



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC APPEAL NO. 7 OF 2015

MICHAEL E.G. MUHINDI.....APPELLANT

VERSUS

JOHN NGURE MUREKIO.....RESPONDENT

RULING

I have before me an application dated 25th May 2015 and filed herein on 28th May 2015 citing the provisions of Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules 2010 seeking the following orders:-

1. ***That this Honourable Court be pleased to grant a stay of execution of the order dated 15th January 2015 issued in Baricho P.M.L.D.T No. 11 of 2008 pending the hearing and determination of this appeal.***
2. ***That costs of this application be provided for.***

The said application is supported by the affidavit of MICHAEL E.G.

MUHINDI the applicant and based on several grounds including:-

- a. ***The applicant was aggrieved by the ruling and order of the learned Senior Resident Magistrate Court at Baricho dated 15th January 2015 in L.D.T No. 11 of 2008 and filed an appeal on 30th April 2015.***
- b. ***The applicant is apprehensive that the Respondent may execute the said order before the said appeal is heard and determined.***
- c. ***The applicant has an arguable appeal with a likelihood of success and if the order appealed from is executed, he will incur substantial loss and his appeal will be rendered nugatory.***

The respondent opposed the application by his replying affidavit to which were attached several annexures. In his response, the respondent stated that the application is incompetent and bad in law because the applicant did not appeal against the

decree of the subordinate Court issued on 5th November 2008 and only appealed against the subordinate Court's order issued on 15th January 2015 which merely confirmed that the execution process was finalized. That he had lodged a boundary dispute concerning the boundary to his land parcel No. KIINE/KIANGAI/195 and the applicant's parcel No. KIINE/KIANGAI/2048 which was heard by the Baricho Land Disputes Tribunal whose award was adopted by the subordinate Court and a decree issued on 5th November 2008 and in execution of that decree, the County Land Registrar and District Surveyor visited the disputed boundary and established that it had been in existence all along. A report was then

filed in Court and made a Court order. That order cannot be stayed since it only declared the position of the boundary.

However, in a supplementary affidavit, the applicant stated that the application is competent and properly in Court since there is an appeal already filed and that he is aggrieved by the manner of execution of the decree issued on 15th January 2015 since the Land Registrar did not mark the boundary between the parties land parcel in accordance with the decree issued on 5th November 2008. This Court therefore has jurisdiction to grant the order sought.

Submissions have been filed both by Mr. Muchira advocate for the applicant and Mr. Magee wa Magee advocate for the respondent.

I have considered the application, the rival affidavits and the submissions by counsel.

This application primarily seeks the stay of execution of the order dated 15th January 2015 issued in Baricho Principal Magistrate's Court L.D.T Case No. 11 of 2008. I have looked at the said order and it reads as follows:-

1. ***That once the boundary is fixed as per the Land Registrar report dated 25th September 2014 this Court mandate comes to an end.***
2. ***That along the disputed boundary there are two main boundary features namely big "mukungugu" plant on one end and a man-made stone on the other end. The Land Registrar declared the same to be the right position of the boundary.***
3. ***Any aggrieved party has 30 days right of appeal.***

What the trial magistrate did therefore was only to comment that he was functus officio once the Land Registrar had fixed the boundary. He then described that boundary and gave any aggrieved party the right to appeal. The magistrate did not order any of the parties herein to do anything or to refrain from doing anything. Where there is no order directing any of the parties to do or refrain from doing anything, there would be no order to be stayed – see REPUBLIC VS KENYA WILDLIFE SERVICES & TWO OTHERS CIVIL APPLICATION NO. 12 of 2007 and also NAIROBI METROPOLITAN PSV SACCOS UNION LTD & OTHERS VS COUNTY OF NAIROBI GOVERNMENT C.A. CIVIL APPLICATION NO. 16 OF 2014 (NBI). It is my view that the subordinate Court was simply repeating the contents of the Land Registrar's report dated 25th September 2014 and did not issue any order capable of execution. The application for stay of execution is therefore not well founded.

Secondly, in an application under Order 42 Rule 6 of the Civil Procedure Rules, the Court's jurisdiction to order a stay pending appeal is determined on the following grounds:-

1. ***The Court must be satisfied that substantial loss will result to the applicant unless the order of stay is granted.***
2. ***The application is made without un-reasonable delay and***
3. ***The applicant gives such security as the Court may order for the due performance of such decree or order that may ultimately be binding on the applicant.***

Although the applicant pleads that he has an arguable appeal with a likelihood of success that is not among the considerations under Order 42 Rule 6 of the Civil Procedure Rules. The main consideration in an application such as this is that the applicant must show what substantial loss he will suffer if stay is not granted. In KENYA SHELL LTD VS KIBIRU & ANOTHER 1986 K.L.R 410 at page 416, **Platt Ag. J.A** (as he then was) captured that requirement in the following words:-

"It is a good rule to see if Order XLI rule 4 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 jurisdiction for granting stay"

And **Gachuhi Ag. J.A** (as he then was) added his voice in the same case by saying:-

“In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted”

In paragraph 7 of his supporting affidavits, the applicant has deponed that if the order appealed from is executed, a portion of his land parcel No. KIINE/KIANGAI/2048 will be appropriated by the Respondent and he will therefore suffer substantial loss rendering his appeal nugatory. As I have already found above, the order sought to be appealed from is not one capable of execution as it did not order the performance of anything. In the circumstances, the issue of substantial loss does not really arise for my determination.

In the circumstances, the application dated 25th May 2015 and filed herein on 28th May 2015 is dismissed with costs.

B.N. OLAO

JUDGE

27TH NOVEMBER, 2015

27/11/2015

Before

B.N. Olao - Judge

Mwangi – CC

Mr. Muchira for Appellant – present

Ms Kiragu for Respondent – present

COURT: Ruling dated, delivered and signed in open Court this 27th day of November, 2015.

B.N. OLAO

JUDGE

27TH NOVEMBER, 2015