



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC APPEAL NO 1 OF 2019

COUNTY GOVERNMENT OF LAIKIPIA.....APPELLANT/APPLICANT

VERSUS

JAMES KIMANI MBURU.....1st RESPONDENT

JOHN KAHWAI KABUCHO.....2nd RESPONDENT

BONFACE MUGO WAIKWA.....3rd RESPONDENT

RULING

1. Before me for determination is the Notice of Motion dated 5th February 2019 brought under Sections 1A and 3A of the Civil Procedure Act, Order 42 Rule 6, and Order 51 Rule 1 of the Civil Procedure Rules, and all other enabling provisions of the law where the Applicant seeks for the following orders.

a. Spent.....

b. Spent.....

c. That this Honourable Court be pleased to grant an order of stay of the Lower court proceedings in ELC Case No. 374 of 2018 pending the hearing and determination of the filed Appeal.

d. The costs of this application be provided for.

2. The said application is supported by the grounds set on the face of the application as well as on the sworn affidavits of Alexander Muchemi the legal advisor of the Appellant/Applicant.

3. On the 12th February 2019, the application was argued orally wherein counsel for the applicant submitted that their application sought to stay the proceedings in the lower court being ELC No 374 of 2018 pursuant to their filed Memorandum of Appeal.

4. That the nature of the claim brought by the Plaintiff/Respondents was on pieces of property acquired in 1991 whose cause of action to the claim arose from the use and ownership of the properties.

5. That the contention of the application was that the claim was statutory barred by dint of Section 7 of the Limitation of Actions Act.

6. That the Appellant/Applicant had raised a Preliminary objection along those times which preliminary objection was dismissed. The appeal was thereof an appeal of the ruling of the lower court dismissing the preliminary objection.

7. The Applicants submission was that the appeal was a strong Appeal and had a high probability of success. That the application was brought without delay the ruling having been delivered on the 23rd January 2019 and the application having been filed on the 6th February 2019.

8. The Applicant's contention was that if the orders were not granted, the appeal would be rendered nugatory which in turn would render substantial prejudice and irreparable loss to the applicants.

9. Counsel prayed that the orders sought in the notice of motion be granted by the Honorable court.

10. The Application was opposed by counsel for the respondent who relied on their grounds of opposition dated and filed on the 11th February 2019 to submit that the Appellant had not tabled any proof to confirm the allegations that the cause of action to the suit pending before the lower court arose in the year 1991 as submitted.

11. Further that the appellant had not attached copies of the pleadings filed before the lower courts in Nyahururu Case No 374 of 2018. The allegations was therefore new issues raised at the bar as it has not been captured in the notice of motion and in the supporting affidavit therein.

12. That on the contrary, the cause of action in the lower court file arose in the month of November, 2018 and was founded on the acts of trespass committed by the Defendant in the lower court suit, the appellant being one of them, touching on the Respondent's suit parcels which were acquired in the year 1991.

13. That the application for stay was unmerited because the Appellant had not demonstrated that he stood to suffer any substantial loss or prejudice if the same was not granted.

14. That the provisions of Section 42 rule 6 of Civil Procedure Rule were to the effect that:

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 such application and to make such order thereon as may to it seem just, 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.

15. That for a party to succeed on an application for stay, he must demonstrate that substantial loss shall be occasioned. He must table a copy of the ruling or order the subject of appeal. In the instant case, the appellant had not attached a copy of the ruling of 23rd January 2019, the subject of his appeal without which this court is not in a position to tell whether the appeal has merit or whether the appellant shall suffer substantial loss or be prejudiced.

16. The appellant had further not attached documents to show that he had applied for copies of the proceedings and rulings or paid for them and that the same were yet to be supplied to him.

17. That the Respondents had on the other hand demonstrated that if the orders of stay sought were granted, there were interim orders of injunction issued on the 5th November 2018 in the lower court Case No 374 of 2018 which orders shall lapse automatically after the lapse of 1 year without extension. That the proceedings in the lower court were at an interlocutory stage. That the appeal was mainly on issues of limitation of time and there was a high possibility that the appeal would be determined before the lower court proceedings are determined.

18. That if the court shall determine that the lower court suit is statutorily barred as sought for in the appeal, the lower court proceedings shall be stopped at the stage they shall have reached.

19. That a casual look at the memorandum of appeal made it clear that the appeal had no chances of success. It was counsel's submission that the appellant had not satisfied conditions set out under order 46 rule 6 of the Civil Procedure Rule, the applicable law which includes furnishing of security for purposes of the order. They prayed for the dismissal of the application.

20. Counsel for the interested party herein, and the 2nd Defendant in the lower court did not oppose the notice of motion. He submitted that the ruling delivered by the Chief Magistrate on 23rd January 2019 was on a preliminary point of law where the appellant had sought to strike out the suit as it was statutorily barred.

21. That it was apparent from the pleadings by the Respondent/Plaintiffs that the cause of action arose in 1991. That the appeal stood a high chance of success and that they would be joining the appellants in proving this at the appeal stage

22. He submitted that the lower court matter be stayed. The effect of success in the appeal would be to strike out the lower court suit which would mean that all the proceedings will be nullified and rendered void in the circumstances. That it was important to avoid a case where precious judicial time will be wasted.

23. That should the lower court proceedings be allowed to continue, the lower court was likely to make further orders that are potentially prejudiced to the proceedings in the appeal that will render the same nugatory.

24. That the appeal was on a preliminary point of law and it was safe to procrastinate that it will not overstay and the prejudice that the Respondent speaks of is not likely to occur in the event

25. He submitted that it was in the interest of justice and in the interest of saving judicial time that the notice of motion be allowed and the lower court proceedings be stayed until the appeal was heard and determined.

26. Counsel for the respondent objected to the submission by counsel for the interested party to the effect that from the notice of motion dated 5th February 2019, no party had been cited as an interested party. Further in the memorandum of Appeal, the pleadings that had initiated this proceedings, one honorable Joseph Maina Kiguru who had presented himself as an interested party was the 4th Respondent in the memorandum of Appeal. That it was therefore strange that the 4th Respondent was highly in support of the application brought against

him by the Appellant/Applicants

27. That the provisions of Order 51 rule 14 of the Civil Procedure Rule provided that;

(1) Any respondent who wishes to oppose any application may file any one or a combination of the following documents —

(a) a notice preliminary objection: and/or;

(b) replying affidavit; and/or

(c) a statement of grounds of opposition;

(2) the said documents in subrule (1) and a list of authorities, if any shall be filed and served on the applicant not less than three clear days before the date of hearing.

28. The 4th respondent has not filed any of the above documents.

29. Counsel submitted that the oral submissions by the interested party be expunged from the record and be disregarded when the court is making a determination in this matter

30. In rejoinder, Counsel for the interested party submitted that for the purpose of notice of motion they were not cited as Respondents as it was not the substantive Memorandum of Appeal. That they had come to court as the interested party to the application

31. In rejoinder to the above submissions, Counsel for the Applicant submitted that in order to grant a stay under Order 42 rule 2 of Civil Procedure Rule, three conditions had to be fulfilled:

i) A substantial loss may result to the Applicant unless stay of execution is ordered;

ii) Application not brought without undue delay

ii) Security is furnished

32. He submitted that the application was not brought without undue delay. That the Applicants had stated that he would suffer irreparable loss and prejudice therefore the two grounds had been satisfied.

33. That on the issue of security, the Applicant vide ground 4 of his application had stated that they are willing to abide by any directions given by the court.

34. That Order 42 Rule 8 of the Civil Procedure Rule exempted the Applicant, who is the government, from furnishing the security which security could not be substantiated in this case.

35. The Applicant submitted that the grounds for granting an order of stay had been fully satisfied. The issues raised by Respondent were issues for appeal. That he had submitted that the ruling had not been typed and undertook to file it within which time the court would grant. That in the record of appeal, they would attach the proceedings and ruling while on the issue of interim orders obtained by the Respondents and while looking at the appeal, it was unlikely that it would take one (1) year. That the Respondents had an opportunity to make any application before the court for any orders. That they were willing to abide by any directions

Analyses and determination.

36. I have considered the rival arguments. The issue as already stated is whether this court has jurisdiction to stay proceedings in the lower court pending the determination of the appeal.

37. A Preliminary Objection filed by the Applicant/Appellant herein that the suit filed in the trial Magistrate's Court being ELC No. 374 of 2018 was statutorily time barred by the provisions of Section 7 of the Limitation of Actions Act, and the lower court having dismissed the Preliminary Objection vide its ruling delivered on the 23rd January 2019 is the main reason for the present application herein where the Applicant now seeks to have the proceedings in the Chief Magistrate's Court halted pending an appeal on the said ruling.

38. The application is premised on **Order 42 rule 6** of the Civil Procedure Rules which specifies the circumstances under which either the trial court or an appellate court may order stay of execution or proceedings pending an appeal.

39. A further reading of this provision of the law clear stipulates a situation where the Applicant seeks to stay execution. It is clear from the face of the application and from the submissions herein by the parties that they were operating on the mistaken belief that the conditions prescribed in **Order 42 rule 6(2)** were also applicable to applications for stay of proceedings which is not the case in this circumstance. **Order 42 rule 6(2)** cannot come to the aid of the applicant.

40. **Ringera J** (as he then was) when confronted by a similar application in the case of **Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000** held as follows:

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously” (emphasis added)

41. In this regard thereof, the courts discretion in deciding whether or not to grant stay of proceedings as sought in this application must be guided by any of the following three main principles;

- a) Whether the applicant has established that he/she has a prima facie arguable case.
- b) Whether the application was filed expeditiously and
- c) Whether the applicant has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought.

42. It is important to point out that an arguable appeal is not one that will necessarily succeed but one which raises triable issues.

43. What is fundamental in the said application, is the express statutory prohibition of bringing an action to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person. As is stipulated under Section 7 of the Limitations of Actions Act.

44. On the first issue herein, I think that the applicant has demonstrated that it has an arguable appeal regarding whether the suit filed in the trial court was or was not in contravention to the envisaged provisions of Section 7 of the Limitations of Actions Act.

45. I find that the applicant had demonstrated that if the court were to decline granting orders of stay of proceedings as sought it will suffer prejudice which will expose it to injustice.

46. On the second issues as to whether the application was filed expeditiously, it is not in contention that the application was brought without delay the ruling having been delivered on the 23rd January 2019 and the application having been filed on the 6th February 2019.

47. On the last issue as to whether the applicant has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought, I find that the non-attachment of formal decree or order from the lower court on the basis of which the appeal or application would be made is not in my humble view, fatal to an appeal or interlocutory application under the appeal. That is why the court has discretion under sections 3A and 63 of the Civil Procedure Act, which discretion is anchored under Article 159 of the Constitution of Kenya 2010.

48. In the case of **Dream Camp Kenya Ltd vs. Mohammed Eltaff and 3 Others** [2013] eKLR, the court of Appeal held as follows:

“Every litigation is inconvenient to every litigant in one-way or another. Also no one in his right senses enjoys being sued and ipso facto no one cherishes litigation of any nature unless it is absolutely necessary. With respect, we accept litigation is expensive and no litigant would enjoy the rigours of trial. The aftermath of vexatious and frivolous litigations is normally taken care of by way of costs. The discomfort of litigation would not certainly render the success of the intended appeal nugatory if we do not grant the application sought. If the learned Judge is eventually found wrong on appeal, and the applicant succeeds in its intended appeal, then the orders so made by the learned Judge would be quashed and the applicant would be compensated for in costs.”

49. In **Harman Singh & Others vs Mistri 1971 E.A 122**, it was held that:

The High Court has inherent jurisdiction to order a stay of a suit for sufficient reason where the ends of justice so require. It is a discretionary power vested in the Court

50. I find that the applicant has an arguable case on the appeal from the decision of the trial court on the issue of statutory prohibition pursuant to Section 7 of the Limitation of Actions Act which will be canvassed at the intended appeal.

51. I find that the claim by the Applicants herein should first be determined expeditiously so that if it is confirmed that indeed the Respondents' case in the trial Magistrates' court was Statutorily time barred than it would be in line with the provisions of Section 1B of the Civil Procedure Act.

52. Accordingly, for the reasons set out above, I grant the Applicant's Notice of Motion dated 5th February 2019 in terms of prayers 2, 3 and 4 thereof. The Record of Appeal shall be filed and served within the next 21 days.

53. That Cost of this Application be in cause.

Dated and delivered at Nyahururu this 28th day of February 2019.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE