



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA IN BUSIA

LAND & ENVIRONMENTAL DIVISION

ELC NO. 33 OF 2015

WILLIAM OSIMATA EMASETE

VINCENT WESONGA OSIMATA

(Suing as personal representative of the estate of

DESIRANDA AKANYATI (Deceased).....PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF BUSIA.....DEFENDANT

R U L I N G

1. By a Notice of Motion dated 17/11/2017 filed here on the same date, the Defendant/Applicant (simply “Applicant” hereafter) – **COUNTY GOVERNMENT OF BUSIA** – seeks various orders against the Plaintiffs/Respondents (simply “Respondents”) – **WILLIAM OSIMATA EMASETE** and **VINCENT WESONGA OSIMATA**. The orders are meant to maintain Status Quo that would otherwise be upset by execution of judgement delivered by this court on 18/10/2017. The orders prayed for in the application are four (4) but the application was brought under a certificate of urgency and heard *ex parte* on 20/11/2017. At that stage, prayers 1 and 2 were dispensed with and the prayers that remain for consideration now are 3 and 4. Prayers 3 and 4 are as follows:

Prayer 3: That pending the hearing and final determination of the intended appeal, the honourable court be pleased to order for stay of execution of the judgement of Hon. Justice Kaniaru dated 18/10/2017 and the orders therein.

Prayer 4: Costs of this application are in the cause.

2. The application is brought under Order 42 rule 6 of Civil Procedure Rules, Section 1A, 1B, 3 and 3A of Civil Procedure Act, 2010 and all other enabling provisions of law. The grounds advanced in support of the application stipulate, inter alia, that the Applicant is aggrieved by the judgement delivered by the court and intends to file appeal; that the orders given in the judgement are in the nature of permanent injunction and would make the Applicant suffer substantial loss if enforced; that the Applicant has a good appeal with high chances of success; that the Applicant would be gravely prejudiced if eviction is carried out before the appeal is heard and determined; that the Applicant can compensate the Respondents in the event the appeal does not succeed; and that the Applicant is ready to abide by any terms set by the court.

3. The supporting affidavit accompanying the application merely amplify the grounds on which the application is premised.

4. The Respondents responded vide grounds of opposition filed here on 19/11/2017. According to the Respondents, the Applicant has not satisfied the conditions necessary for stay of execution. He also said that this court does not have jurisdiction to entertain the application as filed. It was further averred that the application is an abuse of the court process and is also *res-judicata*. According to the Respondent, the court is being asked to stay execution regarding issues that were not determined by it.

5. The application was canvassed by way of written submissions. The Applicant’s submissions were filed on 13/12/2017. According to the Applicant, the conditions necessary in order to grant the orders sought have been met. The conditions were said to have been set out in the case of **ISMAEL KAGUNYI THANDE Vs HOUSING FINANCE COMPANY LIMITED: HCC Civil Application No. 156 of 2006**. They require demonstration that the Applicant has an arguable appeal and that the appeal, if successful, would be rendered nugatory if the order of stay is not granted. This position was said to have been reiterated in **RELIANCE BANK LIMITED (in liquidation) Vs NORLAKE INVESTMENT LTD: HCC Civil Application No. 93 of 2002**.

6. The memorandum of appeal was not annexed but it is clear that the Applicant intends to challenge the orders by the court to restore the land to its condition before the Applicant occupied it. It is also clear that the Applicant intends to challenge the capacity in which the Respondent filed the suit on behalf of a deceased registered owner. To the Applicants, these are arguable points and the first requirement has therefore been met. As to the second requirement, the Applicant submitted that enforcement of the judgement would entail demolition of some buildings on the land and incurring of expenditure to restore the land to the state in which it was before the Applicant, would be a big loss should the appeal succeed. This would render the appeal nugatory.

7. The Respondents submissions were filed on 4/12/2017. It was submitted, *inter alia*, that according to order 42 rule 6 of Civil Procedure Rules, the Applicant is required to demonstrate likelihood of substantial loss. The Applicant herein was said not to have demonstrated this. It was also submitted that provision of security by the Applicant is a pre-condition for granting an order of stay. The Applicant herein is said not to have offered any security. The Respondent averred that a successful litigant is entitled to the fruits of a court judgement and they are no exception.

8. Further, the Respondents felt that the court was being asked to stay execution of something it never ordered namely: demolition of a building comprising of a complete cultural centre complex constructed on the said land in the 1980s which contain historical arti-facts and some precious items. According to the Applicant, the court did not order this; it merely ordered for restoration of land.

9. The Respondents annexed various decided authorities to the submissions. The authorities are:

(i) GOVERNORS BALLON SAFARIS LTD Vs SKYSHIP COMPANY LTD & Another: CA Civil Application No. 32 of 2015, NAIROBI.

(ii) AB & Another Vs RB: CA Civil Application No. 4 of 2016, MALINDI.

(iii) REPUBLIC Vs THE COMMISSIONER FOR INVESTIGATION & ENFORCEMENT, Exparte WANANCHI GROUP KENYA LIMITED: HCC Misc. Application No. 51 of 2013, NAIROBI (Commissioner's Case)

The Respondents did not explain the usefulness or applicability of these authorities to the matter at hand but I have nevertheless read the authorities and tried to gauge their usefulness.

10. I have considered the application, the response made, and rival submissions. The Respondents, as Plaintiffs, filed the instant suit here complaining that the Applicant, as Defendant, had trespassed and undertaken illegal activities on land parcel No. MUNDIKA/BUKHAYO/329. The Respondents prayed for various orders against the Applicant, including a permanent injunction restraining the Applicants activities, an order to remove some structures and restoration of the land to its previous state; mesne profits, costs and interests.

11. By a judgement delivered on 18/10/2017, the court granted the prayer of permanent injunction, restoration of land, cost and also interest. The stay sought by the Applicant essentially relates to these prayers.

12. The Applicant submitted; *inter alia*, that he is required to demonstrate that the appeal is arguable and that the appeal, if successful, might be rendered nugatory if the order of stay is not granted. These considerations are more useful when an application for stay is filed in the court to which the appeal will be taken. They are considerations that the Court of Appeal has espoused while interpreting rule 5(2)(b) of Court of Appeal Rules. This application itself is brought under Order 42 Rule 6 of Civil Procedure Rules and Sections 1A, 1B, 3 and 3A of Civil Procedure Act (cap 21). A reading of order 42 rules 6 would show that two things are required for grant of an order of stay viz:

1. Demonstration of likelihood of substantial loss.

2. Provision of sufficient security.

13. I think the Applicant has referred to the requirement to prove substantial loss. No mention however is made on the requirement to provide security but in the application itself, the Applicant has evinced an intention to comply with any condition that the court may give. This clearly comes out in ground number 7 in the application.

14. I do not think it serves the interests of justice well to disallow this application. And it is not true, as the Respondent alleged, that the Applicant is asking the court to stay what it never ordered in the first place. The Respondent seem to take the position that the court never ordered the demolition of structures. It is true that the court did not expressly make that order. But it is also true that the court ordered for restoration of land to the status it was before Applicant's occupation. Question is: How could you restore the land to that status without causing demolitions yet the structures on the land were put up by the Applicant after occupation?

15. It is also not true to say that the court has no jurisdiction. The jurisdiction of the court is expressly conferred by Order 42 itself and it would be wrong to assert, as the Respondent asserted, that the court would be sitting on appeal against its own judgement if it entertains this application.

16. All in all, I am satisfied that the Applicant may suffer substantial loss should the appeal succeed. The structures on the land should be allowed to remain standing. The Respondents have not shown they have ability to put up such structures if the appeal succeeds. The best thing is to maintain Status Quo awaiting the determination of the appeal. And maintaining the status requires that the order of stay be granted.

17. As concerns security, I think the decree likely to issue in this matter is not a monetary one. The land in dispute is not one intended to be

sold too. I do not know what security the Respondents had in mind. They should have come clear on this. The court has a mandate to ensure a just and proportionate resolution of a matter in a given context, procedural bottlenecks notwithstanding. I think this is a proper case where the rule as to requirement of security needs to be relaxed. And this is so because there is no threat to the land in dispute. It is also so because the Applicant has the capacity to compensate the Respondents in the event that such compensation is required.

18. The upshot is that I allow the application in terms of prayer 3. Costs, that is prayer 4, to be in the cause.

Dated, signed and delivered at Busia this 11th day of April, 2018.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiff:

Defendant:

Counsel of Plaintiff

Counsel of Defendant