



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO.95 OF 2017

MARY NJERI MUNGAI.....PLAINTIFF

VERSUS

TEKET OLE MUNTET.....1ST DEFENDANT

PAUL SITIYIO MUNTET.....2ND DEFENDANT

RULING

(Application for stay pending appeal; decree against the applicant being one for a permanent injunction and vacant possession of land; land having been in possession of the respondent until the applicants trespassed into it; no substantial loss demonstrated by the applicants; application dismissed with costs)

1. The application before me is that dated 16 July 2018 filed by the unsuccessful defendants. It is an application brought pursuant to the provisions inter alia of Order 42 Rule 6 of the Civil Procedure Rules, and the main prayer is for a stay of execution of the judgment and decree pending hearing of an intended appeal to the Court of Appeal.

2. To put matters into context, in this suit, the plaintiff/ respondent sued the defendants/applicants seeking a declaration that she is the legal owner of the land parcel Naivasha/Moi Ndabi/452 and for an order to permanently restrain the defendants from the said land. She averred in the plaint that she is the rightful proprietor of the said land having been allocated by the Settlement Fund Trustees (SFT) and having been issued with title after clearing with the SFT. The applicants filed defence and counterclaim. They also claimed that they had been allotted this land by the SFT although they had yet to be issued with title. I heard the case and in my judgment delivered on 3 July 2018, I held for the respondent. I declared her the rightful proprietor of the suit land and ordered the applicants to vacate the suit land within 14 days. I also issued an order of permanent injunction against the applicants and directed them to shoulder the costs of this suit.

3. Aggrieved, the applicants filed a Notice of Appeal on 12 July 2018 and followed it up with this application seeking stay pending appeal. In the supporting affidavit, sworn by the 2nd defendant, the applicants have basically averred that they have a good appeal and that they are ready to abide by any conditions set by the court. The respondent filed Grounds of Opposition where she contended that she has been in occupation and what the respondents have been doing is trespassing. It is argued that they will suffer no prejudice as they have never been in possession. It is also said that they should deposit Kshs. 750,000/= as security.

4. I have considered the application. Order 42 Rule 6 (2) applies and it provides as follows :-

(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.

5. It will be seen from the above that stay may be granted if the applicant demonstrates that he stands to suffer substantial loss and further if the applicant is able to provide security as the court may order. On substantial loss, I am not persuaded that the applicants have demonstrated to me that they stand to suffer any substantial loss if this application is disallowed. The supporting affidavit sworn by Mr. Muntet, the 2nd applicant does not disclose in any way what loss they may suffer. The onus is clearly upon the applicants to tell the court what loss they stand to suffer so that the court can assess whether this disclosed loss amounts to substantial loss as required by the rules. But as I have said, the applicants have not told me anything about any loss that they may suffer.

6. The decree that I issued was one asking the applicants to vacate the land and permanently restraining them from it. From the evidence that was tendered, I was persuaded that it is the plaintiff who had been in possession until the applicants came to the land and decided to settle in it. Clearly to me, the applicants must have come from somewhere or have land somewhere else. For example, where does the family of the applicants reside? This question was never answered during the hearing of the suit and it has not been offered within this application. I am thus not persuaded that the applicants stand to suffer any substantial loss if the orders sought herein are not granted.

7. Having not been persuaded that there is any substantial loss that the applicants may suffer, this application must fail and is hereby dismissed. It follows that for the duration of the appeal, the applicants will have to stay away from the suit land, and if they are in possession, they must give vacant possession to the respondent forthwith. If the applicants succeed on appeal, they can always come back and claim possession of the suit land but for now they are permanently restrained from the same.

8. The plaintiff/respondent will have the costs of this application.

9. Orders accordingly.

Dated, signed and delivered in open court at Nakuru this 6th day of March 2019.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In Presence of : -

No appearance on the part of M/s Wairegi Kiarie & co. for the applicants.

Mr. Ikua present for the respondent.

Court Assistant: Nelima Janepher.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU