



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 17 OF 2015

ELIJAH GITHINJI APPELLANT/APPLICANT

-VERSUS-

ASSUNTA MURUGI NKONGE 1ST RESPONDENT

DAVID MUTERU KARARI.....2ND RESPONDENT

RULING

1. On **25th May 2015**, **Elijah Githinji** (hereinafter referred to as the applicant) brought the notice of motion dated **22nd May, 2015** seeking among other orders, stay of execution of an order issued on 22nd April, 2015 by Honourable T.W Cherere Chief Magistrate in Nanyuki CMCCC No.10 of 2014 and all other consequential orders arising therefrom pending the hearing and determination of the application and the appeal herein.

2. The application is premised on the ground that the applicant has appealed against the decision of the lower court which restrained the respondents by themselves, their agents, servants and/or employees or any other person claiming under them from laying building materials, constructing or carrying on any other developments the suit property (Sipili/Donyoloip/Block 2/845 –Mukutanio) pending the hearing and determination of the suit pending in the lower court. The applicant contends that unless the orders sought are granted, he stands to suffer substantial loss as the appeal, which has high chances of success, will be rendered nugatory. Pointing out that the application has been brought without unreasonable delay, the applicant alleges that the 1st respondent is in the process of evicting him from the suit property.

3. In support of the application, the applicant filed the affidavit he swore on **22nd May, 2015**. In that affidavit the applicant has reiterated the grounds on the face of the application and annexed the following documents to prove the averments contained therein:-

- a) A copy of the ruling and the order appealed from, marked **E-G 1** and **2** respectively and
- b) A copy of the memorandum of appeal filed in this appeal, marked **E-G 3**.

4. In opposition to the application, the 2nd respondent filed the grounds of opposition dated **19th June, 2015** where he contends that the applicant has not shown what loss or substantial loss (if any) he stands to

suffer if the orders sought are denied; that the applicant has not satisfied the conditions for grant of the orders sought and that granting the orders sought will severely prejudice him as the applicant will continue effecting developments on the suit property contrary to the law.

5. Terming the application an abuse of the process of the court and meant to delay the conclusion of the suit pending before the lower court, the 2nd respondent urges the court to dismiss it.

6. When the matter came up for hearing, counsel for the applicant **Mr. Kiget**, submitted that the orders sought will not affect the respondents in any way because the applicant is in occupation of the suit property.

7. On whether the applicant has satisfied the conditions for grant of the orders stipulated in **Order 42 Rule 6** of the Civil Procedure Rules, he submitted that the court is granted immense powers and leeway beyond the conditions set therein. He reiterated the applicant's contention that unless the orders sought are granted the appeal will be rendered nugatory.

8. Counsel for the 2nd respondent **Mr. Thuku**, submitted that filing an appeal does not necessary entitle one to an order of stay of execution. He submitted that for stay of execution to issue in favour of the applicant, the applicant must satisfy the conditions set out in **Order 42 (6)** of the civil Procedure Rules. In the circumstances of this case, he submitted that the applicant has not demonstrated that he stands to suffer any substantial loss if the orders sought are not granted.

9. He pointed out that the applicant has not offered any security or demonstrated that he intends to comply with any orders which may ultimately issue against him. Terming the application to be lacking in merit, he submitted that the applicant has deposed that he is being evicted from the suit property when that is not factually correct. In that regard, he submitted that the impugned order only sought to prohibit the applicant from building on the suit property and does not talk about eviction.

10. Explaining that there have not been any attempts to evict the applicant from the suit property, he explained that the suit pending before the lower court was to be fast tracked.

11. In support of the the respondent's submissions reference is made to the following cases:-

- i. **Daniel Kihara Murage v. Jacinta Karuana Nyangi & Another (2015) e KLR** where it was stated:-

“To justify the grant of stay, the applicant must show or establish facts to satisfy the court that if execution is allowed to proceed, it will result in a state of affairs that will substantially affect or negate the very essential core of the applicant's case as the successful party in the appeal...The applicant ought to have placed before the court facts to show to the satisfaction of the court that if no stay is granted, he will suffer a loss that is substantial. The mere fact that land is concerned does not make any loss substantial.”

- ii. **Everlyn Jebitok Keter v. Henry Kiplagat Muge & 2 Others (2011) e KLR** where it was stated:-

“It is usually a good rule to see if O.41 r.4 (present Order 42 Rule 6) of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the corner stone of both jurisdictions for granting a stay...In this case the applicant has not shown how he stands to suffer unless stay is ordered. She has therefore not demonstrated that substantial loss may result to her unless the order of stay is made.”

- iii. **Robert Ngaruiya Chutha vs. Joseph Chege Ndungu (2014) e KLR** where it was stated:-

“The Court of Appeal in the case of Charles Wahome Gethi v. Angela Wairimu Gethi, Civil Application No.302 of 2007 (2008) e KLR held that:-

“...It is not enough for the applicant to say that they live or reside on the suit land and that they will suffer substantial loss. The applicants must go further and show substantial loss that the applicants stand to suffer if the respondent executes the decree in this suit against them”....It is my finding that the defendant has not established that he shall suffer loss if the orders sought are not granted. Further, under Order 42 this court is not required to inquire into the merits of the intended appeal as that is a question that can only be determined by the Court of Appeal. Consequently, the ground that the appeal shall be rendered nugatory does not suffice....Lastly, the rules of procedure require that the applicant must offer security as the court may order. On perusal of the application before court, it is evident that the defendant has not stated that he is willing and ready to give security subject to the directions of the court....I accordingly decline to grant the orders sought.”

12. Maintaining that the respondent will not suffer any prejudice if the orders sought are denied, the respondent’s advocate urges the court to dismiss the application.

13. In a rejoinder, Counsel for the applicant submitted that the authorities cited in support of the respondent’s case are distinguishable.

14. In granting an order for stay pending appeal, the court considers the following guiding principles;

- a) Grant of stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice.
- b) Whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted.
- c) The court should weigh the pros and cons of granting or not granting the order.
- d) The court should bear in mind such factors as the need for expeditious disposal of cases, the *prima facie* merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilisation of judicial time and whether the application has been brought expeditiously.
- e) The application for stay of proceedings pending appeal must provide specific details and particulars of the loss he is likely to suffer if the stay is not granted.
- f) If substantial loss will result, or that justice would be put into disrepute, it should be demonstrated. See the case Lucy Waithera Kimanga & 2 others v. John Waiganjo Gichuri (2015) eKLR.
- g) The applicant must demonstrate willingness to furnish such security as the court may order for the due performance of such obligations as may ultimately vest in him/her.

15. In the instant case, the applicant has merely averred that if execution is to proceed, he will be evicted from the suit property which he occupies and has developed.

16. On whether the applicant is likely to be evicted from the suit property, counsel for the respondent informed the court that the applicant is not under threat of eviction because the ruling/order appealed from did not decree that the applicant be evicted from the suit property.

17. Having read the ruling/order appealed from, I can confirm that it did not order eviction of the applicant. That being the case, there is no evidence whatsoever of the loss the applicant would suffer if

the orders sought are not granted. I also note that the applicant has not offered any security for due performance of any obligation that may ultimately vest on him.

18. Consequently, I find the application to be lacking in merit and dismiss it with costs to the respondents.

Dated, Signed and Delivered at Nyeri this 21st day of October, 2015.

L N WAITHAKA

JUDGE

In the presence of:

N/A for the appellant

N/A for the respondents

Court assistant - Lydia