



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERICHO

ELC CASE NO. 23 OF 2018

GRACE CHEMUTAI KOECH.....PLAINTIFF

VERSUS

FRANCIS KIPLANGAT CHEBIROR.....1ST DEFENDANT

KIPKURUI WILLIAM KEMETO.....2ND DEFENDANT

ROBERT KIPKIRUI TANUI.....3RD DEFENDANT

RULING

Introduction

1. By a Notice of Motion dated 14th February, 2019 the 3rd Defendant moved the court seeking the following prayers:

a) Spent

b) That the Honourable court grants leave for the 3rd Defendant/Applicant to appeal against the ruling of the honourable court dated 17th February 2019

c) That pending the hearing and determination of the intended appeal to the Court of Appeal, there be a stay of execution of the ruling and order of this court dated the 17th February 2019

d) The costs of this application be in the cause.

2. The application is supported by the grounds stated on the face of the Notice of Motion and the Applicant's affidavit sworn on the 14th February, 2019.

3. The background of this application is that on 13th March, 2018 the Plaintiff applied for orders of injunction against the Defendant to restrain the Defendant from *inter alia* interfering with the Plaintiff's proprietary interest in land parcel number KERICHO/KAPSUSER/3325 pending the hearing and determination of this suit. By its ruling dated 13th June 2018, the court ordered that the status quo be maintained pending the hearing and determination of the suit herein. The court further clarified that:

“For the avoidance of doubt status quo means that neither the Plaintiff nor the Defendant should use or occupy the suit property before this matter is heard and determined. Should any of the parties require to remove their belongings from or harvest crops on the suit property, they shall do so under the supervision of the OCS Kapsoit Police Station.”

4. Subsequent to the said ruling, the Plaintiff filed an application on 25th July 2018 seeking to cite the 3rd Respondent for contempt of the court order dated 25th June 2018. In her affidavit in support of the application, the Plaintiff alleged that the Defendant had in contravention of the court order, gone to the suit property, dug up holes and connected electricity, planted sugar cane and started demolishing the small kitchen that was on the suit property. Despite being served with the application the 3rd Respondent did not file any Replying Affidavit or Grounds of Opposition despite being given time to do so. The application was canvassed by way of written submissions but only counsel for the Plaintiff filed her submissions. The court delivered its ruling on 17th January 2019 in which the court found the 3rd Defendant to be in contempt of the court. The court then ordered that the 3rd Defendant appear in court for mitigation purposes. On 12.2.2019 the 3rd Defendant

filed an affidavit explaining that he had not disobeyed the court order and attached a report from the Directorate of Criminal Investigations but he did not appear in court as required. He later filed this application in court.

5. The application is opposed by the Plaintiff/ Respondent through her Replying affidavit sworn on the 7th March 2019. In the said affidavit she depones that the application is a ploy to delay the hearing and determination of this case as the applicant failed to respond to the Respondent's application until after the ruling had been delivered. She depones that the applicant has come to equity with unclean hands as he disobeyed the court order and the court ought not to exercise its discretion in his favour.

Issue for determination

6. The main issue for determination is whether the Applicant ought to be granted a stay of the ruling and order of the court dated 17th February 2019 pending appeal.

Analysis and determination

7. Learned Counsel for the Applicant submitted that if the matter proceeds, the Applicant may be sentenced and committed to civil jail without being accorded a chance to be heard on appeal and the appeal would be rendered nugatory. This would cause great injustice to the applicant. Counsels cited the case of **African Centre for Rights and Governance & 3 Others v Naivasha Municipal Council (2018) eKLR** where the court relied on the case of **Justus Kariuki Mate & Another v Martin Nyaga Wambora & Another (2014) eKLR** where the Supreme Court made orders staying a mitigation and sentencing hearing pending an appeal on the order that held the applicants to be in contempt of court. In allowing the stay orders, the Supreme Court observed as follows:

“(66) Indeed if this court declined to maintain the status quo, the High Court would proceed to take mitigation, and sentence the applicants. There is a likelihood that in case, the applicants would be incarcerated, and the substratum of the appeal –cause would have been spent. In the event that this Court eventually finds in favour of the applicants, it would be impossible to recompense them by way of costs. In the alternative if the Court finds in favour of the Respondents, no harm would have been occasioned to them”.

8. The Court of Appeal took a similar view in the case of **National Bank and Another v Geoffrey Wahome Muotia, Court of Appeal at Nairobi, Civil Application No. NAI 283 of 2015 (2016) eKLR**. These authorities are binding on this court.

8. The principle to be discerned from the above authorities is that if there is a likelihood that that an appeal may be rendered nugatory, the court ought to grant a stay of execution. In the instant case the applicant failed to respond to the application for contempt of court and since he has been convicted of contempt of court, all that awaits him is mitigation and sentencing. If he is sentenced, his appeal would be rendered nugatory. He is in a similar position as the applicants in the above-cited cases. Consequently, it is in the interest of justice that a stay of execution be granted to enable him pursue his right of appeal.

9. The upshot is that the application has merit and it is hereby allowed.

10. The costs of the application shall be in the appeal.

Dated, signed and delivered at Kericho this 12th day of June, 2019.

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J. M ONYANGO

JUDGE.

In the presence of:

1. Miss Ngetich for Mr. Mutai for the 3rd Defendant/Applicant
2. Miss Sitati for the Plaintiff/Respondent
3. Court assistant – Rotich