



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT
AT MOMBASA

ELC APPEAL CASE NO. 26 OF 2018

ABDALLA ALI NASSIR.....PLAINTIFF

VERSUS

WYCLIFFE W. LUKIO

MUNICIPAL COUNCIL OF MOMBASA.....DEFENDANTS

RULING

(Application for stay pending appeal; appellant aggrieved by an order of the trial court which ordered the demolition of a wall; substantial loss may be occasioned to the appellant if the wall is pulled down and the appellant succeeds on appeal; status quo ordered to be maintained pending appeal)

1. The application before me is that dated 29 April 2019 filed by the appellant. It is an application seeking a stay of execution pending appeal of the decree issued by the Mombasa Chief Magistrate's Court, in ELC No. 26 of 2018. The application is opposed.
2. The background is that the respondent sued the applicant and the Municipal Council of Mombasa in a suit filed in the year 2010 in the Chief Magistrate's Court at Mombasa, being Mombasa ELC CMCC No. 907 of 2010 (it would appear that the case was later renumbered to Mombasa ELC CMCC No. 26 of 2018). He sued them seeking inter alia a permanent injunction to stop the appellant from constructing a wall or blocking the access road known as 4160/II/MN serving the land parcel Plot No. 4178/II/MN. He also sought orders to compel the demolishing of the wall, or in the alternative, a declaration that he has a permanent right of way through the access road known as 4160/II/MN. The court allowed the case and ordered the applicant to pull down and demolish the wall and building constructed on the access road and was further restrained from interfering with the access road. Aggrieved, the applicant filed an appeal to this court. He sought stay in the lower court which was denied hence this application.
3. In opposing the application, the respondent has contended inter alia that the applicant admitted the encroachment into the public access road and had undertaken to remove the wall and other structures. He has stated that the encroachment was also proved through a survey report. He does not believe that there is any prejudice which the applicant stands to suffer if the wall is demolished.
4. Counsel representing the parties filed written submissions save for counsel for the 2nd respondent. I have taken these submissions into consideration.
5. This is an application for stay pending appeal and therefore the provisions of Order 42 Rule 6 (2) apply. The said law 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.
6. It follows from the above that first, the applicant needs to satisfy the court that he/she stands to suffer substantial loss if the stay order is not granted, secondly the applicant must have come to court without unreasonable delay, and finally the applicant needs to offer security for the due performance of the decree.

7. I do not think that it can be argued that the applicant has come after unreasonable delay and the key question that I ask myself is whether the applicant, in this application has demonstrated that he stands to suffer substantial loss. I am not quite sure about the issues because there has not been annexed any of the pleadings and the judgment. What I have is the decree, and from it, I can discern that the respondent had complained about a wall, or building, which had been built by the appellant apparently on a road reserve. There is judgment in favour of the respondent but clearly the applicant is aggrieved hence the appeal. We cannot tell at this stage what will be held on appeal, and whether or not this court is going to affirm what the trial court held. It could happen that this court will be persuaded that the wall was justified, in which case, if execution is to proceed, then a wall which ought to have remained will have been pulled down. This may force the applicant to rebuild the wall and in my view that may occasion the applicant some substantial loss.

8. My view of the matter is that it is best that the current status quo be maintained until the appeal is heard and finalized. The applicant will however need to deposit the taxed costs of the lower court case within 60 days of taxation as security. If he does not do so, then this order of stay will lapse.

9. The costs of this application will abide the costs of the appeal.

10. Orders accordingly.

DATED, SIGNED and DELIVERED at MOMBASA this 24th day of October 2019.

MUNYAO SILA

JUDGE.

IN THE PRESENCE OF:

Mr. Kirui holding brief for Mr Omwenga for the 1st respondent.

Court assistant; Koitamet