



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

CIVIL APPEAL NO.84 OF 2015

KAUMA MUNYI.....APPELLANT

VERSUS

KITHUKA KITHURI..... RESPONDENT

RULING

The respondent filed a suit against the appellant at the Resident Magistrate's Court at Kyuso namely, **Kyuso RMCC No. 29 of 2011, KithukaKithurivs. KaumaMunyi** (hereinafter referred to only as "the lower court" where the context so admits). In his plaint dated 10th October 2011, the respondent averred that he was at all material times the owner of unregistered parcel of land situated at Kamayagi Village, Tharaka Location, Mumoni District (hereinafter referred to as "the suit property"), which property he inherited from his grandfather. The respondent averred that in the month of July 2010, or thereabouts, the appellant entered the suit property without his permission, fenced a portion thereof, cut down trees on the said portion and started cultivating the same. The respondent averred that the appellant's acts aforesaid amounted to trespass on the suit property. The respondent sought judgment against the appellant for a declaration that the suit property belongs to the respondent and a permanent injunction to restrain the appellant from entering or in any other manner remaining on the suit property. The appellant filed a statement of defence in which he denied the respondent's claim in its entirety.

The lower court case was heard by B. M. Mararo P.M. who in a judgment dated 26th September 2015 and delivered on his behalf by B. M. Kimtai S.R.M. on 21st October 2015 entered judgment for the respondent against the appellant as was prayed for in the plaint. The appellant was aggrieved by the said judgment and lodged an appeal against the same to this court on 2nd November 2015. The appellant has challenged the lower court's judgment on several grounds which are set out in his memorandum of appeal dated 2nd November 2015. Together with the memorandum of appeal, the appellant filed an application by way of Notice of Motion dated 2nd November 2015 seeking a stay of execution of the said judgment pending the hearing and determination of the appeal herein. The appellant also sought an order of temporary injunction to restrain the respondent from entering, fencing, cutting trees or grazing on the suit property pending the hearing and determination of the appeal herein. The application was brought on the ground that, the appellants' appeal herein has overwhelming chances of success and that if the stay sought is not granted, the appeal would be rendered nugatory and the appellant would suffer irreparable loss and damage. In his affidavit in support of the application, the appellant stated that the respondent has started the process of executing the judgment appealed herein and he is using the police and the area chief to harass him and members of his family. The appellant has stated that he has occupied the suit property

since he was born and that he has nowhere to move to if he was to be evicted from the suit property.

The appellant's application was opposed by the respondent through a replying affidavit sworn on 17th November 2015. The respondent contended that the appellant is not entitled to the stay of execution sought as he has not furnished any security for the decretal amount. The respondent contended further that the stay sought if granted would deny him the enjoyment of the fruits of his judgment because it is the appellant who is using the suit property at the moment. In conclusion, the respondent contended that the appellant has not put forward valid grounds to warrant the issuance of the orders sought.

When the application came up for hearing before me on 25th November, 2015, the appellant and respondent who are both appearing in person informed the court that they wished to rely on their respective affidavits filed in support of and in opposition to the application. I have considered the appellant's application together with the affidavit filed in support thereof. I have also considered the respondent's affidavit in opposition to the application. Order 42 Rule 6(1) of the Civil Procedure Rules gives this court power to stay execution of a decree of the lower court pending appeal. Order 42 Rule 6(2) provides for conditions that must be met before an order for stay of execution is granted. The rule bars the court from making an order for stay of execution unless it is satisfied that the applicant would suffer substantial loss if the stay is not granted, and that the application for stay has been made without unreasonable delay. In addition, the applicant must furnish such security as the court may order for the due performance of the decree in the event of that the appeal fails. On the material before me, I am satisfied that the appellant stands to suffer substantial loss unless the stay sought is granted. The lower court had granted a permanent injunction restraining the appellant from entering or remaining in possession of the suit property. This means that the appellant must vacate the suit property if the decree of the lower court is not stayed. The appellant has claimed that he has been in occupation of the suit property since he was born and that he has no other parcel of land to move to if he is evicted from the suit property. In his affidavit in reply, the respondent has not denied these claims by the appellant. His concern is only about security for his costs. In the circumstances, I am satisfied that the loss that would be occasioned to the appellant would be substantial if the stay sought is not granted. I am also satisfied that the application for stay was brought without unreasonable delay. The judgment of the lower court was made on 21st October 2015 and the present application was filed on 2nd November 2015 less than a month from the date of the said judgment. I have noted that the appellant has not proposed any form of security. This in my view cannot stand on his way to getting the stay sought. The court would order appropriate security to be furnished by the appellant as a condition for the stay.

For the foregoing reasons, it is my finding that the appellant's application for stay has a merit. Having reached this finding, I don't think that it is necessary to consider the appellant's further prayer for injunction pending appeal. In any event, no basis was laid for the prayer the appellant having not sought a similar prayer in the lower court. I therefore allow, the appellants application dated 2nd November 2015 on the following terms;

1. The decree given on 21st October, 2015 in Kyuso RMCC No. 29 of 2011 is stayed pending the hearing and determination of this appeal.
2. The stay is granted for a limited period of twelve (12) months from the date hereof within which the appellant should prosecute the appeal herein.
3. The appellant shall deposit in court within sixty (60) days from the date hereof a sum of Kenya Shillings Fifty Thousand (Kshs.50,000/=) as a security in default of which payment the stay granted herein shall lapse automatically without any further reference to the court.
4. The cost of the application shall be in the appeal.

Delivered, Dated and signed at Nairobi this 22nd day of January, 2016

S. OKONG'O

JUDGE

In the presence of

Present in person Applicant

Present in person Respondent