



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

APPEAL CASE NO. 18 OF 2018

LILIAN MERCY MUTUA T/A LILIAN M GEMSAPPELLANT

VERSUS

KASIGAU RANCHING (D.A) CO. LIMITED..... RESPONDENT

RULING

1. This ruling is in respect of the Notice of Motion dated 13th November 2018 by the Appellant. It is brought under Sections 1A, 1B, 3, 3A, 63(e), 75 and 78 of the Civil Procedure Act, Order 22 Rule 22, Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law.

2. The Application basically seeks an order to stay any/all further proceedings in **Voi SPMCC ELC No.16 of 2018; Kasigau Ranching (D.A.) Co. Limited –vs- Lilian Mercy Mutua T/A Lilian M. Gems**. The Application is premised on the grounds on the face of the motion and supported by the affidavit of Lilian Mercy Mutua T/A Lilian M. Gems sworn on 13th November 2018. The Applicant had raised a notice of Preliminary Objection in the subordinate court on the grounds that the Chief Magistrate's court lacked jurisdiction to entertain the Respondent's claim as presented before it for the reason that it offended various provisions of Section 5 of the Civil Procedure Act, Section 13 of the Environment and Land Court Act, Order 4 Rules 1 (4), Order 4 Rule 3, Order 4 Rule 6, Order 2 Rule 10 (1), Order 4 Rule 1 (6), Order 2 Rule 15(1)(a) and various articles of the Constitution as well as several provisions of the Mining Act. Upon hearing the advocates for the parties, the learned magistrate, (E. G. Nderitu SPM) found that the notice of preliminary objection was unmerited and overruled the same. The Applicant has now preferred this appeal against that decision.

3. The Application is opposed by the Respondent through a replying affidavit sworn by Jonathan Mwangeje Mshiri on 13th December, 2018 and grounds of opposition dated 13th December, 2018. It is the Respondent's contention that land parcel registered as **LR. 12180** belongs to the Respondent who has a title to it. That the Appellant secretly moved to the land without the consent of the Respondent and has refused to move out despite objections and protests mounted by the Respondent against illegal entry into the said parcel of land. The Respondent believes that the Appellant is illegally on the said land and is doing illegal mining on mining location Reference No.1459/1-10 since there is no consent from the registered owner. That the said land is private land and the Appellant has not shown registrable interest thereon.

4. Relying on legal advice, the Respondent believes that the subordinate court at Voi has jurisdiction in law to hear and determine the suit dealing with trespass to private land and could issue orders of eviction against the trespasser on the land. It is the Respondent's contention that the suit in the subordinate court is not about mining rights but mainly trespass to private land and violation of the rights of the registered owner. That the Appellant hunched the objection before the subordinate court on several sections of the mining Act which do not deal with jurisdiction. That issues of fact cannot be raised at the objection level as these are issues to be tested during the hearing of the suit. The Respondent argues that the appellant has not shown what prejudice she is likely to suffer if the matter in the subordinate court proceeds to full hearing.

5. Mr. Ngonze, learned counsel for the Appellant in his submissions relied on the law invoked and the grounds thereon well as the facts in the supporting affidavit. He submitted that pursuant to the averment in the plaint, the appellant raised a Preliminary Objection on the issue of jurisdiction but the subordinate court in its ruling disallowed the objection. The Appellant has filed a Memorandum of Appeal in which he avers that the subordinate court has no jurisdiction under the Mining Act. He submitted that unless the orders sought herein are granted, the appeal shall be rendered nugatory.

6. On his part, Mr. Getange submitted that the subordinate court has jurisdiction, adding that the gist of the matter before the subordinate court is not about mining but trespass. He submitted that the Application is an abuse of the court process and urged the court to have it dismissed.

7. I have considered the Application and the submissions made as well as the authorities cited. I have also considered the relevant law. The Application is *inter alia*, expressed under Order 42 Rule 6 of the Civil Procedure Rules and Sections 1A, 1B, 3, 3A 63(e), 75 and 78 of the

Civil Procedure Act. Order 42 Rule 6 (1) and (2) provides as follows:

(1) No appeal or second appeal shall operate as a stay of execution or proceeding 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 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.

(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:

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 Court of Appeal in the case of **Butt -v- Rent Restriction Tribunal (1982) KLR 417** while considering an Application of this nature had this to say: -

1. “The power of the court to grant or refuse an Application for stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is; if there 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.

3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the Applicant at the end of the proceedings.

4. The court in exercising its discretion whether to grant and refuse an Application for stay will consider the special circumstances of the case and unique requirements”

9. It is clear from the wording of Order 42 Rule 6 that for an Applicant to succeed in an Application of this nature, he must satisfy the following conditions, namely; (a) substantial loss may result to the Applicant unless the order is made and (b) the Application has been made without undue delay.

10. In the case of **Silverstein – v- Chesoni (2002) 1KLR 867**, the court held that: -

“The issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

11. In the present case, the Applicant has stated that the appeal would be rendered nugatory unless stay is granted. The Applicant objected to the jurisdiction of the subordinate court. The objection was overruled. However, the Applicant has preferred an appeal against ruling of the subordinate court. In my view, the Applicant has demonstrated that it would suffer substantial loss. If the proceedings proceed to conclusion before the subordinate court, the appeal herein may be rendered nugatory.

12. On whether or not the Application was brought without undue delay, I am satisfied that there was no delay. The Application was filed on 14th November, 2018 while the ruling appealed against was made on 30th October, 2018 and Memorandum of Appeal lodged herein on 6th November, 2018. There was no unreasonable delay.

13. The upshot is that I find the Application dated 13th November, 2018 has merit and is allowed. Costs off this Application to abide the outcome of the appeal.

It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA this 6th day of March 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Omuya Holding for Githange for Respondent

No appearance for appellant

Esther Court Assistant

C.K. YANO

JUDGE