



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

ELCA CASE NO. 18 OF 2018

MICHAEL NYAGA NTHIGA.....APPELLANT

VERSUS

FAITH NJOKI WAMBOGO.....1ST RESPONDENT

JUDITH WAMBOGO NJOGU.....2ND RESPONDENT

LAND REGISTRAR EMBU.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

(Being an appeal from the judgement of Hon L.K. Mwendwa (Senior Resident Magistrate) delivered on 9th August, 2018 in the Principal Magistrate Court Civil case No. 82 of 2015 at Runyenjes)

RULING

1. By a notice of motion dated 16th October 2018 brought under the provisions of **Order 42 Rule 6 and Order 51 Rule 1 of Civil Procedure Rules, Sections 1A and 3A of the Civil Procedure Act (Cap 21) and all other enabling provisions of law** the Appellant sought the following orders;

a. That the application herein be heard ex-parte in the first instance and be certified as urgent.

b. That this honourable court be pleased to grant stay of execution of judgement delivered on 9th August, 2018 in Runyenjes PMCC No. 82/2015 pending the hearing and determination of this application interparties.

c. That this honourable court be pleased to order stay of execution of the judgement of Hon L.K. Mwendwa delivered on 9th August 2018 in the Principal Magistrate Court Civil Case No. 82 of 2015 at Runyenjes pending hearing and determination of the appeal.

d. That this honourable court be pleased to issue inhibition orders against land parcel No. Kagaari/Kigaa/3508 until the appeal is heard and determined.

e. That the costs be in the cause.

2. The said application was based upon the grounds set out on the face of the motion and supported by the Appellant's supporting affidavit sworn on 16th October 2018. It was contended that the Appellant had filed the application without undue delay; that his appeal was arguable with high chances of success; and that unless the orders sought were granted, the pending appeal might be rendered nugatory, if successful.

3. The 1st Respondent filed an undated replying affidavit on 18th October 2018 in opposition to the said application. It was contended that the said application had no merit and that it was a tactic to deny the Respondents the fruits of their judgement. It was further contended that the judgement and decree of the magistrate's court *in Runyenjes SPMCC Case No. 82 of 2015* merely dismissed the Appellant's suit hence there was nothing capable of being stayed.

4. When the said application was listed for hearing on 14th November 2018, the advocates for the parties agreed to canvass it through written submissions. The parties were granted a total of 42 days to file and exchange their respective submissions. The record shows that although the Respondents filed their submissions on 18th December 2018, the Appellant did not file his submissions until 8th March 2019.

5. The court has considered the Appellant's said application, the replying affidavit in opposition thereto as well as the written submissions on

record. The court is of the view that the following two issues arise for determination in the application;

- a. Whether the Appellant has made out a case for an order for stay of execution.
- b. Whether the Appellant has made out a case for the grant of an order of inhibition.

6. It would appear from the material on record that the Appellant's suit was dismissed by the trial magistrate hence he lost his bid to recover *Title No. Kagaari/Kigaa/3508* (hereinafter *the suit property*). In the circumstances, there was no positive order capable of execution except, may be, an order for payment of costs. The court, therefore, agrees with the Respondents' submission that the prayer for an order of stay is misconceived since there is nothing to be stayed. There is, of course, nothing which could prevent an aggrieved Appellant in such circumstances from seeking an injunction or other interim order pending the hearing and determination of an appeal.

7. In the case of **Western College of Arts & Applied Sciences Vs Oranga & Others [1976-80] KLR 78** the Court of Appeal held, *inter alia*, that;

“But what is there to be executed under the judgement the subject of the intended appeal? The High Court has merely dismissed the suit, with costs. Any execution can only be in respect of costs.

In Wilson Vs Church the High Court had ordered the trustees of a fund to make a payment out of that fund. In the instant case, the High Court has not ordered any of the parties to do anything, or refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court judgement for this court, in an application of a stay. It is so ordered.”

8. That holding has been followed in various other cases such as **Kilindini Warehouses (K) Ltd & Another Vs Omar Saleh Said & Another [2014] eKLR** which was cited by the Respondents' Advocate. The said case of **Western College of Arts and Applied Sciences** was also cited with approval in **Nairobi Civil Application No. Nai 219 of 2007 Sonalux Limited & Another Vs Barclays Bank of Kenya Ltd & 2 Others**.

9. The second issue relates to an order of inhibition. It was contended that unless the suit property was preserved, there was a risk of it being alienated or disposed of with the consequence that the pending appeal may be rendered nugatory, if successful. The Respondents did not specifically address this aspect of the application in their written submissions. It was not contended that there was no risk of the suit property being unavailable upon conclusion of the appeal.

10. In the case of **Shivabhai Patel Vs Manibhai Patel [1959] E.A 907**, the court made the following observations with regard to preservation of property which is in dispute.

“...In my opinion it is not only right that the court should attempt to preserve property which may be in issue, but it is the clear duty of the court to do so. If the Plaintiff succeeds in this suit (and part of his claim is based on this cheque) there might be a barren result, and that it is the duty of the court to avoid...”

11. The court has considered the entire material on record at this juncture. It would appear that there was an agreement for exchange of land amongst the parties or some of them. It would further appear that the Appellant transferred the suit property to the 1st Respondent in the hope of receiving another parcel in exchange thereof. It is also apparent that his suit for recovery of the suit property was dismissed by the magistrate's court in consequence whereof he filed the instant appeal.

12. In the circumstances, the court is of the opinion that if the suit property is alienated or disposed of before the conclusion of the appeal, there might be a barren result. There is a risk that the appeal, if successful, might be rendered nugatory. Accordingly, the court is satisfied that there is sufficient cause to grant an order of inhibition for preservation of the suit property until the appeal is disposed of or until further orders.

13. The upshot of the foregoing is that although the Appellant's prayer for an order for stay has no merit, the court finds that he has made out a case for the grant of an order of inhibition. Accordingly, the court makes the following orders;

- a. The Appellant's prayer for an order of stay for execution is hereby declined.
- b. The Land Registrar Embu shall register an order of inhibition under section 68 of the Land Registration Act, 2012 against Title No. Kagaari/Kigaa/3508 for a period of two years from the date hereof or until the hearing and conclusion of the appeal, whichever comes first.
- c. Costs of the application shall be costs in the appeal.

14. It is so ordered.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **28TH** day of **MARCH, 2019**.

In the presence of Ms Kiai holding brief for Ms Ndorongo for the Appellant and Mr Njagi holding brief for Mr Ndande for the Respondent
Court clerk Muinde.

Y.M. ANGIMA

JUDGE

28.03.19