



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC APP. NO. 30 OF 2014

STANLEY NDIRANGU GITAU.....APPLICANT

VERSUS

PAUL KIRAGU KAMAU.....RESPONDENT

RULING

The Application

The application before the court is a Notice of Motion dated 27th November 2014 filed by the Appellant. The Appellant is seeking the following orders:

1. A stay of the ruling of the Senior Principal Magistrate at Kikuyu dated 11/11/2014 and that the *status quo* over Nguirubi/Thigio/269 before judgment was entered be maintained until this motion is heard interparties and be enforced by the OCS Tigoni Police Station to ensure compliance.
2. The Respondent be restrained from further destruction of property on the aforesaid land, the subject matter of this suit.
3. The said ruling of the Senior Principal Magistrate at Kikuyu be set aside and quashed by this Court, and the motion before the learned Magistrate dated 15/8/2014 be allowed as a matter of law, while the Respondent's motion dated 5/9/2014 before the said magistrate be dismissed.

The Appellant's application is based on the grounds that the appeal herein has overwhelming chances of success, and will be rendered nugatory unless a stay of the aforesaid ruling is granted. Further, that the Appellant will suffer irreparable harm if the orders are not stayed as he and his family will be evicted from the land they have lived since 1985.

The Appellant further averred that the trial Magistrate misdirected herself on the application of the doctrine of "lis pendens" and on the law and principles governing striking out a statement of defence for disclosing no triable issues.

The Plaintiff in his supporting affidavit and further affidavit sworn on 27th November 2014 and 19th December 2014 respectively gave a detailed account of the genesis of the dispute herein. In summary his averment is that the Respondent herein bought the suit property during the pendency of a suit involving the said property namely **Kikuyu Senior Principal Magistrate's Court No. 128 of 2012- Hannah Wathoni Nganga –vrs- Stanley Ndirangu Gitau.**

Further, that the said Respondent subsequently filed a suit for eviction of the Appellant from the suit

property and an application for striking out of the Appellant's defence in **Kikuyu SPMCC No. 192 of 2014**. It is the Appellants claim that the trial court in its ruling on the said application misdirected itself on the doctrine of *lis-pendens* in holding that the Appellant's defence in **Kikuyu SPMCC No. 192 of 2014** did not disclose any triable issues.

The Response

The Respondent opposed the Appellant's application in a replying affidavit he swore on 10th December 2014 wherein he stated that the Appellant was evicted from the suit property on the 21st of November 2014 pursuant to a court decree, and is no longer in occupation of the same. Further, that the Respondent has since entered into occupation and erected a fence around the suit property with the intentions of developing the same. The Respondent averred that he is the absolute and indefeasible owner of the suit property, having acquired title to the said property on the 3rd of July 2014 after a sale agreement for a valuable consideration and subsequent registration. He annexed a copy of the title deed and of a certificate of official search dated 18th of July 2014.

The Respondent confirmed filing Civil Case Number 192 of 2014 before the Senior Principal Magistrate's Court at Kikuyu for eviction orders. He also confirmed that he made an application for striking out of the Appellant's defence in the said suit, and stated that the said application was unopposed. It was the Respondent's contention that the Appellant does not stand to suffer any loss as he does not have a proprietary interest in the suit property.

The Issues and Determination

The parties were directed to file written submissions on the Appellant's application. The Appellant filed submissions dated 22nd December 2014 while the Respondent's submissions were dated 20th January 2015. The Appellant's submissions dwelt mainly on the merits of his case in terms of whether the suit property could be sold during the pendency of a suit, whether the trial magistrate understood the principles on striking out of a defence and whether the trial magistrate had understood the nature of the Appellant's motion to strike out the suit in the lower court. The Appellant also made submissions on the procedures used to draft and serve the decree extracted in the lower court.

The Respondent on the other hand submitted that the Appellant could not invoke Order 42 Rule 6 of the Civil Procedure Rules on stay of execution, as the execution had already taken place by his eviction from the suit property. Further, that the Appellant had not tendered any evidence of the substantial loss he is likely to suffer, and the interest of the Respondent also has to be taken into account in terms of enjoying the fruits of his judgment. The Respondent relied on the decisions in **Joseph Gachie T/A Joska Metal Works vs Simon Ndeti Muema, (2012) e KLR** and **Machira T/A Machira & Co. Advocates vs East African Standard (No 2), (2002) KLR 63** in support of his arguments.

I have read and carefully considered the pleadings filed and submissions made by the parties herein. The issues to be determined are whether the ruling of the Senior Principal Magistrate at Kikuyu dated 11/11/2014 in **Kikuyu SPMCC No. 192 of 2014** should be stayed pending the hearing of this appeal; whether the Appellant should be granted the *status quo* and injunction orders sought; whether the ruling by the trial court can be set aside and/or quashed; and lastly whether this Court can allow and/or dismiss the motions that were before the trial court.

I will commence with a consideration of the last two issues. The Appellant seeks this Court to set aside and quash the ruling of the trial court that is the subject matter of this appeal. The law on review of orders including their setting aside is found in the provisions of section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules, which avail an opportunity to any person who feels aggrieved by a decree or order of the court to apply to have the said decree or order varied or set aside. It is important to reproduce the provisions of section 80 of the Civil Procedure Act for a full appreciation of the Court given the jurisdiction of review. The said section reads as follows:

“80. Any person who considers himself aggrieved—

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act,

may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

These provisions are repeated in Order 45 Rule 1 (b) of the Civil Procedure Rules, which in addition spells out conditions that must be met in an application for review of a decree or order.

It is clear from the said provisions that it is the Court that has passed a decree or made an order that can review that decree or order, including by setting it aside or quashing it. In the present case the ruling sought to be set aside and quashed was delivered in **Kikuyu SPMCC No. 192 of 2014** by the Kikuyu Senior Principal Magistrate’s Court, and it is for the said court to review the said ruling and not this court, unless and/or until the suit in the lower court has been transferred to this Court. The jurisdiction of this Court in relation to the ruling delivered by the lower court is therefore in the circumstances only an appellate jurisdiction, and the provisions of the Civil Procedure Act and Rules as to the hearings of appeals are the ones to be observed in this regard.

This finding also applies to the issue as to whether this Court can allow or dismiss the motions filed in **Kikuyu SPMCC No. 192 of 2014** dated 15/8/2014 and 5/9/2014 respectively that were heard by the lower court and on which a ruling was delivered, which ruling is the subject matter of this appeal. It is also for the same reasons that this Court will not consider the Appellant’s submissions on the merits of his case, which should be made at the hearing of his appeal.

The outstanding issues remaining to be determined therefore are those of stay of the ruling of the lower court, and whether the injunction and *status quo* orders sought can issue. Order 42 Rule 6 of the Civil Procedure Rules provides for stay of execution pending appeal as follows:

“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.”

For a stay of execution to be granted, an applicant must satisfy the conditions stated in rule 6 (2) to the effect that:

(a) the application for stay must be made without unreasonable delay from the date of the decree or order to be stayed;

(b) the applicant must show that he will suffer substantial loss if the orders of stay is not granted,

and

(c) the applicant offers such security as the court may order to bind him to satisfy any ultimate orders the court may make binding upon him.

The essence of an application for stay pending appeal is aimed at preserving the subject matter of litigation to avoid a situation where a successful appellant only gets a paper judgment.

This court also has powers to grant a temporary injunction pending appeal on such terms as it thinks just, provided the procedure for instituting an appeal from a subordinate court has been complied with. The Court of Appeal in **Madhupaper International Ltd Vs Kerr [1985] KLR 840** held that a judge who dismisses an application for injunction has jurisdiction to grant the unsuccessful applicant an injunction pending the hearing of the intended appeal, so as not to render the decision of the appellate court nugatory should the appeal be successful. This principle in my view also applies where the application for an injunction pending appeal is with regard to an injunction which has been denied by a lower court, and the said decision appealed from to this Court.

In the present appeal, the Appellant did not dispute the Respondent's allegation that he has been evicted from the suit property, and it is the view of this Court that any substantial loss he may suffer therefore can only be as regards his opportunity and possibility of recovering the suit property should he be successful in his appeal. The Court notes in this regard that the suit property has been sold to and registered in the Respondent's name, and to this extent both parties interests can therefore be adequately catered for by preserving the *status quo* as regards the ownership of the suit property. In addition, since the Appellant has not pleaded that he is willing and able to offer security for the Respondent's costs, I cannot restrain the Respondent from further dealing with or developing the suit property.

This Court accordingly allows the Appellant's Notice of Motion dated 27th November 2014 only to the extent of the following orders:

1. That the Appellant and Respondents whether by themselves, their employees, agents, servants and or anybody else claiming and or acting on their instructions be and are hereby restrained from selling, transferring or in any other manner alienating or disposing of the parcel of land known as Nguirubi/Thigio/269 pending the hearing and determination of this appeal or until further orders.
2. That the prayer for a stay of execution of the ruling of the Senior Principal Magistrate at Kikuyu dated 11/11/2014 in **Kikuyu SPMCC No. 192 of 2014** is hereby dispensed with by the terms of order 1 hereinabove.
3. The prayers that the Respondent be restrained from further destruction of the parcel of land known as Nguirubi/Thigio/269; that the ruling of the Senior Principal Magistrate at Kikuyu dated 11/11/2014 in Kikuyu SPMCC No. 192 of 2014 be set aside and quashed; and that the motions before the said Senior Principal Magistrate filed in **Kikuyu SPMCC No. 192 of 2014** dated 15/8/2014 and 5/9/2014 be allowed and dismissed respectively are hereby denied.
4. The costs of the Appellant's Notice of Motion shall follow the appeal.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____26th____ day of ____February____, 2015.

P. NYAMWEYA

JUDGE