



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

CASE No. 79 OF 2016

MBUGUA THUO.....PLAINTIFF

VERSUS

LABAN GATONYE KAMAU.....DEFENDANT

RULING

1. Judgment was delivered in this matter on 30th April 2019. The court found that the plaintiff had failed to prove his case and proceeded to dismiss it with costs to the defendant. The plaintiff's case as pleaded in plaint filed on 10th March 2016 was that he was a member of a land buying company known as Tayari Farmers Co. Ltd since the 1980s and that by virtue of such membership, he became the proprietor of parcels of land known as plot number 625 (Tayari) and plot number 626 (Tayari). That he had been in occupation of the plots for over 20 years and that on or around 8th March 2016, the defendant trespassed on the plots and deposited building materials thereon with an intention of 'grabbing' the land and building on it.

2. The had plaintiff therefore sought judgment against the defendant for a permanent injunction restraining him either by himself, his agents, his servants and/or employees from trespassing, developing and in any other way from interfering with the parcels of land known as plot No. 625 (Tayari) and plot No. 626 (Tayari); compensation for mesne profits lost during the pendency of this suit; Costs of this suit and interest at court's rate.

3. The plaintiff is now back in court through Notice of Motion dated 16th May 2019 in which he seeks an order of stay of execution of the judgment and decree herein pending hearing and determination of an appeal to the Court of Appeal. He further seeks an order that an inhibition be granted in respect of the defendant's parcel of land is known as Mau Summit/Molo Block 7/1590 (Tayari). The application is supported by an affidavit sworn by the plaintiff while the defendant opposed it through a replying affidavit.

4. The application is brought inter alia under **Order 42 rule 6 (1) and (2)** of the **Civil Procedure Rules, 2010** which provides:

6.(1) 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.

(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; 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. A litigant who seeks stay pending appeal is under a duty to satisfy the court that substantial loss will result to him if stay is not granted and that the application has been made without unreasonable delay. In **Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] eKLR**, Platt Ag JA (as he then was) stated:

It is usually a good rule to see if order XLI rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event.

Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money.

6. The plaintiff filed Notice of Appeal on 6th May 2019. There is thus no doubt that there is an appeal and that the application has been filed without unreasonable delay. What about the test of substantial loss? According to the plaintiff, the court decreed that the defendant is the owner of Mau Summit/Molo Block 7/1590 (Tayari) and the plaintiff therefore fears that the defendant may evict the plaintiff from the suit property or deal with the suit property in such a manner as to place it beyond the reach of the plaintiff should the appeal succeed. Needless to emphasise, the court only dismissed the plaintiff's case. There was no counterclaim by the defendant and the court could not and did not make any declaration regarding the defendant's title. Other than the award of costs in favour of the defendant, there is no positive order in the decree which is capable of enforcement against the plaintiff. Thus, the only aspect of the decree that may expose the plaintiff to substantial loss is if he is made to pay costs before the appeal is determined. I will therefore grant stay but that stay will in the final analysis only affect the aspect of costs.

7. The applicant also seeks an order that an inhibition be granted in respect of the defendant's parcel of land is known as Mau Summit/Molo Block 7/1590 (Tayari). Judgment having been delivered, I see no basis upon which to grant such an order. Other than when dealing with an application for stay, review or setting aside, I have no jurisdiction to revisit the judgment herein. The limb of the application seeking inhibition is certainly not pursuant to the jurisdiction of stay, review or setting aside. That prayer must fail.

8. In the end, I make the following orders:

- a) I grant stay of execution of the judgment and decree herein pending hearing and determination of the plaintiff's appeal to the Court of Appeal.
- b) The stay is conditional on the plaintiff depositing in court such amount as will be agreed by consent or determined by the court to be the defendant's costs of this suit. The deposit to be made within 21 (twenty one) days of the consent or the determination. In default, the stay orders will stand discharged and Notice of Motion dated 16th May 2019 will stand dismissed with costs.
- c) Costs of the application are awarded to the defendant.

9. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 26th day of June 2019.

D. O. OHUNGO

JUDGE

In the presence of:

Mr Kamau holding brief for Mr Biko for the plaintiff/applicant

Defendant/respondent present in person

Court Assistants: Beatrice & Lotkomoi