



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 126 OF 2015

AUGUSTINE BARASA KHISA.....PLAINTIFF

VERSUS

LAZARO NAMASAKE.....1ST DEFENDANT

BUNG'AA NATO..... 2ND DEFENDANT

R U L I N G

1. The application dated 6/2/2017 seeks the following orders:-

(1) That this application be certified urgent and heard *ex parte* in the first instance.

(2) That there be stay of execution of the decree herein pending the hearing and determination of this application *inter partes*.

(3) That there be stay of execution of the decree herein dated 5th October, 2016 pending the hearing and determination of appeal in Court of Appeal in Eldoret.

(4) That the costs of this application be provided for.

2. The applicant states that the grounds upon which the application is brought are as follows: that the decree may be executed at any time; that a Notice of Appeal has been filed, and it is intended to file an appeal to the Court of Appeal, that intended appeal has overwhelming chance of success and lastly that if execution is levied the appeal would be rendered nugatory.

3. The Notice of Appeal appears to have been filed on 4/10/2016. A copy is exhibited as **Exhibit "BN-2"** in the supporting affidavit of the 2nd applicant sworn on 6/2/2017. This court can only assume that the same was served for there is no indication on its face showing that the Notice was served upon the other side.

4. The application is opposed. The sworn affidavit of Patrick Okile has been filed toward this end. It is urged in that replying affidavit that the application has been overtaken by events as the deceased's body which was the subject of the decree was exhumed and buried in a public cemetery on 27/9/2016. Consequently it is alleged that save for the costs, which in any event have not been taxed there is nothing to be stayed at the moment. Further the deponent avers that the application is vague and it does not state clearly which stay of execution is sought.

5. In a supplementary affidavit, the 2nd applicant avers that **Civil Appeal No. 17 of 2017** is now filed at

Eldoret. Further it is alleged that the respondent has filed a bill of costs with the intent of taxing it against the applicants yet the appeal is pending.

THE APPLICANT'S SUBMISSION

6. The applicant filed submissions on 23/8/2017. He submits that there has been no delay in presenting the application. He avers that he was not contesting the main suit and that his position is that he was wrongly enjoined in the case as he never had any interest in the subject matter and is not directly affected by the decree of 26/9/2016 save for the order on costs. He urges that he would be directly affected by the order on costs which is yet to be executed against him.

7. In response to the averment that no security has been offered for the stay orders sought he states that it is not in all cases that security is required. He relies on **Article 48 of the Constitution** which, he states, protects the right of access to justice. He further relies on the case of **Kenya Bus Services Ltd & Another –vs- Minister for Transport and 2 Others (2012) eKLR** and urges that the court therein upheld the provisions of **Article 48** against the application of **Section 13A of the Government Proceedings Act**. He urges that likewise, in the instant case, the requirement of a security is an impediment to the right of access of justice and is therefore contrary to **Article 48 of the Constitution**. Further it is averred that the respondent would suffer no prejudice if the orders sought were granted.

THE RESPONDENT'S SUBMISSIONS

8. The respondent filed submissions on 18/9/2017. He reiterates the arguments in the replying affidavit regarding the fact that the body of the deceased has been exhumed and buried at Kibomet Cemetery and that therefore the application is overtaken by events; that the applicant and the 1st defendant in the suit filed a joint statement of defence; that whereas the 1st defendant recorded his witness statement as required by the Civil Procedure Rules, the 2nd applicant failed or neglected to do so, yet both defendants were represented by one Advocate. However it is conceded that when the plaintiff's case came up for hearing, the Advocate who appeared that day came on record for the 1st defendant only but the 2nd defendant was still called as a witness. Judgement was delivered in chambers in the applicant's presence. The applicant is therefore depicted as a person who was keen on the case to its conclusion.

9. The respondent poses the question: if the applicant was wrongly enjoined why did he not make an application to the trial court to make a finding to that effect? It is urged that the instant application is calculated at delaying the respondent's enjoyment of the judgment and that the appeal lodged is frivolous and does not have any chance of success at all.

10. It is urged that in any event, the costs, can be refunded if the appeal succeeds. It has also been stated that the applicant has not shown that the respondent is not a person of means and that he would be unable to pay the costs at the trial court and at the appellate court in the event the appeal succeeds. Since the 1st defendant is not a party to the appeal, the respondent submits that the bill of costs should be taxed as the same can be executed against the 1st defendant.

DETERMINATION

11. The application is brought under **Order 40 Rule 6(1) of the Civil Procedure Rules and Section 1A, 1B, 3, 3(a) and 63(e) of the Civil Procedure Act**. In an application such as the instant one, the applicant must show that he has an arguable appeal and that if an order of stay is not granted, the appeal, were it to succeed, and would be rendered nugatory by the refusal to grant the stay or the injunction. Numerous previous cases have established as much. In the case of **Charles Nzau Ndeto the Administrator of the Estate of the Late Reuben Mutua v Euro Bank Limited (In Liquidation) [2008] eKLR** the court stated as follows:

“The law as to the principles upon which this Court will decide a matter brought under rule 5(2) (b) of the Court's Rules is now well settled. The applicant is enjoined to demonstrate to

the court, first, that the appeal or the intended appeal as is the case here, is arguable, that is to say the intended appeal is not frivolous and, secondly, the applicant must show that if the application for injunction is dismissed and the intended appeal eventually succeeds, the results of such a success would be rendered nugatory - see the case of Reliance Bank Ltd. (in Liquidation) vs. Norlake Investments Ltd. – Civil Application No. Nai. 93 of 2002 (unreported).”

12. As to whether there is an arguable appeal, an examination of the record is necessary. The plaintiff filed a plaint on 9/10/2015. The plaintiff case was that, having purchased **Plot No. 30 Nyasi Settlement Scheme** in Trans-Nzoia County, from one Stephen Fwamba Murunga (now deceased) in 1980, he stayed on the subject land for 35 years without any claim from any other person until the said Fwamba died on 1/9/2015 when the defendants claimed that the deceased’s body should be buried on the land. The plaintiff’s case was that the defendants are not related as kin or beneficiaries of the deceased, yet on 3/10/2015, the defendants, in a mob of more than 200 hired goons, carried the body of the deceased and forcefully buried him on the land. It is that forceful burial on the land by the defendants that prompted the plaintiff to sue the defendants. The plaintiff sought for an order that the body be exhumed and buried elsewhere and that the defendants and their agents be restrained by way of a permanent injunction from ever trespassing on upon the plaintiff’s land. He also sought costs of the suit. The orders above were sought against the 1st and 2nd defendant the latter who is the applicant herein, jointly and severally.

13. A long joint defence comprising of 18 paragraphs was filed on behalf of the 1st and 2nd defendants on 14/1/2016. The defence raised questions as to the propriety of the plaintiff’s ownership of the property, and maintained that the deceased never had any agreement with the plaintiff. The defendants accused the plaintiff of being bent on acquiring property illegally and through underhand means. Paragraph 13 of the joint defence is relevant to the quest to know if the appeal filed by the applicant in the Court of Appeal is arguable. In my view, the defence seems to acknowledge the applicants role in, and tries to justify, the forceful burial of the deceased’s body of the subject land. I find that in the circumstances of this case the applicant’s current plea that *“he has all along been wrongly enjoined in this case”* and that *“he had no interest in the subject matter herein and is not directly affected by the decree of 26/9/2016 save for the order of costs”* are so inconsistent with the pleading in the joint defence such that an averment in this application that there is an arguable appeal seems weak.

14. In my view, scrutiny of the plaint and defence reveals that the 1st and 2nd defendants were held by the plaintiff to be accountable to the same degree for the forceful burial, and from the prayers sought, there was no other issue between them and the plaintiff save the trespass upon the land the plaintiff considered as his. It is conceded that the body so forcefully buried on the subject land has since been exhumed and buried elsewhere and I agree with the respondent that in those circumstances there is nothing to stay in respect of the subject matter of the suit.

15. In any event, no memorandum of appeal is annexed to the supporting affidavit. The court can only glean from the applicant’s bare statements what the gist of this appeal is: that he did not have an interest in the land. However, that was not the issue before the trial court. The issue before the trial court was the forcible burial and the acts of trespass. The plaintiff indeed pointed out that the defendants had no relationship with the deceased as kin or as beneficiaries. Even a stranger may be held guilty of trespass to land.

16. I have already stated above that the applicant must show that he has an arguable appeal and secondly, that if an order of stay is not granted, the appeal, were it to succeed, would be rendered nugatory by the refusal to grant the stay. These two grounds must be demonstrated to exist simultaneously before an order of stay may be granted. The applicant has failed to demonstrate that he has an arguable appeal or that it would be rendered nugatory if no stay is granted and this application therefore fails. The application dated 6/2/2017 is hereby dismissed with costs.

Dated, signed and delivered at Kitale on this 30th day of **October, 2017.**

MWANGI NJOROGE

JUDGE

30/10/2017

Coram before Mwangi Njoroge Judge

Court Assistant – Isabellah

Ms. Mwemeke holding brief for Okile for the plaintiff/respondent

Mr. Nyamu holding brief for the defendant/applicant

COURT

Ruling read in open court in the presence of the counsel for the parties.

MWANGI NJOROGE

JUDGE

30/10/2017