



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 256 OF 2013

EVANS MAIRURA OMWENGA.....PLAINTIFF

VERSUS

DANIEL CHEBET.....DEFENDANT

RULING

On the 5th of November 2014, this court entered judgment for the plaintiff against the defendant by declaring the plaintiff to be the rightful proprietor of the land parcel Eldoret Municipality/Block 14/783 and issuing a permanent injunction stopping the defendant and/or his servants/agents from entering, being upon, grazing, keeping livestock, cultivating, developing, interfering with any structures, or in any other way dealing and/or interfering with the land parcel Eldoret Municipality/Block 14/783 and granting an award of general damages in the sum of Kshs.200,000 in favour of the plaintiff against the defendant. Costs of both main suit and counterclaim were given to the plaintiff.

The defendant filed the Notice of Appeal on the 12.11.2014 which was lodged before the Deputy Registrar on 14.11.2014. This was followed by an application dated and filed on 3.12.2014 by the defendant praying that M/s Ombima & Co. Advocates be allowed to come and record on behalf of the defendant/applicant and that there be temporary stay of execution of the judgment and decree herein pending the inter-partes hearing and determination of this application which was granted. The applicant further prayed a stay of execution of the judgment and decree herein pending the hearing and determination of an appeal to be filed before the Court of Appeal as per the annexed draft Memorandum of Appeal which is the subject of determination today.

The application is based on grounds that the Honourable court delivered its judgment on 05.11.2014 in favour of the respondent which decision the defendant/applicant is dissatisfied with. He claims that the respondent is on course to immediately dispose off the suit land and that the defendant/applicant shall be gravely prejudiced and is set to suffer substantial losses and damages in the event the plaintiff/respondent proceeds to enforce the decree issued. The applicant is ready, willing and able to provide reasonable security as the court may so order AND contends that this application is timeously made and in the interests of justice.

The application is supported by the affidavit of **Daniel C. Chebet** wherein he states that the defendant/applicant is dissatisfied with the judgment entered by the Honourable Court both on law and fact and as such, has made a decision to procedurally appeal against the said judgment.

Further upon reflection of the conduct of the trial, he preferred to see alternative legal representation and as such, appointed M/s Ombima & Co. Advocates to represent him in the conduct of the appeal and the institution and prosecution of this application.

He is informed by his Advocates on record that they have indeed timeously prepared an appeal before the Superior Court but the Court of Appeal registry at Eldoret declined to receive it awaiting preparation and certification of the presiding courts proceedings pursuant to Rule(s) 74, 75 and 82(1) of the Court of Appeal Rules 2010 which he have already applied for.

He is aware from his own knowledge that the plaintiff/respondent is on the verge of selling the suit property to unknown third parties in a bid to defeat and/or pre-empt the intended appeal hence the need to grant the order sought. To that end, he is aware of his own knowledge that the plaintiff/respondent has sent several potential buyers to the suit land with the intent of purchasing the same. He shall suffer substantial loss and damages in the event the plaintiff/respondent enforces the decree herein as he legitimately purchased the suit land and taking into account the value and location of the property, he shall lose a valuable lifetime investment and/or asset. He is further informed by his Advocates on record that appeal filed is meritorious as there is new and compelling evidence touching on the legitimacy and proprietary of the title allegedly issued to the plaintiff/respondent that has been made available to him but was not available during the trial, that is of intrinsic value to the prosecution and outcome of the appeal hence the need to grant the orders sought.

He is ready, willing and able to comply with any reasonable order for provision of security for costs or otherwise as the court may order so as to ensure the efficient prosecution of the appeal.

He believes that the plaintiff/respondent shall not suffer any prejudice and/or loss in the event this application is allowed as the orders sought serves to accord the court the opportunity to comprehensively and finally determine the facts in issue between the parties.

He is further informed by Advocates on record that any inconveniences occasioned to the plaintiff/respondent on account of this application and/or any orders therefore can comfortably be settled/compensated by way of an award of costs. He is aware that this application is timeously made within the prescribed period and/or any purported delay is sufficiently justifiable on the basis of the reasons provided hereinabove.

He confirms that his Advocates have expeditiously sought certified copies of the proceedings herein for purposes of preparing the record of appeal in readiness for its prosecution.

The respondent filed a replying affidavit stating that on 18th April, 2013, he filed this suit in court and sought for order inter-alia that a permanent injunction restraining the defendant from trespassing into, constructing upon, disposing of and/or in any way interfering with the part of that parcel of land known as LR Eldoret Municipality/Block 14/783 and a declaration that the plaintiff is the lawful owner of the suit land – L.R. Eldoret Municipality/Block 14/783. He had also prayed for an order that the applicant pays mesne profits and general damages for unlawful encroachment into the suit land and costs of this suit. That contemporaneousness, he filed an application for injunction wherein he sought interlocutory orders. That the said application for injunction was heard and determined in his favour and that the applicant proceeded not to appeal against the said order and it remained in force until the determination of the suit and is still in force. That the defendant thereafter on 8th August, 2013 filed a defence and counterclaim alleging ownership among other things. That whilst the injunction was in force, the defendant/applicant proceeded to disobey court orders and further admitted it whilst giving evidence in court. That indeed from the documents given in court and the evidence tendered, it is clear that the defendant has no proprietary interests in the suit land. He urges the court to refer to copies of witness statements and documents filed in court on behalf of both parties so as to verify his assertions. That indeed, the applicant has preferred a criminal complaint in Eldoret Chief Magistrate's Court and the plaintiff has been charged over non-existent allegations. He claims that the defendant is relying on a report of the police that he had an opportunity to produce in court which he did not and the same has not been tested to verify its truth or viability and is now estopped from relying on it.

The respondent claims that there is another person in the name of Festus Kiptoo who has preferred another suit alleging ownership. That the said Festus Kiptoo is a son of Paul Kemboi now deceased who alleged to have sold the land to the applicant herein. And it is worth noting that the said Kiptoo was a

witness of the applicant in this suit. The respondent beseeches the honourable court to peruse the proceedings in Eldoret E&L Case No. 18 of 2014 pending before this court and have the same heard contemporaneously. That indeed there is no appeal capable of warranting the court to grant a stay of execution. He claims that the grant of the stay will prejudice the plaintiff's interest and shall cause confusion and bring the court to disrepute. That the appeal be the defendant/applicant is not arguable and has no chances of success. That the defendant has not given security to warrant issuance of a stay of execution as by law required. The respondent concedes that the application is an abuse of court process and is a waste of the court's time and should be rejected in limine.

Mr. Ombima learned counsel for the defendant/respondent submits that the applicant is likely to suffer substantial loss in the event the order is not made staying execution in that the suit land is adjacent to the applicant's residence and that he has been in actual possession of the suit property. Moreover, that the respondent has been charged in court over the matter. He further submits that the application has been made without undue delay.

On security for the due performance of the decree, the applicant argues that none of the parties are in occupation and that the suit property is protected by the decree of the court and therefore no need for security for the performance of the decree.

Mr. Nyachiro learned counsel for plaintiff/respondent argues that the applicant has not demonstrated that he is likely to suffer substantial loss if stay is not granted. He submits that the fact that the land is next to his residence is not enough to prove likelihood substantial loss if stay of execution is not granted. Moreover, Mr. Nyachiro argues that though the application was filed without unreasonable delay, no appeal has been prepared and prays for security if stay is granted as the court awarded general damages of Kshs.200,000 which has not been paid. According to Mr. Nyachiro, the application is made under Order 42 Rule (1) (2) that does not deal with stay pending appeal.

I have considered the evidence on record and the submissions of both counsels and do find that there is no evidence that the applicant is in possession of the suit property and that the said property is registered in the name of the respondent. I have perused the judgment of the court, the court declared the respondent as the rightful owner of the property. This court cannot stay such a declaration as it will amount to reversing the decision of trial Judge on an application and therefore exercising appellate jurisdiction over the the trial judge, jurisdiction that this court does not have. The aforesaid decision can only be reversed on appeal to the Court of Appeal.

The second relief granted by the court was a permanent injunction stopping the applicant from entering, being upon grazing, keeping livestock, cultivating, developing, interfering with any structures or in any other way dealing and/or interfering with the land parcel ELDORET MUNICIPALITY/BLOCK 14/783.

Lastly, the court awarded damages of Kshs.200,000 and costs. I do find that granting stay of execution of the decree will amount to reversing the decision of the court which will be an illegality as the court has no such jurisdiction.

The only order that can be executed is the award of damages of Kshs.200,000 which I do find that cannot amount substantial loss as it can be refunded by the respondent.

In conclusion, I do find that the application was filed without unreasonable delay. However, there is no evidence of substantial loss and therefore the application is not allowed. However, in the interest of justice, I do make an order that a restriction be placed on the register of the property to prevent selling, charging or dealing with the property in any manner by the Land Registrar within a period of 90 days pending the filing of appeal. I do not make any order for security as the title to the property is secured. Costs of the application to abide by the appeal.

DATED AND DELIVERED AT ELDORET THIS 2ND DAY OF OCTOBER, 2015.

ANTONY OMBWAYO

JUDGE

Delivered in the presence of: