



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

ENVIRONMENT AND LAND COURT MISC APPLICATION NO.12 OF 2016

COUNTY GOVERNMENT OF KWALE.....APPELLANT

VERSUS

SAUMU SAID NYANYA

JUMAA ATHUMAN NYEVU

SAUD ATHUMANI NYEVU

MWINYI KOMBO RAMATHAN.....DEFENDANTS

RULING

This is the Notice of Motion dated 5th May 2016. It is brought under Section 1A, 1B, 3A of the Civil Procedure Act and Order 42 Rule 6 of the Civil Procedure 2010. It seeks orders;

1. Spent.

2. Spent.

3. That the execution of the order and/or ruling of the Kwale Senior Principal Magistrate (Hon. C. M. Maundu) made in 17/2/2016 in Kwale PMCC No.93 of 2014 be stayed until the hearing and final determination of the appeal lodged herein by the appellant.

4. That costs of this application be provided for.

The appellant has listed the ground they rely on. The main ground is that on 17/2/2016 the respondent obtained an order and/or ruling from the Kwale senior principal magistrate (Hon. C. M. Maundu) made on 17/2/2016 in Kwale PMCC No.35 of 2014 (consolidated with PMCC No.93 of 2014) restraining the appellant from entering, accessing or trespassing on Kwale Mahubuni/560 (hereinafter called "the suit property"). The appellant is the registered owner and has at all material times been in occupation, possession and in control of the suit property and both equity and the principles of **GIELLA –VS- CASSMAN BROWN & CO LIMITED (1973) EA** gravitate towards the appellant retaining the said control and possession until the substantive case is heard and determined. Further that the respondent has written to the appellant expressing their intention to execute the said order and/or ruling unless the appellant vacates the suit property.

Further that the appeal lodged by the appellant is arguable and has high chances of success. The application is supported by the affidavit of Kevin Dzumo, the director legal services in the county government of Kwale, the appellant herein sworn on the 5th May 2016.

It is the appellants' contention that the orders granted by the subordinate court are illegal. They have put forward the cases of: -

SOUTH NYANZA SUGAR COMPANY LIMITED (EXPARTE APPLICANTS) –VS- PRINCIPAL MAGISTRATE RONGO AND 2 OTHERS E & L JUDICIAL REVIEW NO 38 OF 2012

CENTRAL KENYA LIMITED -VS- TRUST BANK LIMITED AND 4 OTHERS COURT OF APPEAL NO.215 OF 1996 AT NAIROBI. SELECTED LIMITED – VS- GOLD ROCK DEVELOPMENT LIMITED MILIMANI HCC CIVIL APPEAL NO48 OF 2015

It is the appellant's contention that it is the registered owner of the suit property. In it are fully constructed sub-county offices.

The appellant is in occupation, possession and control of the suit property.

In paragraph 15 of the Replying Affidavit sworn on the 5th September 2016 the 1st respondent admits that the appellant has completed the building and it is in use.

The application is opposed. There is a Replying Affidavit sworn by Saumu Saidi Nyanya the 1st respondent herein on the 5th day of September 2016.

She states that she owns the suit property Kwale Mahubuni/560. She annexed a copy of the title deed as annexure (SSN1) that she obtained orders of injunction against the appellant vide Kwale PMCC No.35 of 2014. She has attached a copy of the order marked "SSN-4". She contends that the appellant has not come to court with clean hands. That the appellant despite having been served with interim orders of injunction went ahead to complete constructing the building and started using it. That for this reason the appellant does not deserve to benefit from this court's discretion. It is the respondent's further contention that the appellant has failed to place before the court evidence to explain what kind of loss they are likely to suffer. They have put forward the case **MAINA MBURU –VS- PAUL MAINA KABECHA AND GRACE NJAMBI MAINA (SUED AS ADMINISTRATORS OF THE ESTATE OF STEPHEN KIMANI MAIN (2016)** where it was held that "in this case the applicant deponed that he will suffer substantial loss he did not illustrate how he will suffer substantial loss he merely stated it. Substantial loss occurring to the applicant is the cornerstone in considering whether stay of execution order should issue or not. The onus of proof normally rests on the appellants who is expected to illustrate the substantial loss he will suffer of execution is levied. It is not enough to claim that one will suffer substantial loss without expounding what loss would be."

I could not agree more with the above position. It is respondent's contention that the appellant has failed to demonstrate what loss they would suffer if these orders are not granted.

Further that the appellant has failed to demonstrate that the appeal will be rendered nugatory if these orders are not granted as the orders of my injunction granted are not final. The respondent prays that the application be dismissed with costs.

I have considered that submissions of both counsels substantiating their client's respective positions in their respective affidavits.

I have considered the authorities cited. The issues for determination are:

1. Whether stay of execution pending appeal should be granted.

2. Who should bear the costs of the application?

It is appropriate at this point to consider the facts that have emerged and the legal principles under order 42 Rule 6 of the Civil Procedure Rules. Rule 6 (1) states:

“No appeal or second appeal shall operate as a stay of execution or 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 there on 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.”

2. 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

b) Such security as the court order for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

The purpose of the application for stay pending appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal successful will be not rendered nugatory. The appellant has told the court that it is likely to suffer substantial loss as the orders which were granted amount to eviction orders.

As it stand or the suit property are the appellants sub county officers which are operational. The staff are already in occupation. They stand to suffer if they are evicted from the said building.

I find that the appellant has demonstrated that it will suffer substantial loss if these orders are not granted. This application was filed on 5/5/2016. The orders in the subordinate court were granted on 17/2/2016. I find that there has been not been unreasonable delay in bringing this application. Without going to the merits of the appeal itself it should be noted that both the appellant and respondent have titles to the suit property. It would have been in order if the learned trial magistrate had ordered that the status quo be maintained. A glance at the orders issued means that appellant ought to be evicted from the premises. The orders were granted when the appellant was already in full occupation of the suit property. I find that refusal to grant the orders sought will render the appeal nugatory.

Supposing the appellant be ordered then they later succeed in appeal what next?

Public resources have been used to put up the sub-county offices. The appellant was in occupation, possession and control of the suit property. The appellant through the director of legal services have deponed that they are ready to abide by any conditions set by this honorable court as regards to furnishing security for the due performance of the decree I am guided by the authority of **VISTA HOLDINGS INTERNATIONAL LIMITED –VS- SPAN IMAGE KENYA LIMITED (2014) eKLR**

I direct that the appellant do file in court an undertaking that they will compensate the respondent in the event that the appeal does not succeed. Accordingly the applicant is allowed in the following terms: -

1. THAT the execution of the order and/or ruling of the Kwale Senior Principal Magistrate (Hon. C. M. Maundu) made on 7/2/2016 in Kwale PMCC No.93 of 2014 be stayed until the hearing and final determination of the appeal lodged herein by the appellant.

2. THAT the appellant to file in court within twenty one (21) days a letter of undertaking to compensate the 1st respondent in the event the appeal does not succeed.

3. Costs of this application to abide the outcome of the appeal.

Ordered accordingly.

L. KOMINGOI

JUDGE

6/4/2017

Ruling dated and delivered in open court on the 6th day of April 2017 in the presence of Mr. Ondego for Kibaara for the appellant, Mr. Jumbale for the 1st respondent and the court assistant Koitamet

L. KOMINGOI

JUDGE

6/4/2017