



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

APPEAL NO. 12 OF 2018

LYDIA CHEPCHIRCHIR KOSKEL.....APPELLANT

VERSUS

JUSTUS ACHUKA OMENYO.....RESPONDENT

(Being an appeal from the ruling and order of the Chief Magistrate's Court at Nakuru (Hon. B. Mararo, Principal Magistrate) dated 14th September 2018 in Nakuru CMCC No. 1047 of 2018)

RULING

1. This ruling is in respect of appellant's Notice of Motion dated 28th September 2018. The following orders are sought in the application:

a) Spent.

b) Spent.

c) THAT this Honourable Court be pleased to order a stay of execution of the ruling and order made on 14th September 2018, in Nakuru CMCC NO.1047 OF 2018 pending the hearing and determination of the Applicant's appeal.

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

2. The application is supported by a supporting affidavit and supplementary affidavit, both sworn by the appellant. The respondent has opposed it through a replying affidavit. Parties also filed and exchanged written submissions.

3. The application is brought 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.

4. The appellant seeks stay of execution pending appeal. She must therefore satisfy the court that substantial loss will result to her if stay is not granted and that the application has been made without unreasonable delay. Needless to add, she must have an appeal. 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.

5. From the material placed before the court, I note that being dissatisfied with the ruling and order of the Chief Magistrate's Court at Nakuru (Hon. B. Mararo, Principal Magistrate) dated 14th September 2018 in Nakuru CMCC No. 1047 of 2018, the appellant filed Memorandum of Appeal herein on 27th September 2018. There is thus a pending appeal. I further note that the present application was filed 14 days after the ruling was delivered. There was no unreasonable delay in the circumstances.

6. The applicant contend that unless stay is granted, the respondent will evict her from the parcel of land known as Njoro/Ngata Block 7/661 (Chumo) which is the suit property. In the ruling and order appealed from, the subordinate court had allowed respondent's Notice of Motion dated 30th August 2018 as prayed. A copy of the said application as well the hand written ruling is annexed by the appellant. The following orders were sought in the application:

1. THAT this application be certified as of utmost urgency and service be dispensed with in the first instance.

2. THAT pending the interpartes (sic) hearing and determination of this application this honorable court be pleased to issue an order of temporary injunction restraining the Respondent by herself, her agents, servants and/or anybody claiming under her interring and or burying the remains of REUBEN KIBET KOSKEI (deceased) on the plaintiff's parcel of land measuring 90 x 60 feet excised from LR.NO. NJORO/NGATA BLOCK 7/661(CHUMO).

3. THAT pending the hearing and determination of this suit this honorable court be pleased to issue an order of temporary injunction restraining the Respondent by herself, her agents, her servant, her children and or relatives and/or anybody claiming under her from interring and or burying the remains of REUBEN KIBET KOSKEI (deceased) on the plaintiff's parcel of land measuring 90 x 60 feet excised from LR.NO.NJORO/NGATA BLOCK 7/661(CHUMO).

4. THAT a mandatory injunction do issue restraining the defendant/respondent by herself, her agents and/or servants, her children and or relatives from trespassing, entering, remaining thereon or in any other way dealing with the plaintiff's parcel of land measuring 90 x 60 feet excised from LR.NO. NJORO/NGATA BLOCK 7/661(CHUMO).

5. THAT the orders granted herein be served upon the OCS Nakuru Central Police Station to provide security and enforce compliance

6. THAT cost of this application be borne by the Respondents.

7. In essence therefore, a restraining injunction and a mandatory injunction were granted in the terms pleaded at prayers (3) and (4) of the application.

8. The respondent has argued that there is nothing to be stayed since the appellant vacated the suit property on 21st September 2018 and the respondent demolished her temporary structures thereon. While the appellant admits that her structures were demolished, she states that she has not vacated only spends time away during the week since she is employed at Salgaa.

9. At this point, the issue of whether or not the application is overtaken by events is beside the point. It suffices to show, as the appellant has done that the orders that were made have the effect of having her evicted from the suit property before the suit pending before the subordinate court is concluded and before this appeal is determined. That in my view would constitute substantial loss. I am therefore satisfied that there is merit in the application. So as to ensure that the appeal is prosecuted promptly, I will limit the life of stay orders that I will grant.

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

a) I grant stay of execution of the ruling and order made on 14th September 2018, in Nakuru CMCC NO. 1047 of 2018 pending the hearing and determination of this appeal.

b) The stay order shall, unless otherwise ordered by this court, remain in force for a period of 18 (eighteen) months only from the date of this ruling.

c) Costs of Notice of Motion dated 28th September 2018 shall be in the appeal.

11. Ruling herein was to be delivered on 10th April 2019 but was delayed since I proceeded on medical leave. The delay is regretted.

Dated, signed and delivered in open court at Nakuru this 29th day of July 2019.

D. O. OHUNGO

JUDGE

In the presence of:

Mr Mwalo for the appellant/applicant

Ms Nancy Njoroge holding brief for Mr Ombui for the respondent/respondent

Court Assistants: Beatrice & Lotkomoi