



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 146 OF 2015

(FORMERLY KERUGOYA 46 OF 2014)

ITUMU MBUTEL.....PLAINTIFF

VERSUS

IRERI NJERU.....1ST DEFENDANT

PETER MUGO IRERI.....2ND DEFENDANT

RULING

1. By notice of motion dated 12th November 2018 brought under the provisions of **Order 9 Rule (9) and (10) Order 42 Rule (6) of the Civil Procedure Rules** (hereinafter the *Rules*) and **all the enabling provisions of the law** the 2nd Defendant sought leave of court to change advocates from the firm of Njiru Mbogo & Co Advocates to Momanyi Gichuki & Co Advocates. The 2nd Defendant also sought an order for stay of execution of the judgement dated 25th October 2018 together with all consequential orders pending the hearing and determination of an intended appeal.
2. The said application was based upon the grounds set out on the face of the motion. It was contended that the 2nd Defendant was living and conducting tailoring business on the suit property and that if he were to be evicted his intended appeal would be rendered nugatory. It was further contended that even if he were to be evicted he should at least be allowed to carry his belongings with him.
3. The said application was supported by an affidavit sworn by the 2nd Defendant on 12th November 2018 in which he reiterated and expounded upon the grounds set out in the motion. It was alleged that the Plaintiff had issued an illegal eviction notice with a view to evicting him from the suit property. He further claimed that he had put up a permanent building on the suit property on which he was carrying on tailoring business. He contended that if he were to be evicted at this moment, his intended appeal to the Court of Appeal would be rendered nugatory.
4. The Plaintiff filed a replying affidavit sworn on 13th December 2018 in opposition to the said application. It was contended that the 2nd Defendant had never been in possession of the suit property save for the temporary structure on the suit property on which he used to undertake his tailoring business. It was further contended that he ceased conducting the said business about one year prior to the conclusion of the suit. It was also stated that the 2nd Defendant had voluntarily removed his possessions from the said temporary structure in consequence of which the Plaintiff fenced of the suit property.
5. It was the Plaintiff's further response that the decree has since been fully executed by his registration as proprietor and that he had since sub-divided the original suit property into twelve (12) portions being *Embu/Gangara/4014 – 4025*. The Plaintiff, therefore, contended that the application for stay had been overtaken by events. He, therefore, asked the court to dismiss the application for stay.
6. When the said application was listed for hearing on 17th December 2018 the 2nd Defendant's advocate sought leave to file a supplementary affidavit within 14 days. The court granted the leave sought and directed the 2nd Defendant to file and serve a further affidavit and written submissions on his application within 21 days. The Plaintiff was granted a period of 21 days upon service to file and serve his written submissions. The record shows that the 2nd Defendant filed a further affidavit and written submissions on 22nd January 2019. There were no submissions on record on behalf of the Plaintiff by the time of preparation of this ruling.
7. The court has considered the 2nd Defendant's said application, the Plaintiff's replying affidavit in response thereto as well as the submissions on record. The grounds upon which a stay of execution of decree may be granted are set out in **Order 42 Rule 6 (2) of the Rules** in the following terms;

“(2) No order for stay of execution shall be made under subrule (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”.

8. The 2nd Defendant is required to demonstrate what substantial loss, if any, he may suffer unless the order for stay is granted. Although the 2nd claims to be in occupation of the suit property, there is no evidence on record to demonstrate such occupation. The evidence at the trial of the suit indicated that the 2nd Defendant had built a brick structure on a portion of the suit property for business purposes. That business must be the tailoring business the parties have referred to in their affidavits. The evidence at the trial also showed that the Plaintiff was cultivating the other portion of the suit property. There was no evidence to the effect that the 2nd Defendant was residing on any part of the suit property.

9. The court notes that the 2nd Defendant has not alleged in either the supporting affidavit or further affidavit that the Plaintiff intends to sell the suit property before the hearing and determination of the intended appeal. The court would readily agree that disposal of the suit property may constitute substantial loss within the meaning of **Order 42 Rule 6 (2) of the Rules** since it may render the intended appeal, if successful, nugatory. However, that is not the contention of the 2nd Defendant in the instant application.

10. The Plaintiff has contended that the application has been overtaken by events because the decree has been executed and he has since subdivided it into twelve new parcels. He exhibited copies of the relevant mutations for the alleged sub-division. Although it would appear from the material on record that steps have been taken towards execution, it is not clear if the process has been completed or perfected. The Plaintiff did not exhibit a copy of the land register for the suit property to verify his claims as to registration and sub-division. The copy of the mutation form exhibited shows that it has not yet been registered by the Land Registrar. It could not, therefore, be stated with certainty that the application for stay has been overtaken by events.

11. Although the court has found that the 2nd Defendant has failed to demonstrate that he is entitled to an order of stay, the court is nonetheless inclined to make an order for preservation of the suit property for a limited period to accord the 2nd Defendant a chance to file and prosecute his intended appeal. There is some evidence on record to the effect that the Plaintiff is in the process of sub-dividing the suit property. If the property is alienated before the intended appeal is heard and concluded, then there might be a barren result should the 2nd Defendant succeed on appeal.

12. The upshot of the foregoing is that the court finds no merit in the 2nd Defendant’s notice of motion dated 12th November 2018 and the same is hereby dismissed with costs to the Plaintiff. However, in exercise of the court’s inherent power under **section 3A of the Civil Procedure Act (Cap 21)** the court hereby issues an order of **inhibition** under **section 68 of the Land Registration Act, 2012** to prevent the registration of any transactions with respect to *Title No. Embu/Gangara/764* and *Embu Gangara/4014 – 4015* for a period of two years with effect from the date hereof. It is further ordered that the Deputy Registrar shall supply the 2nd Defendant with copies of the proceedings for the purpose of the intended appeal within 45 days from the date hereof.

13. It is so ordered.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 7TH day of MARCH, 2019.

In the presence of Mr Kathungu for Plaintiff and Mr. Wachira holding brief for Mr. Momanyi for the Defendants.

Court clerk Mr. Muinde.

Y.M. ANGIMA

JUDGE

07.03.19