



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO 19 OF 2017

PETER MUCHOKI - PLAINTIFF/APPLICANT

VS

ELIAS MWORORO KAMAU - DEFENDANT/RESPONDENT

RULING

1. On the 3/1/2013 the Applicant filed an Originating Summons against the Respondent and sought the following orders;
 - a. that the Applicant is entitled to be registered as the proprietor of all that parcel of land known as LOC 16/MBUGITI/2102 by way of adverse possession;
 - b. that the Respondent's title has been extinguished by dint of section 17 of the Limitations of Actions Act;
 - c. that the Plaintiff be registered as the proprietor of the suit land under Section 38 of the Limitations of Actions Act.
2. After completion of all the preliminaries and hearing of the case the Court on 12/4/18 dismissed the Applicant's case.
3. On 16/7/18 the Applicant by Notice of Motion of even date sought the following orders from the Court;
 - a. Spent
 - b. That this Honourable Court be pleased to issue an order for the maintenance of status quo as to the occupation and use of land parcel No LOC 16/MBUGITHI/2102 pending the hearing and determination of the intended appeal to the Court of appeal as per Notice of Appeal filed herein on 24/4/18
 - c. Costs of the application be provided for.
4. The application is supported by the affidavit of the Applicant sworn on even date. In the affidavit the Applicant states that soon after dismissal of his case, he, by a letter dated 12/4/18 applied for certified copies of proceedings and judgement of the Court with a view to filing an appeal and that the Respondent has started to interfere with the status quo in respect to the suit land as it pertains to occupation cultivation and use before he has exhausted all the avenues of litigation including intended appeal to the Court of Appeal. On 24/4/18 filed a Notice of Appeal. The Respondent has relied on a consent order recorded on the 3/5/16 which states as follows;

“By consent the status quo of land parcel LOC 16/MBUGITHI/2102 be maintained between the Plaintiff and the Defendant as to occupation cultivation and use pending the hearing and determination of the suit.”
5. The application is opposed by the Respondent through an affidavit in reply filed on the 25/7/18. The Respondent states that the Applicant's application is a ploy to let him continue occupying the suit land and was only been filed after the Plaintiff through his advocates have lawfully served the Applicant with a letter dated 14/5/18 requiring vacant possession of the suit land. In the affidavit the Respondent asserts that his action is legitimate as it follows the dismissal of the Applicant's case for adverse possession in respect of the suit land.
6. Finally, the Respondent has expressed doubt on the ability of the Applicant to pay him the costs of this case following dismissal of this application and the costs of any appeal if any that he may prefer to the Court of appeal.
7. The parties undertook with concurrence of the Court to canvass the application by way of written submissions. The Applicant and the Respondent filed their written submissions on the 28/9/18 and 1/8/18 respectively. The Court has duly considered the application, supporting affidavit replying affidavit and written submissions together with all the annexures thereto.

8. Before making determination as to the issues raised by the parties for determination by the Court, it is worthwhile to lay in context the Applicant's application. As set out above it is clear that the orders sought by the Applicant are convoluted. The Court says so because the Applicant purports to seek an order for a status quo, at the same time an injunction and impliedly a stay of execution. These three matters fall in jurisdiction for determination by the Court through consideration of independent factors as to their merits. This is so indeed, because the three mean different things when they fall for consideration by the Court in exercise of its jurisdiction. Status quo would fall for consideration when a state of affairs is acknowledged by the parties or found by the Court to exist in favour of the parties that does not need to be disturbed. Injunction is either restrictive or directory dependent on the subject matter as affecting the parties that the Court considered necessary for preservation or compliance. Stay of execution looks at the determination made by the Court as to the rights of the parties which the party in disfavor seeks to stop from enforcement. It is clear that except for the directory injunction the three matters stated in the Applicant's application only serve for an interim period. The interim period is pending determination of the suit on its merits. It is trite that upon determination of the suit all interim orders fall in their place in the final judgment of the Court.

9. Notwithstanding what is stated above, the Court considers that the application of the Applicant and all pleadings taken in perspective is meant for a stay of execution of the judgement delivered by the Court on 12/4/2018.

10. After considering the pleadings and submissions of the parties the Court considers the following to be issues valid for determination;

a. Whether the orders made by this Court in its judgement of 12/4/18 ought to be stayed pending the hearing and determination of an appeal to be filed in the Court of appeal.

b. Who should bear the costs of the application?

11. The Court will determine the issues in turns.

12. The Court on 12/4/18 made the following orders;

“The burden of proving acquisition of title by adverse possession rests upon the Plaintiff to prove on a balance of probabilities that he has acquired title to the suit property by way of adverse possession. The Plaintiff has not discharged this duty too and the Court finds that the claim is unfounded.

The upshot is that the claim fails and it is hereby dismissed.

The costs of the suit are in favour of the Defendant.”

13. Guided by case law and the submissions made by the parties which the Court concurs it is now settled law that in order to a party to succeed in an application for execution it must show that;

a. The appeal sought to be filed is arguable so much so that the probability of its success is on the face of it identifiable.

b. If the order sought is not granted it would render the eventuality of success of such an appeal nugatory.

14. Notwithstanding what is stated in the preceding paragraph, with regard to an application for stay of execution order 42 Rule 6 (2) of the Civil Procedure Rules makes the following provisions;

“(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.”

15. From the analysis set out above it is clear that in order for the Court to stay execution, the following matters must be present at the same time; there must be an order of the Court capable of execution in favour of the party against whom the application is sought. In this case such order would validly be available for the Respondent against the Applicant. Secondly the party in whose favour the order sought to be enforced must have given indication of enforcement or execution of such orders. In this case it is the Respondent who ought to have had such order in his favor and seeks to enforce the same against the Applicant. Thirdly, the party seeking to file an appeal in the Court of appeal and stay execution ought to annex in its application the proposed Memorandum of appeal and the notice of appeal filed in the Court of appeal. In this case it should be that the Applicant has not annexed the notice of appeal and a proposed memorandum and an appeal to be filed in the Court of appeal. Fourthly, the party proposing to file the appeal in the Court of appeal ought to show to this Court that substantial loss would occur if the order made by the Court (in this case on 12/4/18) would cause loss which may not be compensated if it is enforced. Fifthly the party which seeks to file an appeal (in this case the Applicant) ought to provide and/or security for the due performance of the decree issued by the Court in the case appealed.

16. With respect to the present application; there is no order issued by the Court on 12/4/18 except on costs in favour of the Respondent against the Applicant so much so relating to the alleged vacant possession of the suit land. Secondly there is no indication by the Respondent that he intends to enforce the order on costs made in his favour on 12/4/18. The letter dated 12/5/18 by the Respondent through his advocates is a new cause of action by the Respondent for vacant possession by the Applicant of the suit land. Thirdly there is no notice of appeal duly filed in the Court of appeal and a proposed memorandum of appeal to be filed in the Court of appeal annexed to the Applicant's application. There is, however, a notice of appeal filed (erroneously) in this Court. The Applicant has not shown any loss that will suffer if any execution were to be levied against it. The Court says, were to be levied, because there is no valid order made by the Court for eviction against the Applicant and none is threatened by the Respondent. Fifthly, the Applicant has not undertaken to provide security for the due performance of

the decree.

17. Weighing one thing with another and doing the best I can with regard with the matters adverted to and considered in this case the Court finds that the Notice of Motion dated the 16/7/18 is not merited.

18. The Court makes the following orders;

a. The Notice of Motion dated 16/7/18 is hereby dismissed.

b. The Applicant shall pay the Respondent the costs of this application.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 29TH DAY OF NOVEMBER 2018.

J.G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Plaintiff/Applicant – Absent

T M Njoroge HB for Kamau Mwangi for the Defendant/Respondent

Irene and Njeri, Court Assistants