



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC CASE NO. 354 OF 2015

KOMO CHEGE & 6 OTHERS PLAINTIFFS

VS

JOSEPH WANJIKU MWANGI & 15 OTHERS..... DEFENDANTS

RULING

(Application for stay pending appeal; stay granted on conditions).

1. The application before me is that dated 18 March 2015 filed by the defendants. The application is said to be filed under Order 42 Rule 1 and 2; and Order 51 Rule 1 of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act. It essentially seeks a stay of execution of the ruling of 9 March 2016, pending an appeal to the Court of Appeal.

Before I delve into the application, I think it is necessary that I set down some background.

2. This suit was commenced by way of plaint filed on 17 December 2015. The plaintiffs are owners of some plots of land which are situated in an area in Nakuru County that was previously owned by Nakuru Teachers Co-operative Society. The Society appears to have bought land and distributed the same to its members. Some of the beneficiaries of the plots are the plaintiffs and defendants. The case of the plaintiffs in a nutshell is that the area where the plots are situated is residential but that the 1st-15th defendants (although the case against the 9th and 10th defendants was later withdrawn) have allowed their plots to be used as motor garages. It is the contention of the plaintiffs in this suit that this is illegal and that there has been no change of user of the said plots. In addition to the owners of the plots in issue, the plaintiffs also sued the County Government of Nakuru. The position of the County Government is that they have never sanctioned the user of these plots owned by the defendants as garages and they indeed had planned to remove the persons operating garages in the said plots.

3. Together with the suit, the plaintiffs filed an application for injunction. In the application, they sought to have the defendants restrained from having their plots used as garages pending hearing and determination of the suit. I considered the matter and was of the view that the plaintiffs have established a prima facie case with a probability of success. I was of the opinion that on the material tendered, the plaintiffs had shown prima facie, that the defendants were allowing an illegal user of their parcels of land. I proceeded to stop all garages or other related activities within the various cited land parcels owned by the defendants and also stopped the defendants from permitting the user of their properties as garages, pending hearing and determination of the suit.

4. Aggrieved by this ruling, the defendants filed a Notice of Appeal and subsequently this application for stay of execution of the above ruling pending appeal to the Court of Appeal.

5. In their application, the defendants have stated inter alia that the order of injunction determined the claim of the plaintiffs whereas the matter has not yet been determined; that the effect of the order will be to close all the garages situated therein; that the suit plots are a source of income for the defendants; that the defendants will continue suffering substantial loss in the event that the order of injunction remains in force; that there is risk of eviction; and that the defendants have good grounds of appeal with a high probability of success. The supporting affidavit is sworn by Joseph Wanjiku Mwangi who has more or less averred the foregoing. He has further stated that if stay is not granted, the appeal will be rendered nugatory. He has deposed that the plots in issue are not residential but commercial and he has annexed a share certificate to demonstrate this. He averred, that on a balance of convenience, it is desirable that the status quo be maintained pending appeal.

6. The application is opposed by the replying affidavit of Issa Makori, the 3rd plaintiff. He has averred inter alia that the applicants have not come to court with clean hands and do not deserve the audience of this court. He has deposed that the activities carried out by the defendants are illegal. He has cast doubt on the Share Certificate annexed by the applicants and he believes that the same is a forgery. He has insisted that the user of the plots has never been changed from being residential.

7. I heard both Mr. Karanja learned counsel for the applicants and Mr. Morintat, learned counsel for the respondents. Mr. Karanja submitted inter alia that his clients have exercised their right to appeal and the status quo should be maintained pending appeal. He submitted that there was no undertaking as to damages and that in the event the applicants succeed on appeal, they will not be compensated. He submitted that the balance of convenience tilts in maintaining the status quo. He stated that the applicants are ready to tender security.

8. Mr. Morintat, submitted that the applicants do not deserve any audience as they have first not complied with the order for injunction. He indeed has an application for contempt that is pending. He also submitted that the application is fatally defective. On substantial loss, he submitted that if a fire were to break out, or there be loss of life, this cannot be compensated.

8. I have considered the application. It is one for stay pending appeal. This is canvassed in Order 42 Rule 6 which is drawn as follows :-

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. I do not think that the application as drawn is fatally defective. It is clear that it is one for stay pending appeal and if there is any error in the citing of the correct provision of the law, no prejudice has been occasioned to the respondents.

11. It will be noted from Order 42 Rule 6(1) that there is not meant to be a stay of execution of a decree or order except as may be ordered by court. Stay pending appeal therefore falls upon the discretion of the court.

12. In the circumstances of this case, and in exercise of my discretion, I am prepared to give a stay pending appeal. However, this is subject to the following conditions :-

(i) The applicants must file their appeal within 60 days from today. For the record, I have confirmed that the proceedings are ready for collection on payment of the requisite fees.

(ii) The applicants must deposit security of Kshs. 1 Million, in court or in a joint interest earning account, within 14 days from today.

13. If the above two conditions are not met, the applicants will have to abide by the order of injunction.

14. Costs of this application will be in the appeal.

15. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 1st day of April, 2016.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of : -

Mr Mwalo holding brief for Mr. Morintat for plaintiffs/respondents.

Ms. Gitau holding brief for Mr. Karanja for the defendants/applicants

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU