



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CIVIL CASE NO. 18 OF 2008

SIMON MURIITHI MAINA (*suing on his behalf*

and on behalf of 33 others).....**PLAINTIFFS/APPLICANTS**

VERSUS

ANTHONY NZUKI.....**1ST DEFENDANT/1ST RESPONDENT**

EMMANUEL KAKULA.....**2ND DEFENDANT/2ND RESPONDENT**

(Both being sued in their capacities as personal

representatives of the estate of the late

RAPHAEL KAKULA NZUKI) ,

DIVISIONAL INTEGRATED DEVELOPMENT

PROGRAMMES CO. LTD (DIPS)....3RDDEFENDANT/3RD RESPONDENT

RULING

1. The Plaintiffs/Applicants have moved this court via a Motion dated 3rd December, 2012 seeking the orders of stay of execution of a decree issued on 23rd November, 2012 pending the hearing of their intended appeal.
2. The Application is predicated on the grounds that the Applicants have an arguable appeal with a probability of success and that if a stay is not granted, the intended appeal will be rendered nugatory.
3. According to the Applicants, they reside on the suit land and if execution of the decree proceeds, they may be rendered homeless; that there was a consent which exempted them from being affected by the order/decreed impugned and that they will suffer substantial loss if the decree is executed against them.
4. The Applicants have deponed that the Application was made without unreasonable delay and that the court should do equity and justice in the instant matter.
5. The Application is supported by the affidavit of Albert Simiyu Kuloba sworn on 3rd December, 2012.
6. In response to the Application, the 1st and 2nd Defendants filed a Preliminary Objection dated 8th

February, 2013 which raises the following grounds: that the Application is incompetent and bad in law as it seeks to stay the decree of 22nd November, 2012 yet there is no such decree; that no decree can issue from a Ruling and that there is no decree capable of being stayed.

7. The Applicants' case is that on 20th November, 2011, a current order was entered into which recognized that the Applicants were residing on the suit property; that there was a Ruling of 22nd November, 2012 which restrained the Plaintiffs from accessing their homes on the suit property and that the Applicants have lodged a Notice of Appeal to challenge the said Ruling.

8. According to the Applicants, they are apprehensive that the order will be executed, the Deputy Registrar having issued a decree arising from the said Ruling on 3rd November, 2012.

9. The 1st and 2nd Respondents did not file Affidavits to respond to the aforesaid averments but instead lodged a Notice of Preliminary Objection. There is no response by the 3rd Respondent.

10. The parties made oral submissions. The Applicants' submissions is to the effect that the ten (10) Applicants are still on the suit land together with their families and that they have filed a Notice of Appeal to challenge the Ruling; that they have not filed the appeal as they are yet to be supplied with the proceedings and that they will suffer hardship if evicted.

11. The Respondents submitted that the Applicants seek to stay a decree which was never passed by the court; that the Respondents sought for an injunction against the Plaintiffs which they were granted on 22nd November, 2012 and that the court did not exempt any of the Plaintiffs from the said order.

12. According to the Respondents, the Notice of Appeal was filed on 3rd December, 2012 but no appeal has been lodged to date and that the notice has lapsed. It is the Respondents' case that the Applicants have to go to the Court of Appeal to seek extension of time.

13. Under Order 42 Rule 6, (4) of the Civil Procedure Rules, for the purposes of an appeal to the Court of Appeal, an appeal is deemed to be filed when under the rules of that court a Notice of Appeal is filed. Rules 82 of Court of Appeals Rules 2010 stipulates that an appeal shall be lodged within sixty (60) days from the date the notice of appeal is lodged, provided that an Application for a copy of the proceedings has been made within thirty (30) days from the date of the decision impugned excluding the time certified as required for preparation and delivery to the Appellant the proceedings.

14. The aforesaid provision implies that until such a time the proceedings are furnished to the Appellant, the time for filing an appeal is deemed to have stopped running. The current Application cannot therefore be deemed to be bad or incompetent on account of the lapse of sixty (60) days of filing of the Notice of Appeal.

15. This is because the Notice of Appeal and the Application for the proceedings were lodged within the stipulated time.

16. On the issue of the decree being issued in lieu of an order, both sides agree that a Ruling can and could only give "birth" to an order and not a decree. Even if the decree is to be expunged from the record, the Ruling made on 22nd November, 2012 will still be in force and an order can be extracted at any time and enforced. The court finds that such technical errors are taken care of by Section 1A, 1B, 3A of the Civil Procedure Act and Article 159(2) (d) of the Constitution of Kenya which enables the court to do substantial justice devoid of undue procedural technicalities.

17. The court thus overrules the objections raised by the Respondents.

18. The stay of execution of an order or decree requires the Applicant to establish the parameters set out by Order 42 Rule (2) (a) and (b) of the Civil Procedure Rules, that is, that the Applicant will suffer substantial loss unless the order is granted and security is furnished.

19. On substantial loss, the Applicants, and especially the 10 named persons, are in occupation of the suit land and have done extensive developments on the land.

20. If the orders of the court are enforced against them, the same will amount to eviction before the intended appeal is heard.

21. The court therefore finds the first limb of stay of execution has been established.

22. On the issue of furnishing security, the matter is not a money decree to require a deposit to be made as a condition for stay. What the Applicants are seeking is the maintenance of the *status quo* pending the hearing and determination of the appeal to forestall eviction.

23. The court is inclined to order that the *status quo* on the ground should be maintained until the appeal is heard and determined on condition that the Record of Appeal is lodged within forty five (45) days from the date hereof.

24. Each party to bear his own costs.

DATED AND DELIVERED AT MACHAKOS THIS 10TH DAY OF MARCH, 2017

OSCAR A. ANGOTE

JUDGE