order for cancellation of the leasehold for plot No. KERUGOYA/TOWNSHIP/250/448 and the ground to revert to public land. Any subsequent allocation to be procedurally and legally done.*
- (4) A permanent injunction do issue restraining the defendants by themselves, servants, agents, relatives or anybody else claiming through them from encroaching, trespassing, constructing or in any other way interfering with plot No. 215 Kerugoya.*
- (5) Costs of the suit.*

Flowing from the plaint herein, the plaintiff/respondent was laying claim to land parcel described as No. 215. He even filed an application contemporaneously with the plaint seeking a temporary injunction under certificate of urgency. When the application was placed before this

Court, the same was certified urgent and orders in terms of prayer No. 2 were allowed in the following terms:-

***“2. That a temporary injunction be and is hereby issued restraining the 3<sup>rd</sup> defendant/respondent, his agents or servants from carrying out any development and from interfering with the applicant’s quiet possession of plot No. 215 Kerugoya and/or on plot No. Kerugoya/Township 250/448 pending the hearing and determination of prayers 3 and 4 of this application.***

***3. That inter-partes hearing on 14<sup>th</sup> March 2016.***

Arising from the prayers in the plaint and the application filed under certificate of urgency, the plaintiff/respondent was seeking determination of two plots namely Number 215 Kerugoya which he was claiming ownership and Number Kerugoya/Township/250/448. In the judgment delivered on 30<sup>th</sup> April 2020, this Court found that the plot which the plaintiff/respondent claimed described as plot No. 215 Kerugoya did not exist and the purported letter of allotment dated 28/12/1995 was a mere piece of paper without any evidentiary value. This Court also observed that the space where the alleged plot No. 215 Kerugoya lay was an access road measuring 10 metres between the two plots belonging to the plaintiff and the 3<sup>rd</sup> defendant being No. 250/173 and 250/448. The application dated 7<sup>th</sup> May 2020 does not therefore raise any new matters.

**Whether the filing of an appeal acts as a stay?**

***Order 42 Rule 6 (1) CPR states as follows:-***

***(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 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 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”.***

The respondent has indicated in his replying affidavit that he has preferred an appeal to the Court of Appeal where he has also filed an application for injunction. It is trite law that a Notice of Appeal or any other expression to appeal against a decree or order shall not operate as a stay. The respondent’s intention to appeal against the decree of this Court cannot in my view deny the applicant who is a successful litigant the fruits of his judgment.

### **Conclusion**

From my analysis of the factual evidence and the applicable law, I find the Notice of Motion dated 7<sup>th</sup> May 2020 merited and the same is hereby allowed as prayed. The costs of the application shall be borne by the respondent. It is so ordered.

***READ, DELIVERED and SIGNED in open Court at Kerugoya this 9<sup>th</sup> day of October, 2020.***

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**E.C. CHERONO**

**ELC JUDGE**

**In the presence of:-**

***1. Ms Kiragu holding brief for Mrs. Makworo***

***2. Mr. Ngigi***

***3. Mbogo – Court clerk***