



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO 186 OF 2013

ELIAS JOSEPH WABURI WAMUNYUPLAINTIFF

VERSUS

JOSEPH MWANGI NJOROGE.....DEFENDANT

RULING

(Application for stay pending appeal; judgment given cancelling title of the applicant; stay granted subject to deposit of costs)

1. The application before me is that dated 13 October 2017 filed by the unsuccessful plaintiff. The applicant seeks the following substantive orders which are prayers 3, 5 and 6 of the application being :-

(a) That the Honourable Court be pleased to order that all original documents listed in the plaintiff's list of documents filed in this suit, produced and delivered to this court by the plaintiff during the hearing of the plaintiff's case in the suit be returned to the plaintiff.

(b) That there be a stay of execution of the decree of this Court issued on 22 September 2017 and all consequential orders arising therefrom pending hearing and determination of the intended appeal against the judgment and decree of this court delivered and issued on 20th and 22nd September 2017 respectively on such terms that the court may deem just and fit.

(c) That in the alternative (to the above prayer) there be an order of injunction to restrain the defendant by himself, through the administrators, legal representative, agents and or servants from leasing, charging, mortgaging, encumbering, selling, transferring, subdividing, disposing off, or in any way interfering with the title and Registry Index Map to the 4 acres portion of land occupied by the defendant and particularly referred to as parcel No. Nyandarua/Mawingo/725 in the judgment and decree of this Court delivered on 20th and 22nd September 2017 respectively pending hearing and determination of the intended appeal.

2. The application is opposed and before I go to the gist of it, a little background will shed light on the nature of the suit before me.

3. This suit was commenced by the applicant through a plaint that he filed on 11 February 2010. In the suit, the applicant inter alia sought orders that he be declared the lawful proprietor of the land parcel Nyandarua/Mawingo/764 comprising of 8.1 Hectares; a declaration that the defendant/respondent is a trespasser on the said land parcel Nyandarua/Mawingo/764; a declaration that the land comprised in the title Nyandarua/Mawingo/725 is part of Nyandarua/Mawingo/764; cancellation of the title

Nyandarua/Mawingo/725; orders of eviction; costs and interest. The suit was resisted with the defendant claiming good title to the land parcel Nyandarua/Mawingo/725. Both land parcels in issue, that is Nyandarua/Mawingo/725 and 764 resulted from a subdivision of the land parcel Nyandarua/Mawingo/90. In the course of the proceedings, the original defendant died, and was substituted by his legal representative who is the respondent herein.

4. From what I could gather from the evidence presented, the applicant had a decree against the registered owner of Nyandarua/Mawingo/90 (land parcel No. 90) for 20 acres of this land. The original defendant similarly got a decree for 4 acres out of the said land parcel No. 90 which he moved to execute, by subdividing the said land parcel No. 90 into the land parcels No. 724 and 725, with him keeping title to the land parcel No. 725 which comprised of 4 acres. The applicant also purported to execute his decree and proceeded to subdivide the land parcel No. 90 into the land parcels No. 761 and 764, the latter being his alleged portion of 20 acres, and the former being the remainder for the original owner of the land parcel No. 90. It happened that the land parcel No. 725, of the original defendant, fell wholly within the parcel No. 764 of the applicant, and that is why the applicant in his suit, sought orders to have this title cancelled and the respondent evicted from the said land. After hearing the case, I was of the opinion that the purported subdivision of the land parcel No. 90 by the applicant, to bring forth the land parcels No. 761 and 764, was fraudulent. I declared that the proper subdivision of the land parcel No. 90 was the subdivision made by the original defendant and which resulted into the land parcels No. 724 and 725. I cancelled the title of the applicant to the land parcel No. 764 and further directed the District Land Registrar, and District Land Surveyor, Nyandarua, to effect changes to the Registry Index Map of the area. I upheld the title of the original defendant to the land parcel No. 725 and issued an order of permanent injunction restraining the applicant from interfering with the respondent's land parcel No. 725.

5. Through a Notice of Appeal filed on 3 October 2017, the applicant has signaled his intention to appeal against the above judgment. In this application, he has averred that he has an arguable appeal which has good chances of success. He has also stated that he stands to suffer irreparable loss if an order of stay of execution is not granted, as his appeal, if successful, will be rendered nugatory. He has averred that the respondent may sell, charge, or dispose off the land parcel No. 725. In his supporting affidavit, he has more or less repeated the above but has also brought issue on the extraction of the decree.

6. In his replying affidavit, the respondent has deposed that the decree was properly obtained; that his late father properly obtained title to the land parcel No. 725; that the applicant cannot suffer any irreparable loss because he has never been in possession of the 4 acres comprised in the said title; and that the family of the deceased has the financial means to compensate the applicant if any award of damages is made in his favour.

7. I also took in the submissions of Mr. Ngotho for the applicant, and Mr. Awuonda, for the respondent, which I have considered in arriving at my decision.

8. I have considered the application. Before I go further, I do not see any big issue on the decree. If there is a problem with it, an appropriate application can be filed for consideration.

9. What is before me is essentially an application for stay of the decree herein pending appeal. The principals upon which an application of this nature is assessed are contained in 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.

10. 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 through their counsel 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.

11. Starting with the issue of delay, I do not think that it can be argued that this application has been filed after inordinate delay. The judgment in this suit was read on 20 September 2017 and the application herein was filed less than 30 days from the date of the said judgment. I am of the view that the application has not been filed after unreasonable delay.

12. The second element, is that of substantial loss. The applicant has pressed the point that he stands to suffer irreparably if the decree is effected. It behoves this court to see to it that if the appellant is successful on appeal, then his appeal will not be rendered nugatory. In my judgment, I made fairly far reaching orders including the cancellation of the title of the applicant and rectification of the Registry Index Map. If the decree is effected and the applicant succeeds on appeal, then the whole process will have to be reversed, which in my view, will cause hardship and unnecessary inconvenience to the parties. In my opinion, it is best that the decree not be effected, until the appeal is disposed off, or until further orders of this or the appellate court. I see no prejudice which the respondent will suffer, as the respondent and the family of the deceased are in possession of the land in dispute, which possession the applicant has not applied to disturb, pending hearing of his appeal. It is also necessary to issue orders preserving the titles in issue that is Nyandarua/Mawingo/725 and 764 pending hearing and determination of this appeal.

13. The third element is security. As I have mentioned, the respondent and the family of the original defendant are in possession, and strictly, they do not stand to suffer any loss, save probably, the inability to enter into transactions over the title. In my view, a deposit to secure the costs of the appeal, is adequate. I do not know what the costs of the appeal may be, but I think a deposit in the sum of Kshs. 250,000/= is good enough.

14. There are prayers in the application for release of the title of the applicant and release of other documents which were produced by the applicant in his evidence. I wonder why the applicant wants these documents released, yet the appeal is yet to be determined, and the appellate court may wish to have a look at these documents, since they form part of the record. In my view, the applicant will need to await the conclusion of the appeal before applying for release of these documents.

15. I believe that I have dealt with all aspects of this application and now make the following orders :-

(i) That pending the hearing and determination of the intended appeal, there be a stay of execution of the judgment of 20 September 2017.

(ii) That pending the hearing and determination of the appeal, the status quo prevailing in the land parcel Nyandarua/Mawingo/725 be maintained and the respondent is hereby barred from entering into any transactions touching on the said title. The applicant is similarly barred from entering into any dealings or transactions over the title Nyandarua/Mawingo/764 pending the hearing and determination of the intended appeal.

(iii) That the above are subject to the applicant depositing security in the sum of Kshs. 250,000/= within 30 days of this ruling which sum is to be deposited in court and in the event that the appeal is not successful, this amount of money be released to the respondent, but if successful, the said money be released to the appellant.

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

16. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 30TH day of January 2018.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of :-

Mr. Otieno holding brief for Mr. Litoro for the applicant.

No appearance for the respondent.

Court Assistant: Nelima Janepher

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU