REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO. 83 OF 2015

BOARD OF GOVERNORS CONSOLATA

HOSPITAL NKUBU .....PLAINTIFF

VERSUS

LAWRENCE MUNGIIRIA .....DEFENDANT

RULING

Background

This is the ruling in respect of the two applications dated 2nd November, 2018 and 5th November 2018 respectively. The brief background of the applications is that this court heard this suit and gave its judgment on 31st October 2018 in favour of the plaintiff. On 2nd November 2018, the respondent lodged a notice of appeal and also filed the application dated the same day seeking stay of execution of the judgment and decree pending the hearing of application and the intended appeal.

Three days later on 5th November 2018 the plaintiff filed the application dated the same day seeking an order directing the OCS Nkubu police station to provide security to enable them or their agents representatives and/or employees take full possession and use of their land parcel Nkuene/Taita/559 as per the judgment of this court.

When the matter came up for directions on 12.11.2018, the parties through their legal representatives agreed to dispose of the two applications simultaneously by way of affidavit evidence already filed and written submissions.

PLAINTIFFS SUBMISSIONS

The plaintiff through their advocates M/s. G.M Wanjohi & Co. advocates referred to the conditions for the grant of stay of execution order pending appeal as set out under order 42 CPR. The plaintiffs' counsel submitted that the defendant has not demonstrated that he would suffer substantial loss. The plaintiffs advocate also submitted that the defendant has never taken possession of the suit land and that the developments which the defendant purports to have carried out are disputed and that even if such development exist which is denied, the same do not constitute substantial loss.

The plaintiff also submitted that the defendant has not offered security for the due performance of the decree. It is further submitted that before granting such orders, the court should be aware not such to grant orders as doing so would be granting the defendant leave to take possession and use of the suit land yet the court had restrained him from doing so earlier. As regards the application dated 5th November 2018, the plaintiff relied on the supporting affidavit of Fr. Silas Mwiti sworn on 5th November 2018.

He deponed that the defendant has blocked the entrance to the suit land thereby denying the plaintiff access to the suit property. In conclusion, the plaintiff submitted that their application should be allowed to enable them enjoy the fruits of the judgment unless good reasons are given. They relied on the following cases:

1. Masisi Mwita vs Damaris Wanjiku Njeri, civil appeal no. 107/2015 reported in (2016) eKLR.

DEFENDANTS SUBMISSIONS

The defendant through the firm of Kiautha Arithi & co. advocates submitted that he is in occupation of land registration No. Nkuene/Taita/559 and that he had developed the same before the injunction orders were issued by this Hon. Court on 31st October, 2018. The defendant stated that the purpose of stay is to preserve the subject matter pending appeal. The defendant also submitted that he has met the conditions for stay of execution pending appeal as set out under order 42 Rule 6 (2) which provides as follows:

"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 the application is 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 has been given by the applicant"

On the issue of substantial loss, the defendant submitted that he will suffer loss as the plaintiff intends to repossess the suit land to wit land registration no. Nkuene/Taita/559 and in doing so destroy his property already on the suit land. He stated that he took possession of the suit land in the year 2015 and moved to erect a stone perimeter fence and started constructing a storey building which he was stopped from continuing while at the 1st floor.

On the second condition, the defendant stated that judgment was delivered on 31st October, 2018, and on 2nd November 2018 they filed their application for stay. As such, they have brought that application without delay. As regards the second condition, the defendant stated that since the decree herein is not a money decree then the provision of security is not necessary since the land is still intact and the defendant does not intend to put up further developments pending the hearing and determination of the intended appeal. He cited the following cases:

(1) Butt vs Rent Restriction Tribunal (1982) KLR

(2) Consolidated bank vs Nampijia & another civil appeal no. 93 of 1989 (Nairobi). – unreported

(3) Peter Ndekei Muhia vs Charles Njoroge Kimaru & another (2017) eKLR.

DECISION

I have considered the submissions by both the appellant and the respondent in respect of the two applications dated 2nd November and 5th November 2018 respectively. I have also considered the affidavit evidence both in support and opposition to the two applications. I have also considered the applicable law. The first application dated 2nd November 2018 is for stay pending appeal. The second application dated 5th November is basically in opposition to the first application for stay pending appeal. Before the superior court an applicant must satisfy the conditions set out under order **42 Rule 6 civil procedure rules.**

The provisions of order 42 rule 6 (2) are as follows:

"(2) No order for stay of execution shall be made under sub rule (1) above 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 appellant……".

The defendant in his application has stated that he will suffer substantial loss if the order of stay is not granted. He stated that he is in possession of the suit land and that he has undertaken numerous development including the construction of a perimeter wall and a storey building which was stopped on the first floor.

Substantial loss comes from the English word substance which according to BLACK'S LAW DICTIONARY TENTH EDITION means:-

"Of relating to, or involving substance; and not imaginary; having actual, not fictitious existence; important, essential and material; of real worth and importance; strong solid and firm…."

The definition of substantial loss is for an applicant to show that the loss he is likely to suffer if the stay order is not granted is of a considerable huge amount and that the respondent is not in a position to repay the amount should the judgment be overturned by the superior court. In this case, the defendant has simply stated that he has built a perimeter wall and constructed a storey building on the suit property which may cause him substantial loss if the order of stay is not granted. However, the defendant has not attached any valuation report indicating the material worth of the alleged perimeter fence or building to enable this court determine whether the defendant will suffer any substantial loss and therefore grant the orders being sought. Substantial loss is material damage that is so huge such that it take one long or a colossal sum of money to restore to its original position. One cannot say that he will suffer substantial loss when such as a loss has not been quantified or put in material value. The defendant has not assessed the probable loss he will suffer if the orders sought are not granted.

The defendant has also stated that since the subject matter of the decree is not money, it is not necessary to provide for security. My interpretation of order 42 rule 6 civil procedure act is that whether the decree is for a liquidated claim or not a party seeking an order for stay must give security for the due performance of the decree whether the decree is for a liquidated claim or not. That requirement is similar to election petitions which is not a liquidated claim but parties are mandated to deposit security for costs. The subject matter of the decree which the defendant is seeking stay pending appeal is a parcel of land being Land registration no. Nkuene/Taita/559 measuring 0.202 Ha.

The defendant has indicated that he will suffer substantial loss unless the order of stay is given. He should therefore be able to quantify such loss he is likely to suffer which amount should be the equivalent he is required to give or undertake to pay should the intended appeal not succeed. Order 42 rule 6 (2) does not say that it is only in money decree that an applicant seeking stay pending appeal should provide security. The defendant has not even given an undertaking to provide any security or meet any condition(s) that the court may impose as pre-requisite for the grant of stay pending appeal. For all the reasons I have given above I find and hold that where an applicant exercising his right of appeal to the superior court, such an application must be balanced with the undoubted right of a decree holder who must be allowed to enjoy the fruits of a valid judgment. Doing the best in the balancing act, I find that the defendant has not satisfied the conditions set for the grant of the orders sought as set out in order 42 rule 6 civil procedure rules.

I therefore find the application dated 2nd November, 2018 lacking merit and the same is hereby dismissed with costs to the plaintiff. However I find the plaintiff's application dated 5th November 2018 meritorious and the same is hereby allowed as prayed with costs.

It is so ordered.

READ, DELIVERED AND SIGNED BY

E. C. CHERONO,

ENVIRONMENT AND LAND COURT JUDGE KERUGOYA AT MERU THIS 7TH DAY OF DECEMBER, 2018.

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In the presence of:

Mr. Mutuma for plaintiff

Mr. Mutegi for defendant

C/A Janet