



REPUBLIC OF KENYA
IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI
ELC SUIT NO. 239 OF 2013

ACUMEN PROPERTIES (K) LTD.....APPELLANT

VERSES

THE CHAIRPERSON, MWERERE WOMEN GROUP.....RESPONDENT

RULING

The Application

The application before the court is a Notice of Motion dated 1st November 2012 filed by the Appellant. The Appellant has brought his application pursuant to Order 40 Rules 1 and 2 of the Civil Procedure Rules and Order 42 Rule 6 of the Civil Procedure Rules, and is seeking the following orders:

1. That a temporary injunction to issue to restrain the Respondent from encroaching upon, trespassing onto, remaining on or in any way howsoever interfering with all that plot known as plot No. 507/Business-Ole Kasasi trading centre situate at Ongata Rongai (hereinafter referred to as “the suit property”) pending the hearing and determination of this appeal.
2. That there be a stay of execution of judgment issued on 16th October, 2012 by the subordinate court (Hon. Samson O. Temu) in Kajiado SRMCC No. 93 of 2011 pending the hearing of this appeal.
3. That the Officer Commanding Ongata Rongai Police Station to ensure compliance with this order.

The grounds for the application as detailed in the application and the Appellant’s supporting affidavit sworn on 1st November 2012 by its Director, Sylvester Michael Mwai, stem from a ruling delivered by the trial Magistrate dismissing the Appellant’s suit for an injunction, from which the Appellant has appealed. The genesis of the Appeal is a purchase of the suit property by the Appellant on 10th June 2009, from the legal administrator of the estate of Zachariah Wainaina Njoroge, one Elizabeth Wainaina Njeri, for a consideration of Kshs.550,000/=.

The Appellant claims he paid the entire purchase price and took possession of the suit property. However, that on or about 2nd June 2011, after it had commenced construction thereon, the Respondent descended on the said property and destroyed the erected fence, and vandalized and wasted the construction materials, thus necessitating the institution of the lower court suit.

The Appellant attached the pleadings in the suit in the lower court being Kajiado CMCC No. 93 of 2011, and stated that the trial magistrate in his judgment delivered on 16th October, 2012 dismissed his suit with costs, on grounds, *inter alia*, that both parties were claiming the same land using different documents and

that the Respondent's was a first registration. Further, that the trial magistrate allowed the Respondent's counterclaim with costs.

The Appellant stated that the lower court had granted him an injunction pending the hearing and determination of the suit, which lapsed upon the dismissal of the suit, and that the suit property is therefore exposed to possible encroachment and active seizure by the Respondent who has visited the plot and is ready to commence demolition of its structures. Further, that if the suit property is encroached, and the structures thereon demolished and others developed by the Respondents, the appeal herein shall be rendered nugatory, and the Appellant shall suffer substantial irreparable loss and damage.

The Response

The Respondent opposed the Appellant's application in a replying affidavit she swore on 21st January 2013, wherein she stated that the Respondent produced various documents of ownership of the suit property during the hearing of the suit in the lower court, including the allotment letter dated 28th June 1994 from Ole Kejuado County Council to Mwerere Women Group, and payment receipts for land rent. Further, that the suit property belongs to Mwerere Womens Group.

It was the Respondent's averment that the application for a stay of execution of the judgment of the trial magistrate has no basis and does not meet the legal requirements, in that the Appellant has not furnished security to warrant the grant of the orders sought; the intended appeal has no probability of succeeding, and the Appellant has not exhausted the trial court's remedies by making a stay application in the said court. Lastly, that the Appellant has failed to annex a copy of the certified judgment that he intends to appeal against.

The Issues and Determination

The Appellant relied on its pleadings and a survey report by the Kajiado County Government Surveyor dated 12th November 2014. The Respondent in addition to her pleadings filed what she referred to as comments on the application which were dated 17th December 2014 and filed on the same date. I have read and carefully considered the pleadings filed and submissions made by the parties herein. The issues to be determined are whether the Appellant should be granted the injunction pending appeal that is sought, and whether the execution of the judgment issued on 16th October, 2012 by the lower court in Kajiado SRMCC No. 93 of 2011 should be stayed pending the hearing of this appeal.

The survey report dated 12th November 2014 indicates that the Kajiado County records show that plot 470/Residential belongs to Mwerere Women Group and plot No 507/Business belongs to Acumen Properties (K) Ltd. Further, that the disputed plot is zoned as a jua kali workshop and neighboring plots are developed as residential plots. Lastly, that the development plan of the town which was attached, indicates that the disputed plot is plot 507.

The Respondent on her part stated that he County Council records indicate that plot no 470 belongs to Mwerere Women Group, and denied that that the suit property is located in the same place as the said plot, and that it is in a jua kali workshop zone as stated by the surveyor. According to the Respondent they were allocated plot 470 twenty years ago and it is located in a residential neighborhood. Further, that the stones on the suit property were brought thereon by the Appellant, who demolished the Respondent's *mabati* (corrugated iron sheet) house and constructed his own. The Respondent attached photographs of the said construction.

This court 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 case that has guided Kenyan courts in that regard is the case of **Erinford Properties Ltd Vs Cheshire County Council [1974] 2 ALL ER 448** where it was held that it would not be incompatible for a court which had dismissed an application for injunction to grant the unsuccessful applicant injunction pending the hearing of an appeal against the dismissal.

That case was cited with approval by the Court of Appeal in **Madhupaper International Ltd Vs Kerr [1985] KLR 840** where it was 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, should the appeal be successful, nugatory. This principle also applies where the application for an injunction has been denied by a lower court and appeal is filed therefrom.

In the present appeal, the Appellant claims to have bought the suit property, and the Respondent also claims the same property, and states that it was allocated to them by Kajiado County Council. The Court notes that the plot in dispute appears to have two different plot numbers, with the Appellant stating that it is plot No. 507/Business-Ole Kasasi trading centre situate at Ongata Rongai, and the Respondent claiming that the same is plot no 470. The issue of which of the plots is located on the suit is still outstanding. It is therefore necessary to preserve the *status quo* until this issue is clarified, otherwise the Appellant's appeal may be rendered nugatory.

On the second issue for determination as regards stay of the judgment of the lower court, 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 Appellant has not demonstrated his satisfaction of these three elements. In any event the Court is of the view that since 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, and having found that the Appellant is entitled to an injunction pending appeal his interests have already been catered for. However, these interests have to be balanced with those of the Respondent, particularly the costs she was awarded by the lower court in the event that that this appeal is not successful. Therefore the element of security for costs is still relevant in this respect.

This Court accordingly allows the Appellants Notice of Motion dated 1st November 2012 only to the extent of the following orders:

1. That the 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 undertaking any further developments on, or in any way howsoever interfering with the Appellant's occupation of the property known as plot No. 507/Business-Ole Kasasi trading centre situate at Ongata Rongai and/or Plot No. 470 for a period of one year from the date of this ruling or until further orders.
2. The Appellant whether by itself, its employees, agents, servants and or anybody else claiming and or acting on its instructions be and is hereby restrained from undertaking any further developments on the property known as plot No. 507/Business-Ole Kasasi trading centre situate at Ongata Rongai and/or Plot No. 470 for a period of one year from the date of this ruling or until further orders
3. The Appellant shall within thirty days of the date of this ruling deposit in Court the sum of Kshs Three Hundred Thousand (Kshs 300,000/=) being security for the due performance of such decree or order as may ultimately be binding on it. Upon default the order for an injunction pending appeal in order 1 herein above shall automatically lapse.
4. That the prayer for a stay of execution of the judgment issued on 16th October, 2012 by the subordinate court (Hon. Samson O. Temu) in Kajiado SRMCC No. 93 of 2011 is hereby dispensed with by the terms of orders 1 and 2 hereinabove.
5. That the Officer Commanding Ongata Rongai Police Station to ensure compliance with the orders herein.
6. Parties shall be at liberty to apply.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____24th____ day of ____February____, 2015.

P. NYAMWEYA

JUDGE