



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO.125 OF 2012

HUMPHREY PETER MURAGURI.....1ST PLAINTIFF

MARY MUKAMI MUIRURI.....2ND PLAINTIFF

GILBERT MWANGI MURAGURI.....3RD PLAINTIFF

GILBERT MWANGI MURAGURI.....4TH PLAINTIFF

STEPHEN KINYUIRO MURAGURI.....5TH PLAINTIFF

ROSE WANGARI MURIGU MURAGURI (Suing as

the legal representatives of the estate

Of SIMON NGURI MURAGURI).....6TH PLAINTIFF

JOSEPH THIBITHE MURAGURI.....7TH PLAINTIFF

VERSUS

JOHN NGIGI MACHARIA.....DEFENDANT

RULING

(Application for stay pending appeal; principles to be considered; applicants having sued the defendant claiming that he is registered as proprietor of the suit land as trustee; suit dismissed; applicants filing a notice of appeal and seeking orders to preserve the property pending appeal; application allowed subject to deposit of Kshs. 250,000/= offered as security)

1. The application before me is that dated 6 December 2017 filed by the unsuccessful plaintiffs. The applications seeks the following principal order which is prayer 3 in the application being :-

2. That the Honourable Court be pleased to grant a preservatory order to maintain status quo and prevent any development, sale, transfer and/or subdivision of the suit parcel Nyandarua/Matindiri/27 measuring approximately 15.0 Hectares pending the hearing and determination of the plaintiffs'/applicants' intended appeal that has been lodged before the Court of Appeal and a copy of the order hereof be registered at the Lands Registry, Nyahururu.

3. The application is opposed and before I go to the gist of it, I think it is prudent that I give a little background to the same.

4. The plaintiffs/applicants commenced this suit through a plaint that was filed on 31 July 2012. The applicants are siblings to the defendant/respondent, and in their plaint, they claimed that the respondent is registered as proprietor of the land parcel Nyandarua/Matindiri/27 (hereinafter referred to as "the suit land") in trust for all of them. They contended that it was their mother who purchased the suit land but because she did not have an identity card and was a woman, she could not be registered as proprietor thereof and she therefore chose the respondent, who was the first born, to be registered as proprietor on the understanding that he would hold it in trust for the other siblings. The applicants in the suit thus wanted the suit land subdivided amongst them so that each can have a share of it. The defendant filed defence and resisted the suit asserting that he purchased the suit land through his own efforts and that he does not hold the said land in trust for the applicants. I heard the suit and delivered judgment on 23 November 2017. The applicants did not convince me that the respondent holds the suit land in trust for them and I proceeded to dismiss their case. On 30 November 2017, the applicants filed a Notice of Appeal and followed up on the same by filing this application.

5. It is the argument of the applicants that they have an arguable appeal and that if orders preserving the property are not granted as prayed, the object of the appeal will be defeated and rendered nugatory. They have averred that they stand to suffer substantial loss if this application is not allowed as the respondent may sell, transfer or subdivide the suit land. They have stated that they are ready and willing to deposit security for costs amounting to Kshs. 250,000/= within a reasonable time as may be directed by the court.

6. The respondent has opposed the application through a replying affidavit sworn on 15 January 2018. He has stated that since purchasing the property, he has never nursed any intention to sell it and that the same is his retirement package. He has contended that the application is therefore made in bad faith. He has deposed that the property is valued at over Kshs. 40,000,000/= and the amount of Kshs. 250,000/= offered as security is unreasonable. He does not believe that the intended appeal has any merit and is of the view that the application is an abuse of the court process.

7. I took in brief submissions from Mr. Kanyi Nguni, learned counsel for the applicants, and Mr. Wairimu, learned counsel for the respondent and I have considered the same in my ruling.

8. What is before me is an application for stay pending appeal and an application such as this is governed by the provisions of Order 42 Rule 6(2) which 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.

9. It will be seen from the above, that an applicant seeking orders of stay pending appeal, needs to satisfy three things, that is, firstly, that he has come to court without unreasonable delay; secondly, that he stands to suffer substantial loss if the stay order is not granted; and finally, he needs to demonstrate readiness to give security for the due performance of the decree in case he fails in his appeal. Although the parties made some arguments on the chances of success of the appeal, or lack of it, the merits or otherwise of the intended appeal are not among the issues that this court is invited to look at and I will disregard any submissions that touch on the merits of the intended appeal.

10. I do not think that there is any contest that this application has not been filed after any unreasonable delay given that it was filed within two weeks of the judgment. What I need to determine is whether the applicants stand to suffer substantial loss if I deny them the prayers sought in this application and whether there has been an offer of adequate security.

11. In our instance, all along, the respondent has been in occupation of the suit premises. In this application, the applicants do not wish to disturb the possession of the suit land by the respondent, meaning that the respondent can continue enjoying it while the appeal is pending. All that the applicants want is for there to be no dealings on the property until the appeal is disposed of. In the event that the respondent deals with the property, then it stands to be lost, and if the applicants succeed on appeal, then they may end up holding a paper judgment which they may not be able to execute. I am thus persuaded that the applicants stand to suffer substantial loss if the orders herein are not granted.

12. There is an offer of security of Kshs. 250,000/=. As I said earlier, possession of the premises is going to remain with the respondent. He will continue to use the land as he had previously used it, only subject to the restriction on any transactions. I have not been shown what loss he stands to suffer for which he will need compensation in the event that the applicants fail on appeal. I therefore have no problem with the offer of Kshs. 250,000/= to cover for any costs that the respondent may incur for the appeal and the same is acceptable.

13. Given the above, I now make the following orders :-

(i) That pending appeal to the Court of Appeal, the defendant/respondent is hereby restrained from selling, charging, or entering into any dealings that may affect his title to the land parcel Nyandarua/Matindiri/27.

(ii) That pending the hearing and determination of the intended appeal, there be an order of inhibition, restricting the registration of any disposition in the register of the land parcel Nyandarua/Matindiri/27 and this order may be registered in the register of the said land.

(iii) That the above orders are subject to the applicants depositing, in a joint interest earning account, security of Kshs. 250,000/= within 30 days from today.

(iv) That the costs of this application do abide the outcome of the appeal.

14. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 31ST day of January 2018.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of :-