REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO.262 OF 2014

TRUSTEES CHRISCO CHURCH NAKURU.....PLAINTIFF

VERSUS

SAMWEL KIBOWEN TOWETT.....1ST DEFENDANT

ISAAC KIPKEMBOI TOWETT.....2ND DEFENDANT

CO-OPETATIVE BANK OF KENYA LTD.....3RD DEFENDANT

LAND REGISTRAR NAKURU COUNTY.....4TH DEFENDANT

ATTORNEY GENERAL.....5TH DEFENDANT

RULING

(Application for stay pending appeal, principles to be applied; applicant and 2nd respondent having two titles to the same land, title of 2nd respondent upheld, applicant filing an appeal and being in possession; applicant directed to deposit rent equivalent of two years as security pending appeal; amount of rent payable to be assessed by a valuer; no dealings over the title pending appeal)

1. The application before me is that dated 10 October 2017 filed by the unsuccessful plaintiff, brought pursuant inter alia, to the provisions of Order 42 Rule 6 of the Civil Procedure Rules, 2010. The application seeks a stay of execution of the judgment of 20 September 2017 pending hearing and determination of an intended appeal. The applicant also seeks orders to stop the 2nd defendant/respondent from carrying out construction in the suit property pending the hearing and determination of the intended appeal.

2. The background leading to this application is that the applicant filed suit on 22 September 2014, over the land parcel Nakuru Municipality Block 8/36 (the suit property). The applicant claimed to have purchased the suit property from one Joseph Kiplagat Muge, who held a Certificate of Lease to it , and had lodged the transfer documents at the Lands Registry. The applicant's documents were however not registered as it emerged that the 2nd defendant/respondent holds another Certificate of Lease to the suit property.

In the plaint, the applicant sought orders inter alia for a declaration that the applicant or Joseph Kiplagat Muge are the legal owners of the suit land, and a further declaration that the title held by the 2nd respondent, who had acquired proprietorship after a transfer from the 1st respondent, is null and void. The 2nd respondent had taken a loan with the 3rd respondent with the suit property as collateral, and the applicant wished to have a declaration that the loan granted to the 2nd respondent is a nullity. The respondents filed their respective defences to the suit and argued inter alia that the applicant does not exist in law and therefore the suit cannot be sustained, and further argued that what the applicant holds is the fraudulent title. I heard the case, and I held for the defendants. In my judgment of 20 September 2017, I doubted the capacity of the applicant as to me, it is not a person in law. I also found that what the applicant holds is the fraudulent title and I upheld the title of the 2nd respondent. While the case was proceeding, it is the applicant who was all along in possession of the suit property, having erected a tent that was used as a church sanctuary, and other smaller developments for convenience.

In my judgment, I gave the applicant 90 days to vacate the suit property, but I made no order for mesne profits or general damages, as none had been sought by the defendants. I also awarded costs to the defendants, and since I was not convinced as to the legal capacity of the applicant as named, I directed that the said costs be paid by the person who initiated the filing of this suit, that is Benjamin Rotich.

3. It is this judgment which the applicant wishes to appeal and a Notice of Appeal was filed on 25 September 2017.

4. In this application, the applicant, through a supporting affidavit sworn by Mr. Benjamin Rotich, has averred that upon delivery of the

judgment, the 2nd respondent started constructing a stone fence around the suit property, which it is said creates new complications especially if the Court of Appeal allows their appeal. Mr. Rotich has deposed that this changes the nature of the suit property which should be preserved until the appeal is heard and decided. It is also deposed that the judgment has greatly affected the operations of the applicant which is a church organization with many members. The applicant is thus of the view that the suit property should be preserved pending hearing of the appeal.

5. The 2nd respondent, the current registered proprietor of the suit land, filed a replying affidavit to oppose the motion. He inter alia deposed that this court found that the applicant has no locus; that he is entitled to enjoyment of the suit property; that the application is premature as the 90 days given to the applicant to vacate have not lapsed; that this court is functus officio; that an order of injunction can only be granted by the appellate court and not this court; that Mr. Benjamin Rotich should deposit as security the costs of the suit; that the fence being constructed does not obstruct worship; that in any case the said fence protects the applicant by securing its property; that a Notice of Appeal by itself is not an appeal; that the applicant should not benefit twice as it already benefited from the stay of 90 days.

6. The 3rd respondent opposed the application by filing a replying affidavit sworn by Lawrence Karanja, its Legal Manager. He has deposed inter alia that such application cannot be filed by a non-entity and the application itself is a nullity ab initio and it would be ironical for the court to hear a party declared not to exist; that there is no law which grants this court jurisdiction to entertain an application for injunction after dismissing a suit; that the application does not show how the suit property is in danger of alienation or injury; that the applicant has no proprietary rights to be protected; that the proposed appeal has no chances of success; that the defendants have little chance of recovering any costs; and that the application is not merited.

7. A supplementary affidavit (styled "further affidavit") was filed by the applicant. It is averred inter alia that the question of capacity is an issue for appeal; that whether or not the appeal is merited is also an issue for the Court of Appeal; that the issue of payment of costs is also an issue on appeal; that this court has jurisdiction; that the applicant has no other place of worship; that the speed in which the 2nd respondent is fencing the property demonstrates total disregard to the applicant's right to appeal; and that the applicant is entitled to protection until the appeal is decided.

8. I also took in the submissions of Mr. Kimatta for the applicant; Ms. Wangari for the 1st and 2nd respondents; and Mr. Kisilah for the 3rd respondent. I have also taken note of the authorities supplied by counsel.

9. What I have before me is an application for stay pending appeal and applications of this nature are governed by the provisions of Order 42 Rule 6 which provides as follows :-

> ***6. Stay in case of appeal [Order 42, rule 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, 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 subrule (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.*
>
> *(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.*
>
> *(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.*
>
> *(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.*
>
> *(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.*

10. It was of course argued by the respondents, that this court is functus officio and does not have jurisdiction to entertain this application, having already passed judgment on the suit. That is misplaced, because as it can be discerned from a reading of Rule 1 above, a person is at liberty to file an application for stay pending appeal, in the very court which made the judgment or order. If a person is aggrieved by an order made by the court appealed from (which is the trial court), such person may seek to set aside any such order by filing an application in the appellate court. It cannot therefore be argued that this court has no jurisdiction to entertain an application for stay pending appeal.

11. Neither can it be argued that this court cannot entertain an application for injunction after an appeal. A reading of Rule 1 above, will reveal that the court entertaining an application for stay pending appeal, is granted power *"to consider such application and to make such*

order thereon as may to it seem just…". The court therefore has wide discretion to make such order as it deems fit. Rule 1, or indeed Order 42, does not say that the court entertaining such application cannot make an order of injunction, and indeed, the rules do not prescribe the orders that the court can make, leaving it all to the discretion of the court, to make such orders as it seems just. If the court entertaining such application feels that an order of injunction is merited, then the court may indeed grant such order as it is not precluded from doing so. Such order of injunction is of course not an order of an interlocutory injunction, which is the sort of injunction granted pending the hearing of the suit under the provisions of Order 40 of the Civil Procedure Act. This would be an injunction pending appeal, an Order 42 injunction, and not an injunction pending suit, which is an Order 40 injunction.

12. It was also argued that no appeal has been filed, and that a Notice of Appeal by itself is not an appeal. There is no question that a Notice of Appeal is not an appeal by itself.

However, for purposes of entertaining an application for stay pending appeal, Rule 4 of Order 42, does state that an appeal will be deemed to have been filed if a Notice of Appeal has been filed. It is not therefore necessary that the substantive appeal must be filed before one can file an application for stay pending appeal, so long as the Notice of Appeal has been filed.

13. There was also the argument that the application has been filed by a non-entity, since this court held that the plaintiff does not exist and that Mr. Rotich has no capacity to swear the affidavits herein. The finding that the plaintiff is not a legal entity is a finding that this court made, but that finding is indeed part of what the applicant wishes to appeal, for in the Notice of Appeal, the applicant has averred that it intends to appeal against the whole judgment. I cannot therefore make use of my own findings to defeat the application before me for my findings are the very reason why the applicant has preferred an appeal.

14. Let me now go to the merits or otherwise of the application and whether the applicant deserve the orders sought. The matters which this court ought to consider in an application of this nature are set out in Rule 6 of Order 42. The court needs to consider three things being :-

(i) Whether the applicant has filed its application timeously, that is, without unreasonable delay;

(ii) Whether the applicant stands to suffer substantial loss if the application is not allowed; and

(iii) Whether the applicant has offered due security for the performance of the decree.

15. I do not think that there is any contention that the applicant has filed its application after unreasonable delay and this application turns on the second and third issues. That sorts out the first requirement.

16. The second requirement is substantial loss and it is this point which is the cornerstone upon which an application for stay pending appeal is premised. The reasoning around this concept is that the court needs to see that if the appellant is successful on appeal, his/her success is not rendered worthless. It essentially means that the court needs to strive to ensure that the subject matter of litigation is not lost pending appeal, and that if successful, the applicant will not be left holding a worthless paper judgment which he cannot enforce. In my view, in so far as this particular case is concerned, two issues stand out. The first is on preservation of the title at hand, and the second is the possession of the premises as the appeal pends.

17. On the first point, I find no difficulty in making a finding that it is necessary to preserve the title so that there are no dealings over it as the Court of Appeal deals with the appeal. In my judgment, I held that the genuine title is that held by the 2nd respondent which title is charged to the 3rd respondent. If the two parties proceed to deal with it, either in the form of a further charge, or sale, either by the registered owner or the chargee, then there is a danger that there will be no subject matter, in the event that the appellate court holds that the authentic title is that held by the applicant. Other parties may indeed be prejudiced and condemned unheard if the respondents enter into additional transactions over the title. I therefore order that pending hearing and determination of the appeal, or any further orders of this court, or the appellate court, there be no further dealings in respect of the title Nakuru Municipality Block 8/36.

18. The second point is on possession of the suit property pending appeal. I must admit that this aspect of the application has caused me some anxious moments as I am of the view that the applicant has no title, but it is the same applicant who is in possession of the suit premises. The person whom I feel has the genuine title is not in possession of the suit premises, yet he has judgment in his favour, and he deserves to enjoy the fruits of his judgment. I would have had no difficulty in asking the applicant to immediately cede possession to the 2nd respondent, but I do appreciate that the applicant is a church congregation, who may have invested heavily in the premises. They have built a tent sanctuary and that is the site that they congregate to worship. It was argued by Mr. Kisilah, that it is not necessary for the applicant to use this particular site for worship as they can very well look for other premises. That is well and good, but the cost of moving to a new site in my view would be substantial, and if the applicant succeeds on appeal, they will have suffered substantial loss.

19. In my opinion, balancing the interests of the applicant and of the respondent, the applicant may remain in the premises but she must tender security in the form of money, which will compensate the 2nd respondent for the duration of time that he will not be in possession, in the event that the applicant does not succeed in the appeal. The measure of this would be what the 2nd respondent would lose in so far as may be quantifiable, and to me, this measure ought to be what the 2nd respondent would be expected to receive, if he was to lease out the premises as it is, for the duration of the appeal. I cannot of course tell how long the appeal would take, but from what I see, on average, an appeal to the Court of Appeal would take about two years and the applicant will therefore have to make an advance deposit of at least two years of quantified rent. The applicant will also need to deposit, in addition, the costs of this suit within 30 days of taxation. This is what to me would constitute adequate security to the 2nd and 3rd respondents.

20. There was no counterclaim for mesne profits in this case and therefore no evidence was led on how much the premises would fetch if leased out and none of the parties tendered this evidence during the hearing of this application. I do not want to engage in a speculative exercise, and in the circumstances, I think it is best that I refer the matter to the Government Valuer, for him to give an opinion of what the suit premises would fetch per month if leased out. I direct that the Nakuru District Government Valuer be served with this order and do proceed to the suit premises so that he may give a report on this point. In any event, the report be provided within a period of 14 days. Once I

receive the valuation, I will make specific the amount of security that the applicant will need to provide and this money will be held in a joint interest earning account in the names of counsel for the applicant, the 2nd respondent and the 3rd respondent. The taxed costs will also be held in the same account for the duration of the appeal.

21. There is the last aspect of whether or not the premises should be constructed. I think it is best that the current status quo be maintained until the appeal is heard and determined, subject to the deposit of security as directed.

22. On costs of this application, I order that the same abide the outcome of the appeal.

23. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 23RD day of November 2017.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of :-

Mr. Kimatta for the Applicant

Ms. Wangari for the 1st and 2nd Respondent

Mr. Mboga holding brief for Mr. Kisilah for the 3rd respondent

Mr. Kirui for the 4th and 5th respondents

Court Assistant: Carlton Toroitich