



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO.417 OF 2013

CHARLES KOSKEI MERENG.....1ST PLAINTIFF

AUGUSTINE KABII.....2ND PLAINTIFF

SAMUEL KIKWAI.....3RD PLAINTIFF

LINNER C. SAMOEL.....4TH PLAINTIFF

VERSUS

TWIN CONSTRUCTIONS CO. LIMITED.....DEFENDANT

RULING

(Application for stay pending appeal; intended appeal on a ruling on an injunction; notice of appeal filed; application for stay coming close to one year after; held that there has been inordinate delay; application dismissed on the ground of delay)

1. The application before me is that dated 17 February 2016. It is an application filed by the plaintiffs and brought under the provisions of Order 42 Rule 6. Although the application as drawn seems to me to only ask for restraining orders pending hearing of the application, I am prepared to consider it as an application for stay pending appeal against the ruling delivered on 4 March 2015, for to me, that appears to be the intention of the applicant.

2. The background to the application is that on 11 June 2013, the four plaintiffs commenced this suit by way of plaint. In their plaint, they pleaded that they are the bona fide owners of the Plot Numbers 148, 149, 150, 152, 153 and 154 Olenguruone Trading Centre, having been issued with letters of allotment by the County Council of Nakuru and the Commissioner of Lands. They averred that they thereafter took possession and paid rates. It was pleaded that on 20 May 2013, the defendant trespassed into the plaintiff's plots and began excavation works in preparation for the construction of a stadium. The plaintiffs averred that their land does not form part of the stadium. In the suit, the plaintiffs have asked for orders of eviction, injunction and damages for trespass. Together with the suit, the plaintiffs filed an application for injunction. The defendant opposed the application. In its reply, it stated inter alia that it was awarded a tender by the Government of Kenya for the construction of a modern stadium at Olenguruone Shopping Centre. It averred that it was handed over the site and the plan, and they began excavation. It was averred that they are strangers to the allegations of the plaintiffs and that their works were in accordance the approved survey map.

3. The application for injunction was heard by my predecessor, the Honourable Justice Waithaka. In her ruling, the learned Judge, dismissed the plaintiffs' application for injunction. She was also of the view that the matter cannot be properly litigated without the presence of the County Government of Nakuru, the National Land Commission and the Attorney General, and ordered that they be enjoined to the suit.

4. Aggrieved by the decision, the plaintiffs lodged a Notice of Appeal on 13 March 2015. They did not do much until they filed this application on 17 February 2016. As I mentioned earlier, I am prepared to hold the application as one for stay pending appeal. Essentially, the applicants want further construction stopped pending the hearing of their appeal.

5. The application is opposed by the defendant. It is averred that they have been carrying out construction work on the ground as contracted. It is also pointed out that the plaintiffs have failed to enjoin the parties that they were ordered to.

6. I have considered the application. It is one for stay pending appeal and Order 42 Rule 6 (2) applies. It is drawn as follows :-

6. Stay in case of appeal [Order 42, rule 6.]

(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.

7. It will be seen from above that three elements stand out. First, the application must have been made without unreasonable delay; secondly, the applicant must demonstrate substantial loss; and finally the applicant needs to furnish security.

8. I choose to start with the element of delay. I note that this application was filed close to one year after the delivery of the ruling. In my opinion, this is a considerable duration of time. No explanation was tendered as to why the applicants had to wait for close to one year to file an application for stay pending appeal. The plaintiffs wanted to stop an on-going construction, and for sure, there must be considerable developments on site one year down the line. In my view, the close to one year delay by the applicants is inordinate, and there has therefore been unreasonable delay on the part of the applicants. On that alone this application fails. I need not consider the other two elements.

9. I hereby dismiss this application with costs.

10. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 12th day of May, 2016.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT AT NAKURU

In presence of :-

Mr. Kanyi Ngure holding brief for Mr. Manyara for defendant/respondent.

No appearance on part of M/s Ikuu Mwangi & Co. for plaintiffs/applicants.

Court Assistant: Janet

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT AT NAKURU