



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO. 231 OF 2014

ALI SHARIF MAULANA (the lawful attorney of PAOLA GLOLIA)PLAINTIFF

=VERSUS=

SCAVO PIETRO.....DEFENDANT

IN ELC NO. 236 OF 2014

PIETRO SCAVO..... PLAINTIFF

VERSUS

GLORIA PAOLA.....DEFENDANT

RULING

1. On 22nd June 2015, the Honourable Justice Angote delivered a Ruling herein in regard to an application dated 16th December 2014 and granted Orders as follows: -

(i) THAT a mandatory injunction be and is hereby issued compelling the Defendant, Gloria Paolo, (Applicant herein) to demolish the wall erected dividing the house on property known as subdivision No. 622(Original No. 59/7) Watamu and to reconstruct the house so that it is in the same status as it was before the construction of the said wall within 45 days pending the hearing and determination of the suit.

(ii) THAT the Plaintiff (Respondent herein) be at liberty to demolish the said wall and reconstruct the house as ordered in (1) above after the expiry of 45 days and the costs of the demolition of the wall and reconstruction of the house to be paid by the (Applicant herein).

(iii) THAT the Defendant(Applicant) be and is hereby restrained by a temporary injunction from interfering with the Plaintiff's quiet possession of the entire property known as Portion No. 622 pending the hearing of the suit.

(iv) THAT the Defendant(Applicant) do pay the costs of that application.

2. Aggrieved by the said Ruling, the Applicant lodged a Notice of Appeal against the entire decision on 13th July 2015. Nothing much appears to have happened thereafter until a year later when on 21st July 2016, the Applicant moved under Certificate of Urgency to file the present application before me (dated

11th July 2016) seeking a Stay of Execution of the Orders granted by the court on 26th June 2015. The main ground for seeking a Stay of Execution of the Orders is contained in Ground No. 14 of the Application which is framed as follows: -

14. “That (the Respondent herein) has already demolished the said wall and may commence reconstruction of the house to restore it to its previous state. Furthermore, the said (Respondent) has locked up the gate therefore the (Applicant) cannot access his portion of the property. Accordingly, (unless) execution of the aforesaid orders is stayed, the Appeal which the (Applicant) has filed stands to be rendered nugatory.”

3. The Application is supported by an Affidavit sworn by Ali Sharrif Maulana on 11th July 2016 and a Supplementary one sworn much later on 23rd November 2016. While the earlier Supporting Affidavit revolves largely on the contents of Ground No. 14 in support of the Application as enumerated above, the Supplementary Affidavit concentrates on the delay in filing this Application and lays the blame on the Applicant’s previous Advocates on record.

4. In a Replying Affidavit sworn and filed in court on 5th October 2016, the Respondent Pietro Scavo objects to the grant of the orders sought herein. It is the Respondents case that the orders sought to be stayed have been partially executed by the Respondent after the Applicant failed to do so and that, since December 2015, the offending wall that divided the sitting room, the kitchen and the verandah had been demolished and the house had since been restored to its former state as far as the living area is concerned.

5. The Respondent avers that the Applicant is abusing the Court Process by filing an application for stay more than one year after he defied to implement the same orders as a result of which the Respondent himself had to step in and implement the same. The Respondent denies that he is about to commence reconstruction of the house as everything else has so far been done to implement the Court Order save for the roof top where the Applicant had begun constructing a house. The Respondent further denies locking the gate to the premises and avers that the Applicant and the donee of his power of attorney continue to-date to have access to the premises.

6. I have considered the Application and the rival submissions made by the respective counsels for the parties. It is not contested that the parties herein are proprietors in common of all that parcel of land known as Title No. CR 19327 Sub-division No. 622 (Original No. 5917) Watamu. The relationship between the parties appears to have broken down and in the year 2014, the Applicant apparently brought in a surveyor into the suit premises and proceeded to sub-divide the house erected thereon through the construction of a wall that divided the house into two portions. The said sub-division did not go down well with the Respondent who proceeded to file the application dated 16th December 2014 which resulted into the Orders whose stay is sought herein.

7. Order 42 Rule 6 of the Civil Procedure Rules provides as follows:-

6(1) 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.....

(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; 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.

8. Arising from the foregoing, two issues arise for my determination. These are:-

(i) Whether substantial loss may result to the Applicant unless the Orders sought are granted.

(ii) Whether the Application has been made without unreasonable delay and

I shall accordingly proceed to consider the issues in that order.

(i) Whether substantial loss may result to the Applicant if the orders sought are denied.

9. The mandatory orders granted by this court on 26th June 2015 required the Applicant to demolish the wall he erected dividing the house they jointly own with the Respondent and to reconstruct the house so that it is in the same status as it was before the construction of the wall. The said orders required compliance within 14 days of the making of the order. The second limb of the order allowed the Respondent after the expiry of 45 days to demolish the wall and to reconstruct the house in the event the Applicant failed to do so.

10. I think the Applicant's application is premised on the notion that he is entitled to a certain definite section of the suit premises. Both the Applicant and the Respondents are tenants in common. As the Honourable Justice Angote found in the decision sought to be appealed, the nature of tenancy in common is such that there is unity of possession which entitles a tenant in common to exercise possession of every part of the land. In such a situation, a co-owner of the land such as the Applicant cannot unilaterally decide the portion of land that his partner should be allocated in the event they disagree. Section 94 of the Land Act would require the sanction of the Registrar before any partitions are effected. It is therefore not possible to see how the Applicant will suffer loss as against the co-owner's interests.

11. In any event, the purpose of stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant is safeguarded and the appeal is not rendered nugatory. Nothing was placed before me to show that the execution in the nature ordered by the court is likely to waste the suit property materially or otherwise. From the evidence placed before me, it is common ground that the wall which separated the kitchen and the sitting room has been demolished and all that remained was repairs to the roof of the house owned in common.

12. In *James Wangalwa & Another -vs- Agnes Naliaka Cheseto (2012) eKLR, Gikonyo J.*, in discussing the exercise of the High Court's discretion to grant a stay of Execution observed that: -

“The Applicant must establish other factors which show that the execution will create a state of Affairs that will irreparably affect or negate the very essential core of the Applicant's (case) as the successful party in the Appeal.”

13. In my view failure to repair the roof may probably lead to more loss than repairing the same to the extent only of returning the house to its original status.

(ii) Whether the Application was made without unreasonable delay

14. At paragraph two of his Supplementary Affidavit sworn on 23rd November 2016, the Applicant avers that he learnt of the existence of the said orders on 29th June 2015, when he states, he “was surprised to

find that the aforesaid ruling had been executed.” The Ruling referred to required the Applicant to take certain actions within 14 days. No explanation has been preferred as to why there was no compliance other than the claim that the Advocate then on record delayed to file the Application for Stay of Execution.

15. I am not convinced given the circumstances herein that there was any mistake as alleged on the part of counsel. The Applicant was at all material times aware of the orders made. The orders were to be enforced either by the Applicant, or in the event of default, the Respondent. Nothing was done until the Respondent effected the court order and was almost completing the repairs ordered. Having failed and/or refused to comply with the court order for a period of one year, I think it is ironical and improper that the Applicant now rushes to court at this late hour to stop the Respondent who has been diligent and vigilant in executing the Orders.

16. In **William Lenkan Konchellah & Another-vs- Julius Tabarai Ole Mainto Tampushi(2014) eKLR** the Court of Appeal sitting in Kisumu observed:-

“We are being asked to issue stay of execution orders. Yet the respondent says and it is not disputed that the execution has already taken place and we are shown the auctioneer’s report on the same,.. . In our view the law is clear, courts do not act in vain.. we cannot make orders of stay of execution for the same will be orders in vain.”

17. I think the effect of making the orders sought herein when it is admitted that the wall which was sought to be demolished has been demolished will indeed be asking the court to act in vain. The repair sought to be done to the roof was not a matter in contention before the court and is most likely aimed at restoring the suit premises to its earlier status after the removal of the wall and to make it suitable to the inhabitants of the house.

18. In **Antoine Ndiaye -vs- African Virtual University (2015) eKLR**, the court citing other authorities observed as follows: -

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court, as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree-holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination.”

19. Taking all the above circumstances into consideration I am not satisfied that the Applicant has properly brought himself within the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules. The Upshot is that the Application dated 11th July 2016 is dismissed with costs to the Respondent.

Dated, signed and delivered in Malindi this 2nd day of June, 2017.

J.O. OLOLA

JUDGE