



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE 348 OF 1999

PYRETHRUM BOARD HOUSING CO-OPERATIVE SOCIETY LIMITED
.....**PLAINTIFF**

VERSUS

MUNICIPAL COUNCIL OF NAKURU.....DEFENDANT

RULING

On 27th July 1999, the respondent herein filed suit against the respondent for the following reliefs:

- 1) A perpetual injunction restraining the applicant by itself, its servants and/or agents from entering, trespassing, wasting, alienating, or in any way interfering with the respondent's quiet enjoyment of a parcel of land known as NAKURU MUNICIPALITY BLOCK 23/108.
- 2) General damages and costs of the suit.

The said suit was concluded on 16th January 2008 when judgment was entered against the applicant in favour of the respondent as prayed in the plaint and the respondent declared the lawful owner of the suit land. A counterclaim that the applicant had filed was dismissed.

On 29th January 2008 the applicants file a notice of appeal against the judgment. On 28th February 2008 the present application was filed seeking inter alia, an order for stay of execution, all proceedings relating to the execution of the judgment and decree pending the hearing and determination of the appeal. It is in the said application that this ruling is delivered.

A temporary stay of execution was granted by the court on 22nd October 2008 subsequent upon the taxation of the plaintiff's bill of costs. The present application is premised on the grounds that the applicant has an arguable appeal with high chances of success, and that the same would be rendered nugatory if the execution of the decree and all orders arising from the judgment herein was not stayed.

The applicant cites what it refers to as "*special circumstances*", the existence of a school on the suit land with an attendance of 615 students, whose education needs would be disrupted with a negative impact. According to the applicant, the suffering which the said students would be exposed to constitutes irreparable loss on the part of the applicant. The application is opposed on the strength of a replying affidavit filed on 10th March, 2008. In it, the respondent contends that the application is an abuse of the

process of the court, owing to the fact that the school talked about was illegally erected during the subsistence of the suit and in breach of an injunction issued by this court on 1st September, 1999.

Submitting on behalf of the applicants Mrs. Mbeche emphasized only on the element of the stated special circumstances and cited two authorities to support her submissions, namely; **Fidan Gathumbi Njuguna –vs- Mungai Njuguna (NKR) HCCC NO. 410 OF 1999 and Oraro & Rachier Advocates – vs- Co-Operative Bank of Kenya Limited (C.A.) CIV. APPLICATION NO. NAI 358 OF 1999 (149/99UR)**. Both authorities have been carefully considered.

Mr. Karanja Mbugua for the respondents submitted that the application seeks to preserve an illegal status quo for the reasons stated in the replying affidavit and that great injustice would be done to the respondents who have wanted for 11 years to enjoy the fruits of their hard earned property. He submitted further that the applicants have not demonstrated that an award in damages would not adequately compensate them in the event that the appeal succeeds.

I find it prudent to state at this instant that I do not find the two authorities cited by the applicants relevant to their case. The two are distinguishable. I say this because both of them do not address the principles of law and the provisions of the Civil Procedure Rules under which this court operates in dealing with applications of this nature. The conditions which must be fulfilled by an applicant seeking stay orders under **Order XLI Rule 4** are clearly stated in **Rule 4(2)** of the said order. They are that:

i) An applicant must satisfy the court that substantial loss may result to the applicant if an order for stay is not granted and that the application has been brought without undue delay.

ii) The applicant must satisfy the court that he has given such security for the due performance of the decree or order as may be ultimately binding.

Special circumstances or unique requirements may be considered by the court while exercising its discretion whether to grant or refuse a stay, but in my considered view, such consideration cannot override the mandatory requirements of **Order XLI rule 4(2)**. I am led to believe that a view, as taken herein, explains why the court in **Butt –vs- The Rent Restriction Tribunal [1982] KLR 417**, cited in the **Fidan Gathumbi** case also held that:

“The general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.”

Clearly from the words ***“should that appeal court reverse the judge’s discretion”*** must refer to the court of appeal, where an application for stay is sought under **rule 5(2)(b)** of the **Court of Appeal Rules**. It is in an application in the court of appeal that the question whether the denial of a stay would render the appeal nugatory is the primary consideration when deciding whether a stay should or not issue. That was the scenario in the **Oraro & Rachier** case. I believe the principle would equally be of prime consideration where the order appealed from and in respect of which a stay is sought was issued by a subordinate or tribunal.

Going to the merits of the application, I have noted that the issue of the school was considered in the judgment now challenged. The learned Justice Kimaru recorded in his judgment that:

“It was the defendant’s (applicant) case that 615 pupils who are currently learning at Naka Primary School would be affected if judgment is entered in favour of the plaintiff (respondent).”

and that:

“the suit land measuring about 10 acres was surrendered to the commissioner of lands for the

purposes of setting up a public primary school... The defendant became aware of its surrender and made plans to develop a public primary school on the suit land. However, before the defendant could build the primary school, the Commissioner of Lands allocated the land to Hyrax Developers Ltd who in turn sold the same to the plaintiff (respondent). It is apparent that the defendant, apart from assuming that the suit land was public utility land, did nothing to secure the suit land from being transferred to private developers.”

The court then found that even if the applicants questioned the manner in which the Commissioner of Lands transferred the suit land to Hyrax Developers Ltd who in turn sold the same to the respondents herein, the title to Hyrax Developers Ltd could not be impeached without the commissioner being enjoined in the suit and that if the allocation to Hyrax was questionable “***then it is the commissioner of lands who would be answerable***”.

The learned judge concluded by finding that since the land had been surrendered to the Commissioner of Lands and then transferred to the respondents then the same was no longer available for the applicant’s initial plans of developing a school.

Given the above, I do not think that the applicants are genuine in using the existence of the school as a reason to support their application for a stay of execution herein. They have not at all challenged the respondent’s contention that the said school was developed in breach of a court order a fact which is clearly proved by the record. This clearly shows that their hands are tainted in the face of equity.

The applicants have not demonstrated to my satisfaction that the dreaded probable hardship by the school children would impact directly on the applicants in a manner likely to cause substantial loss to them. Such loss is not even stated.

For all these reasons, I find that there is no justifiable cause for granting the order for stay sought herein. Accordingly the application is hereby dismissed with costs.

Dated, signed and delivered at Nakuru this 10th day of July 2009

M. G. MUGO

JUDGE