



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO 335 OF 2012

LOISE CHEMUTAI NGURULE.....1ST PLAINTIFF

JACOB ANGUIYA NGURULE.....2ND PLAINTIFF

VERSUS

WILFRED LESHWARI KIMUNG'EN.....1ST DEFENDANT

WILFRED ABUYE KIMUNG'EN.....2ND DEFENDANT

KENNETH ROTICH.....3RD DEFENDANT

RULING

(Application for stay pending appeal; principles to be applied; application being filed 42 days after filing of Notice of Appeal; no explanation for this delay; application filed after unreasonable delay; substantial loss; claim for declaration to land, permanent injunction and money; applicants having never been in possession of the land; no demonstration that the plaintiffs cannot refund the monetary award if paid; substantial loss not demonstrated; application dismissed)

1. The application before me is that dated 29 June 2015 filed by the defendants. It is an application brought pursuant to the provisions of Order 42 Rule 6 of the Civil Procedure Rules, 2010 and substantially seeks orders of stay of execution of the decree herein pending appeal to the Court of Appeal.

2. The suit itself was filed on 20 December 2012. In the plaint, the 1st plaintiff pleaded that she is the owner of the land parcel Nakuru/Mariashoni/980 and that she has been living on the land with the 2nd plaintiff who is her son since February 1997. They pleaded that they have extensively developed the land and that there are about 10 semi-permanent houses which comprise their family homestead. They also averred that they have planted over 5,000 cypress trees and poles on the land. The 1st and 2nd defendants are step-brothers to the 1st plaintiff whereas it was averred that the 3rd defendant (a Chief) is the agent of the 1st and 2nd defendants. It was pleaded that on 17 December 2012, the defendants invaded the plaintiffs' parcel of land and started felling down the cypress trees and poles. In the suit, the plaintiffs sought orders of permanent injunction to restrain the defendants from the suit land and a declaration that the plaintiffs are owners of the said land. There was also a claim for damages for trespass and costs of the suit.

3. The defendants filed defence vide which they denied the claims of the plaintiffs. Specifically they

refuted that the plaintiffs are the owners of the suit land.

4. The matter proceeded for hearing before my predecessor Honourable Justice L.N Waithaka, and she delivered judgment on 30 January 2015. The good judge held that the plaintiffs had proved their case on a balance of probabilities and entered judgment in their favour as against the 1st and 2nd defendants. The case against the 3rd defendant was dismissed on the ground that there was no evidence that he was acting as agent of the 1st and 2nd defendants. The plaintiffs were also awarded general damages for trespass in the sum of Kshs. 100,000/= and a further Kshs. 70,000/= as the cost of some cypress trees that they had felled and sold. The plaintiff was awarded the costs of the suit.

5. The 1st and 2nd defendants were aggrieved by the above judgment. They however did not file their Notice of Appeal within the prescribed 14 days. Nevertheless, they applied for extension of time to lodge their Notice of Appeal out of time which application I allowed. Thereafter a Notice of Appeal was filed on 18 May 2015. This application seeking stay of execution of the judgment pending hearing of the appeal was then filed on 30 June 2015.

6. The application is supported by the affidavit of the 1st defendant. He has averred that the application has been filed without unreasonable delay; that the appeal is arguable and has good chances of success; that no prejudice will be visited upon the plaintiffs and that they are willing to abide by any conditions that the court may impose.

7. The plaintiffs have filed a Replying Affidavit to oppose the application. The same has been sworn by the 2nd defendant. He has inter alia averred that there is no positive order issued by the court compelling the defendants to do something which may be stayed from execution. He has stated that the judgment of the court was a declaration that they are entitled to the suit property and a permanent injunction for which there is no order to execute. He has deposed that if stay is granted, this court will be setting aside the judgment before the appeal has been heard. He has deposed that the only order that may be executed is the award of Kshs. 170,000/= and he has argued that the applicants have not shown what substantial loss they stand to suffer if they pay this money. He has stated that they are not of little means and have over 100 sheep and 28 cows and they can make full restitution if the decretal sum is paid to them. He has also pointed out that no draft memorandum of appeal has been annexed so as to demonstrate that the appeal has some probability of success.

8. Counsel for the respondents relied on five authorities, all of which I have read and taken into account in this ruling.

9. I have considered the application. It is for stay pending appeal. The principles to guide this court in an application of this nature are set out in the provisions of Order 42 Rule 6 (2) which is drawn as follows :-

(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.

10. From the above, it will be seen that three conditions need to be satisfied for an applicant to succeed in an application for stay pending appeal. These are :-

(i) Substantial loss.

(ii) That the application has been filed without unreasonable delay.

(iii) That there is security for the due performance of the decree.

The parties herein tried to argue on the merits or not of the appeal, but the same is not an issue to be considered.

11. I opt to start with the issue of delay. I am of the considered view that this application has been filed after the lapse of unreasonable delay. The judgment was delivered on 30 January 2015. I will not take into account the date of delivery of judgment, for there was delay in filing the Notice of Appeal which necessitated an application to file a Notice of Appeal out of time, but I will count time from the date when I delivered a ruling on the application to file Notice of Appeal out of time. This was on 14 May 2015. The Notice of Appeal was filed on 18 May 2015. This application was filed on 30 June 2015. No explanation has been given as to why the applicants had to wait for a period of about 45 days since the time I delivered the ruling on the application to file a Notice of Appeal out of time. Even if I was to take into account only the time after the Notice of Appeal was filed, this is a period of about 42 days for which no explanation has been offered.

12. The provision that there must not be unreasonable delay was not put in the rules in vain. An applicant must act swiftly. He certainly must act promptly. He should not dilly dally in making such an application. Where there is some time lapse, he must explain his delay. I think in the circumstances of this suit, the time lapse is inordinate. The delay in my view is unreasonable and as I have stated, no explanation has been given why the application was not filed earlier.

13. Having found that there was delay, the application herein fails automatically for one of the conditions for stay has not been met. But assuming that I am wrong, I will look into whether the applicants stand to suffer substantial loss. The judgment herein was for a declaration that the plaintiffs are owners of the suit property and for an order to have the defendants permanently restrained from the suit property. There was the addition of the monetary award. It was never demonstrated in the course of the trial that the applicants were ever in possession of the suit property. Indeed in her judgment, the learned Judge found that it is the plaintiffs who have been in full occupation of the suit property all along. Having not been in occupation, I do not see what substantial loss the applicants stand to suffer. It would probably have been a different matter if they were to be evicted from the land and they sought to stay that eviction. Here, they have never been in occupation of the land and I really do not see what substantial loss they stand to suffer. If it is the part of the decree that relates to money, it has not been shown that the plaintiffs are incapable of refunding the money if it is paid to them. The plaintiffs themselves have stated that they are people of means and this has not been refuted by the applicants.

14. From the foregoing, it is therefore my holding that the applicants have not demonstrated that they stand to suffer any substantial loss if the decree is executed. Having found so, it is unnecessary for me to go into the issue of security.

15. The upshot of the above is that I find no merit in this application and it is hereby dismissed with costs.

16. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 31ST day of March, 2016.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of : -

Mr. Tumuti holding brief for Mr. Geoffrey Otieno for defendants/applicants.

Ms. Nancy Njoroge holding brief for Mr. Kanyi Ngure for plaintiff/respondents.

Court Assistant : Janet

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU