



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

MISC E.L.C APPLICATION CASE NO. 21 OF 2017

LAWRENCE NJERU MUNYI & OTHERS.....APPLICANT

VERSUS

MUSA NJAU MITHURO.....RESPONDENT

RULING

1. By a notice of motion dated 20th December 2017 brought under the provisions of **Order 42 Rule 6 of the Civil Procedure Rules**, the Applicants, who vaguely described themselves as “Lawrence Njeru Munyi & Others” sought the following orders;

a) *That this application be certified urgent and be heard ex-parte in the first place.*

b) *That this honourable court be pleased to stay execution of the order or decree issued by the Chief Magistrate on 09.10.17 pending filing and hearing of the appeal.*

c) *That costs of this application be provided for.*

2. The said application was based upon twenty two (22) grounds enumerated on the face of the motion. The first two grounds stated that the Applicants had lived on the property in dispute for over 50 years and that they had large families hence if they were evicted before their intended appeal was heard and determined, they would have no place to move to. A majority of the other 20 grounds were basically geared towards giving the history of the land dispute and attacking the order of the Hon. Chief Magistrate made on 9th October 2017.

3. As can be seen, the citation of the case from which the Applicants intend to appeal was not given on the face of the application. The supporting affidavit mentioned several cases which were handled by the High Court and the Court of Appeal in respect of the same dispute. There was, however, only one case before the Magistrate’s Court i.e. Embu *RMCC No. 61 of 1980* which was mentioned. So, the court can only guess that it is the suit before the Chief Magistrate’s Court, which has given rise to the instant application.

4. The said application was supported by an affidavit sworn by Lawrence Njeru Munyi on the 20th December 2017. He deposed that the Applicants had applied for copies of proceedings and the ruling of 9th October 2017 for purposes of appeal but that the same were yet to be supplied by the Chief Magistrate’s Court. The rest of the affidavit gave a disjointed history of the land dispute, previous litigation on the suit properties, and criticism of the various judicial officers who had given orders unfavourable to the Applicants.

5. The Applicants annexed various orders, rulings and judgements which have previously been issued by the Magistrate’s Court, the High Court and the Court of Appeal. A copy of the order or ruling intended to be appealed against was, however, not annexed.

6. The Respondent filed a replying affidavit sworn on 8th February 2018 in opposition to the said application. It was contended that the said application was bad in form and that there was no pending appeal on the basis of which a stay could be sought. It was further contended that the judgement of the Chief Magistrate’s court had decreed that the original suit property be sub-divided into two equal portions with the 1st Applicant’s late father and the Respondent taking one portion each. It was further contended that the 1st Applicant’s late father unsuccessfully appealed against the said decree to the High Court and the Court of Appeal. The Respondent therefore urged the court to bring the litigation between the parties to an end by dismissing the instant application for stay.

7. When the said application was listed for hearing on 7th March 2018, the advocates for the parties agreed to dispose of it through written submissions. The parties were consequently directed to file and exchange written submissions within 60 days and the matter was fixed for ruling on 19th July 2018. By the time of preparation of this ruling, however, only the Applicants had filed their submissions.

8. The court has considered the Applicant’s said application, the replying affidavit in opposition thereto as well as the Applicant’s written submissions. The application is founded on **Order 42 Rule 6 of the Civil Procedure Rules** which provides as follows;

a) 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.

b) No order for stay of execution shall be made under sub rule (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. On the other hand, the provisions of **Order 42 Rule 9 of the Civil Procedure Rules** provide as follows in relation to appeals against orders;

“The powers conferred by Rules 6 and 7 shall be exercisable where on an appeal may be or has been preferred not from the decree but from an order made in execution of such decree.”

10. A perusal of **Order 42 Rule 6(6)** also reveals that the court has power in exercise of its appellate jurisdiction to grant interim relief by way of injunction as long as the procedure for instituting an appeal from the Magistrate’s Court has been complied with.

11. In the opinion of the court, there are two main issues which arise for determination in this matter namely,

a) Whether the application for stay is competent and properly before the court.

b) Whether the Applicants have satisfied the requirements for the grant of an order of stay pending appeal.

12. The court’s appreciation of the law is that an Applicant can only seek an order of stay pending appeal before the Environment and Land Court if there is an appeal before that court. In entertaining such an application, the superior court would be exercising its *appellate jurisdiction* in accordance with the provisions of **Order 42 of the Civil Procedure Rules**.

13. The Applicants have conceded that they were yet to file an appeal before this court. All they did was to request for copies of the proceedings and the ruling of the Chief Magistrate’s court made on 9th October 2017. That is why they moved this court through a miscellaneous application.

14. This court is of the opinion that an Applicant can only invoke its appellate jurisdiction to entertain an application for stay of execution when there is a pending appeal. The mode of instituting such appeal is prescribed under **Order 42 Rule 1 of the Civil Procedure Rules** which provides that;

“Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.”

15. It is, therefore, evident that all the Applicants required to do to institute the intended appeal was to lodge a memorandum of appeal before this court. They were not required to have in their possession or to file copies of the proceedings and ruling alongside the memorandum of appeal. **Order 46** provides for filing of a certified copy of the order or decree appealed against at a later stage where it is not available at the time of lodging the appeal.

16. Consequently, the court is of the view that the instant application is incompetent. It has no legs to stand on since there is no pending appeal. The court cannot exercise its appellate jurisdiction under **Order 46 of the Civil Procedure Rules** unless and until the Applicants have duly complied with the procedure for instituting an appeal from the Chief Magistrate’s Court as prescribed by the rules.

17. The consequence of the incompetence of the appeal is that it is liable to be struck out. The court shall, therefore, proceed to strike out the said application. In view of this action, it shall not be necessary for the court to consider the merits of the application.

18. The upshot of the foregoing is that the Applicant’s notice of motion dated 20th December 2017 is hereby struck out. There shall be no order as to costs since the parties herein appear to be relatives.

19. It is so decided.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 19TH day of JULY, 2018.

In the presence of the 1st Applicant Lawrence Munyi and Ms Mbogo holding brief for Ms Beth Ndongoro for the Respondent.

Court clerk Mr Muinde.

Y.M. ANGIMA

JUDGE

19.07.18