



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. APPEAL NO. 4 OF 2019

MUIA KIVONDO MBALUTO.....APPELLANT

VERSUS

NZIOKA MUSYOKI NGOMO.....RESPONDENT

RULING

1. In the Notice of Motion dated 15th February, 2019, the Appellant is seeking for the following orders:

a. This Honourable Court be pleased to stay execution of the Judgment delivered on 15th January, 2019 and the subsequent decree pending final determination of the Appeal.

b. Costs of this Application.

2. The Application is premised on the Affidavit of the Appellant who has deponed that on 15th January, 2019, Judgment was entered against him in Machakos CMCC No. 891 of 2014; that being dissatisfied with the said Judgment, he filed an Appeal in this court and that the Judgment of the lower court should be stayed pending the hearing and determination of the Appeal.

3. The Appellant finally deponed that unless the order of stay is granted, he will suffer immense loss and irreparable harm and that the Appeal will be rendered nugatory.

4. In his Replying Affidavit, the Respondent deponed that the Application does not satisfy the requirement of Order 42 Rule 6(2) of the Civil Procedure Rules; that all the parties were afforded a hearing in the lower court and that the Application should be dismissed.

5. The Respondent deponed that he purchased the suit land in the year 2001 from someone who purchased the same land from the Appellant and utilized it since 1987 and that the execution of the lower court's Decree has not commenced.

6. The Respondent finally averred that if the orders of stay are to be granted, the Appellant should be ordered to deposit the amount ordered by the lower court of Kshs. 159,970 and the Title Deed for land known as Iveti/Mung'ala/1587 in court as security.

7. The Appellant's advocate submitted that the essence of an Application for stay of execution pending Appeal is aimed at preserving the subject matter of litigation; that although the Respondent is in possession of the suit land, he stands to suffer substantial loss if the Appeal succeeds and that there was no unreasonable delay in filing the Application.

8. In his submissions, the Respondent's advocate submitted that the Appellant has not demonstrated how he is likely to suffer substantial loss if the Decree holder proceeds to execute the Decree; that the Title Deed has the Appellant's name and that the suit land cannot be sold.

9. The Appellant herein filed the Memorandum of Appeal. In the said Memorandum of Appeal, the Appellant averred that the learned Magistrate erred in arriving at her Judgment of 15th January, 2019. The impugned Judgment of the learned Magistrate has not been annexed on the Affidavit of the Appellant. However, the Appellant has extracted an order (*sic*) which represents the final decision of the court. In the extracted order, the learned Magistrate decreed as follows:

“1. That the property in dispute is Iveti/Mung'ala/1587.

2. That a permanent injunction do issue restraining the Defendant whether by himself, servants, agents and/or otherwise from continuing with his illegal activities on the portion occupied by the Plaintiff within Iveti/Mung'ala/1587.

3. That the Defendant do compensate the Plaintiff for the damage caused by the destruction of the Plaintiff's fence assessed at

Kshs. 159,970.

4. That a survey of Iveti/Mung'ala/1587 be carried out.

5. That the Land Registrar to commence the process of transfer of the portion within plot 1587 occupied by the Plaintiff for the purposes of registration and issuance of title."

10. It is the above Decree that the Appellant (who was the Defendant in the lower court) is seeking to stay pending the hearing of the Appeal. The Application is premised on the provisions of Order 42 Rule 6(1) and (2) of the Civil Procedure Rules which provides as follows:

"6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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."

11. From the annexed Decree of the lower court, it is clear that a portion of the suit land which is registered in favour of the Appellant ought to be transferred to the Respondent. That being so, the Appellant is likely to suffer substantial loss if the title he is holding is transferred to the Respondent. Indeed, if the Appellant succeeds in his Appeal, the said Appeal might be rendered nugatory in the event the Respondent transfers to a third party the portion of land that the lower court decreed that it should be transferred to him.

12. The Respondent's claim for damages succeeded in the lower court. The Decree extracted by the Appellant shows that the Appellant is supposed to pay to the Respondent a sum of Kshs. 159,970 as damages in respect of the destroyed fence. Under Order 42 Rule 6(2) of the Civil Procedure Rules, a party seeking for a stay of execution is required to give security as the court orders for the due performance of the Decree as may ultimately be binding on him.

13. Considering that the Appellant is supposed to pay damages to the tune of Kshs. 159,970, and in view of that fact that he is likely to suffer substantial loss unless a stay of execution is granted, I shall allow the Application dated 15th February, 2019 in the following terms:

a. The Judgment delivered by the court in Machakos CMCC No. 891 of 2014 is hereby stayed pending the hearing and determination of the Appeal.

b. The above order is granted on condition that the Appellant deposits in court Kshs. 159,970 being security for the due performance of the Decree within thirty (30) days from the date hereof.

c. Each party to bear his own costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 4TH DAY OF OCTOBER, 2019.

O.A. ANGOTE

JUDGE