



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 19 OF 2011

ESTATE OF JOSHUA WAMBUGU MINJIRE

Represented by

CALEB MINJIRE WAMBUGU.....PLAINTIFF

VERSUS

ISIAH KAVULAFU.....1ST DEFENDANT

JOSEPH SHIYENJI.....2ND DEFENDANT

RULING

1. The application dated **30/8/2019** and filed in court **3/9/2019** has been brought by the defendants. It seeks an order of stay of execution of the judgment delivered by this court on **18/7/2019** pending the hearing of the intended appeal.
2. The applicants has brought the application under **Section 3A and 63(e) of the Civil Procedure Act, Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules 2010 and Article 50 and 159 of the Constitution of Kenya.**
3. The grounds on which the said application is made are that the defendants, being dissatisfied with the judgment of the court, have filed a notice of appeal; that the decision of the court affects a large number of persons being members of the group; that the process of preparation, hearing and determination of the appeal may take long; that it is necessary to preserve the subject matter herein to avoid scuttling the activities of the group; that the respondent shall suffer no prejudice and that the applicants will be left with no remedy if execution proceeds.
4. The application is supported an affidavit of the 2nd defendant dated **30/8/2019** and a further affidavit dated **30/9/2019**.
5. The plaintiff/respondent filed replying affidavit on **25/9/2019**. His response is that his father is the registered owner of plot No. **Kaplamai/Kachibora Block 3/Muhuti/109** while **Mungoma Self Help Group** which is represented by the applicant is the registered proprietor of Plot No. **Kaplamai/Kachibora Block 3/Muhuti/110**; that it has been confirmed by way of expert evidence by surveyors that the defendants are occupying plot No. **109** and that the court has already identified them as trespassers thereon; that both plots have been confirmed by the surveyors to be in existence on the ground and also in the Registry Index Map; that the estate of his late father is now entitled to the fruits of judgment herein and the defendants who have their own plot would not suffer any prejudice by giving up possession; that the estate of the deceased would be exposed to substantial loss if the orders sought were granted; that the plaintiff/respondent undertakes not to dispose of or interfere with the title pending the appeal and would be ready to have it deposited in court; that no possible loss on the part of the applicants in the event that the application is not granted has been demonstrated; that no memorandum of appeal has been annexed to the application and the court has not been shown that there is an arguable appeal.
6. In the further affidavit of the 2nd defendant it was averred that there were two surveyor's reports which did not agree; that the private surveyor instructed by the defendants found plot No. **109** on a different site and not the site occupied by the defendants; that they would suffer loss if evicted without compensation for the purchase price paid; that the deceased was the chairman of the farm who allocated the plots to members; that the defendants would undertake not to waste damage or dispose of the title until the appeal is determined and are willing to surrender their title to court for safe custody during the pendency of the appeal; that moving the defendants from the site they occupy would affect other land owners of adjoining land parcels and that the determination of whether there is an arguable appeal is the mandate of the Court of Appeal and not this court.
7. The defendants/applicants filed their submissions on **25/10/2019**. The plaintiff/respondent filed his submissions on **28/10/2019**. I have considered the application and the response and the submissions.
8. In their submissions the defendants reiterated matters in their affidavits and cited the cases of **Bashir Godana -vs Fatuma Godana Tupi**

[2018] eKLR, **Sammy Some Kosgei -vs- Grace Jeel Boit** [2013] eKLR, **David Oyiare Ntungani -vs- Matuiya ole Naisuaku Orket** [2017] eKLR in support of their application.

9. The plaintiff cited **Reliance bank -vs- Norlake Investments** [2002] 1 EA 227 and **Sammy Some Kosgei -vs- Grace Jeel Boit** [2013] eKLR in support of their objection to the defence application. They maintained that the court has found the plot belonged to the plaintiff and that the defendants have trespassed thereon.

10. I have the application and the response including the submissions of the parties. The issue that arises in the instant application is whether a stay of execution pending appeal should be granted. The condition for the grant of a stay of execution pending appeal are set out in **Order 42 Rule 6** of the Civil Procedure Rules.

11. **Order 42 rule 6** of the Civil Procedure Rules 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 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 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.

(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

12. I have examined the record and found that a notice of appeal was filed on **31/7/2019**. For the purposes of the instant application, an appeal is therefore deemed to be in place for that reason.

13. Would the defendants suffer substantial loss if the orders sought not granted?

14. It is noteworthy that this court found for the plaintiff and observed that the title is registered in his name. The plaintiff's long quest for restitution of the plot to the estate of the deceased has come to end in so far as the suit before the court was concerned.

15. It is also not disputed that plot **No. 110** situate in same locality belongs to the defendants' group. I find that all that would happen is that the defendants would move to their rightful plot and the plaintiff would take possession of plot **No. 109**.

16. In this case though the defendants have alleged that there would be chaos on the ground by virtue of re-arrangement of the position of plots which would allegedly disrupt the existing *status quo* if they were moved, the defendants did not enjoin any other party to the suit especially the person purported to be in occupation of plot **No. 109** and therefore their claim rings hollow. This is therefore not a dispute to be equated with a case of double allocation where both parties claim one plot and judgment in favour of one leaves the other destitute.

17. I find that for the foregoing reasons no risk of substantial loss has been established by the defendants as their plot is still in existence on the ground, in the register and in the Registry Index Map.

18. Has the application been made without unreasonable delay? The judgment in this matter was delivered on **18/7/2019** while the instant application was lodged on **3/9/2019**, after a duration of **46 days** or less than two months. In my view the application was timeously lodged.

19. The last issue raised by the respondent is that of security. On that issue the applicants have undertaken to deposit their title for plot No. **Kaplamai/Kachibora Block 3/Muhuti/110** with the court for safe custody until the intended appeal is concluded. However in the suit the plaintiff never challenged their right to hold that title. It is not meaningful to him as security. Their rightful possession of the title in their names was never an issue. What was at issue was whether on the ground they were in occupation of the land represented by that title. I find this to be totally different issue and that submitting their own title to the court is not worthwhile as security in this matter because it is not dispute. The disputed location of plot **No. 109** has been established by the expert report of the County Surveyor and all that remains is for the

plaintiff/respondent to take possession thereof. I therefore find that the security offered is not adequate to compensate the plaintiff/respondent for the continued denial of possession of the premises.

20. For the foregoing reasons this court is of the view the application dated **30/8/2019** has no merit and the same is hereby dismissed with costs.

Dated, signed and delivered at Kitale on this 27th day of November, 2019.

MWANGI NJOROGE

JUDGE

27/11/2019

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Ms. Wanjala holding brief for Kiarie for plaintiff/respondent

Mr. Barongo holding brief for Wanyonyi for Defendant/Applicants

COURT

Ruling read in open court at 3.10 p.m.

MWANGI NJOROGE

JUDGE

27/11/2019