



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. APPEAL NO. 175 OF 2015

JAPHETH MUTUA MUSANGIRESPONDENT

VERSUS

FRANK NDONYE KILUNGUAPPELLANT

RULING

1. In the Application dated 17th November, 2015, the Appellant is seeking for the following orders:

a. That this Honourable Court be pleased to stay hearing, determination or proceedings in Machakos CMCC No. 428 of 2015 pending hearing and determination of the appeal herein.

b. That this Honourable Court be pleased to stay execution of the orders given on 13th November, 2015 in Machakos CMCC No. 428 of 2015 by Hon. C.K. Kisiangani Resident Magistrate pending hearing and determination of this Appeal.

2. The Application is supported by the Affidavit of the Appellant who has deponed that he has filed an Appeal against the Ruling of C.K. Kisiangani in Machakos CMCC No. 428 of 2015; that the order that was issued by the lower court is draconian; that he is being asked to vacate his matrimonial home and being evicted by a purported purchaser and that there is a pending suit in respect to the suit land in Nairobi Co-operative Tribunal which was filed before the lower case was filed.

3. The Appellant has deponed that unless the orders he is seeking are granted, his house will be demolished and that the said orders should be stayed pending the hearing of the appeal.

4. In response, the Respondent deponed that the Appellant did not present any evidence to this court or the lower court to show that he has put up a matrimonial home on the suit land; that the Appellant has acknowledged the sale of the land to him and that the Appellant is using and damaging the suit land.

5. The Appellant's advocate submitted that the suit property herein is the subject of two other suits, namely HC Succession Cause No. 280 of 2015 and Co-operative Tribunal Case No. 264 of 2014.

6. It is the Appellant's deposition that his grandfather, Mwanza Kilungu, transferred the suit land to his wife, Monica Katee Mumbo; that the said Monica Katee Mumbo passed away on 8th May, 1990.

7. It was the Appellant's case in the lower court that all the siblings of the late Monica Katee contributed towards the share of the land and started developing the land and that when the Appellant started interfering with the suit land, a suit was filed in the Tribunal.

8. The Appellant deponed that the purported sale between Naum Munyiva Kilungu and the Respondent is null and void.

9. The Respondent's advocate submitted that the suit property in the Tribunal case was Machakos/Konza North Block 1/671 whereas the land parcel the subject of the Ruling appealed against was Plot No. 505; that the two suits do not deal with the same suit property and that the Respondent could not have relied on the provisions of Section 6 of the Civil Procedure Act to defeat the Respondent's Application for injunction.

10. Counsel submitted that the trial court acted on the correct principles when it granted the orders sought.

11. The Appellant herein is seeking for a stay of execution of the orders of Hon. C.K. Kisiangani in Machakos CMCC No. 428 of 2015 pending the hearing and determination of the appeal.

12. The Memorandum of Appeal shows that the Appellant is challenging the decision of the lower court on the ground that the order that was made was draconian because the Appellant was being asked to vacate the matrimonial home and that the lower court did not address the fact that there was a pending suit in the Tribunal raising the same issues.

13. The Application before me therefore is not to determine whether the learned Magistrate was right or not in allowing the Respondent's Applications, but rather, whether those orders should be stayed pending the hearing of the appeal. Consequently, I shall not delve into the merits of the Ruling of 13th November, 2015, or whether indeed the suit before the Tribunal raises issues that are similar to the issues in the lower court. That is what is to be determined when the substantive appeal will be argued.

14. It is trite that an order for stay of execution pending appeal can only be granted when the Applicant shows that he shall suffer substantial loss unless the order is granted and when the Application is filed without unreasonable delay. The Applicant is also required to give security for the due performance of the decree (*See Order 42 Rule 6(2) (b) of the Civil Procedure Rules*).

15. Although the applicant has deposed that the order granted by the lower court has the effect of evicting him from the matrimonial home, no evidence was presented before the learned Magistrate or this court to show that the Appellant has a matrimonial home on parcel of land known as Plot No. 505.

16. Indeed, the failure by the Appellant to annex any photographs showing the existence of a home on the suit land defeats his arguments that he shall suffer substantial loss unless the orders are granted.

17. I have read the Ruling of the learned Magistrate. In the said Ruling, the learned Magistrate was clear that she was granting the injunctive orders so as to preserve the suit land and to sustain the suit. Consequently, the issue of the Appellant being evicted from what he calls a matrimonial home does not arise.

18. Having failed to demonstrate the loss that he shall suffer unless the order of stay of the orders of the court are granted, I find the Appellant's Application dated 17th November, 2015 to be unmeritorious.

19. I therefore dismiss the Application dated 17th November, 2015 with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 23RD DAY OF FEBRUARY, 2018.

O.A. ANGOTE

JUDGE