



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

ELC NO. 74 OF 2013

JAMES MUNENE NDUMBI PLAINTIFF

-VERSUS-

**SOSPETER MURIMI KARITU
DEFENDANT**

RULING

1. This ruling is in respect of three applications dated **13th November, 2014; 24th November, 2014** and **20th November, 2014**. The first two applications are by the defendant while the third one is by the plaintiff.
2. The application dated 13th November, 2014 seeks an order of stay of execution of the judgment in this matter pending the hearing and determination of the application and the intended appeal. The application is premised on the grounds that the applicant has filed an appeal against the judgment of this court (read ELC) delivered on **29th October, 2014** and applied for certified copies of proceedings to enable him compile the record of appeal. The application has been brought expeditiously.
3. Pointing out that the subject matter of the suit is land and money, the applicant contends that he stands to suffer irreparably if the orders sought are not granted. The applicant states that he is ready to furnish security for costs.
4. The application is supported by the affidavit of the defendant/applicant, Sospeter Murimi Karitu, where the grounds thereon are reiterated.
5. In opposition to the application, the plaintiff filed the grounds of opposition dated 18th November, 2014 where he contends that the applicant has no ownership right/interest of any kind known in law over the suit property (the parcel of land known as Mwerua/Kanyonkora/131); that the orders sought are incapable of being granted; that should the applicant succeed in his appeal, he can be compensated with money and that the applicant has not satisfied the conditions for grant of the orders sought. Terming the application an abuse of the court process and lacking in merit, the defendant prays that it be dismissed with costs to him.
6. The defendant also filed the replying affidavit he swore on **18th November, 2014** and the further affidavit he swore on **2nd December, 2014** in which he basically reiterates the contentions in his grounds of opposition.
7. When the matter came up for hearing, counsel for defendant/applicant submitted that the applicant has

met the conditions for grant of stay of execution pending appeal. In this regard, he stated that the application was filed expeditiously and reiterated the applicant's contention that unless the orders sought are granted, by the time the court of appeal delivers its judgment in the intended appeal, there may be nothing left of the suit property.

8. With regard to the requirements for grant of stay pending appeal, counsel for the applicant referred to the case of **Sammy Some Kosgei v. Grace Jelel Boit (2013) eKLR** where it was observed:-

“...The relevant provisions in relation to stay pending appeal are contained in order 42 Rule 6(2) of the Civil Procedure Rules, 2010 which provides as follows:-

(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 due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

It will be seen that the above provisions are couched in mandatory terms and three conditions must be satisfied before an applicant may succeed on an application for stay pending appeal. First, the court must be satisfied that substantial loss will be occasioned to applicant unless the order of stay is made. Secondly, the application for stay pending appeal must be made without unreasonable delay; and finally, there must be security for due performance of the decree...

The more critical issues herein are whether the applicant stands to suffer substantial loss if the order is not granted and the question of security. In my view I think that if an applicant cannot demonstrate substantial loss, then the application ought to automatically fail and there would be no point in considering the question of security. It is the question of substantial loss which is the epicenter in an application for stay of execution pending appeal...”

9. The legal position canvassed in **Sammy Some Kosgei v. Grace Jelel Boit** (*supra*) is replicated in many cases. To name but just a few, the position is replicated in 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.” (emphasis supplied).

ii) **Everlyn Jebitok Keter v. Henry Kiplagat Muge & 2 Others (2011) eKLR** 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) eKLR** 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) eKLR 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.” (emphasis supplied).

Analysis and determination:

10. From the cases cited above, it is clear that for this court to exercise the discretion vested on it in favour of the applicant, the applicant must satisfy the conditions set in **Order 42 Rule 6(2)** of the Civil Procedure Rules. More importantly, the applicant must by way of evidence demonstrate that unless stay pending appeal is granted he/she will suffer substantial loss. The applicant must also furnish security for satisfaction of such decree as may ultimately issue against him.

11. The instant application was filed on 24th November, 2014, which is less than one month from the time the judgment on which it is premised was delivered. In the circumstances, I agree with the applicant's counsel that the application was brought without unreasonable delay.

12. With regard to the requirement for security, I note that the applicant has expressed willingness to furnish security for due performance for such decree as may ultimately issue against him.

13. On whether the applicant has demonstrated that he stands to suffer substantial loss if the orders sought are not granted, I note that the applicant has merely stated that the subject-matter is land and money and he stands to lose irreparably if the judgment hereto is executed.

14. As pointed out above, it is not enough for the applicant to allege that if the judgment is executed he stands to suffer substantial loss. The applicant is under a legal obligation to, by way of evidence, prove that he indeed stands to suffer substantial loss. It has been held in many cases, that the mere fact that the subject matter of the appeal is land is not proof that the applicant will suffer substantial loss.

15. The upshot of the foregoing is that the applicant has failed to demonstrate what substantial loss, if any, he stands to suffer if stay of execution is not granted. Consequently, the application for stay pending appeal fails and is dismissed with costs to the plaintiff/respondent.

16. Turning to the application for contempt dated 24th November, 2014, the defendant/applicant wants the plaintiff/respondent to be committed to jail for contempt of court. The application is premised on the grounds that the plaintiff/respondent has blatantly violated the orders issued by this court on 14th November, 2014 and extended on 19th November, 2014. It is the applicant's case that the plaintiff/respondent has blatantly ignored the said orders of the court hence putting maintenance of peace and social order at risk. The applicant avers that the respondent has continued cutting trees and sawing wood in the suit property despite the existence of an order for maintenance of status quo. In order to uphold the dignity of the court and the sanctity of court orders, the applicant maintains that its metes and just that the respondent be punished for the said contemptuous actions.

17. The application is supported by the affidavit of the applicant sworn on **24th November, 2014** in which it is deposed that in contravention of the orders of this court issued on 14th November, 2014 and extended on 19th November, 2014, on 20th November, 2014 the respondent sent men to cut down more trees and to saw wood on the land. To prove that the respondent acted in contravention of the court order for maintenance of status quo issued on 19th November, 2014 the applicant has annexed to his supporting affidavit and marked as SKM3 photographs of labourers sawing timber a day after the order for maintenance of status quo was issued, that is on 20th November, 2014. It is the applicant's case that despite having been warned by DCIO Kerugoya, the respondent continued with his disobedience of the orders herein by cutting more trees. Explaining that the respondent has threatened to physically assault him and his family, the applicant urges the court to allow the application for contempt in order to uphold the dignity of the court and the sanctity of court orders.

18. In reply and opposition to the application, the respondent filed the replying affidavit he swore on 2nd December, 2014 in which he admits having been served with the order for maintenance of status quo but denies been in contempt of the order. The respondent gives the following reasons for his saying that he is not in contempt of the said orders of the court:-

- a) he had almost finished clearing the gum trees in the suit property;
- b) the order for maintenance of status quo did not stop him from removing the trees that he had already cut;
- c) The order was open to interpretation.

19. Concerning the photographs annexed to the affidavit sworn by the applicant in support of the application and which show some activities on the suit property even after he had been served with the court order, the respondent avers that no photographs were taken on the dates indicated in the applicant's supporting affidavit.

20. The respondent has further deposed that it's the applicant who is interfering with his quiet possession of the suit property.

Analysis and determination

21. It is not in dispute that the respondent was served with the order for maintenance of status quo on 14th November, 2014. Although the respondent denies having been in contempt of those orders, he categorically states that because he had already cleared the gum trees on the suit property and because the order did not restrain him from removing the trees already cut and sawed, based on his theory that the order for maintenance of status quo was open to interpretation, he removed the trees/timber that had already been cut down/sawed.

22. With regard to the photographs that indicate activities on the suit property, even after he was served with the order for maintenance of status quo, he states that the photographs were not taken on the dates therein indicated. He, however, does not state when the photographs annexed in the supporting affidavit of the applicant were taken.

23. Upon considering the totality of evidence adduced in support of the application for contempt and the explanation offered by the respondent in respect thereof, I entertain no doubt that hiding in his theory that the order for maintenance of status quo was subject to interpretation, the respondent decided to engage in activities that amounted to contempt of the said order of the court.

24. On Status quo, **the Blacks Law dictionary 8th Edition states that this is a Latin word which means "the situation as it exists"**.

25. An order for maintenance of Status quo has been explained by **Murithi J in Boabab Beach Resort as quoted by F. Tuiyot, Saifudeen Abdullahi & 4 Others in Mombasa High Court Misc. Civil Cause No.**

“In my view, an order to Status quo to be maintained is different from an order of injunction both in terms of the principles for grant and the practical effect of each. While the latter is an substantive equitable remedy granted upon establishment of a right, or at interlocutory stage, a prima facie case, among other principles to be considered, the former is simply an ancillary order for the preservation of the situation as it exists in relation to pending proceedings before the hearing and determination thereof. It does not depend on proof of right or prima facie case. In its effect, an injunction may compel the doing or restrain the doing of a certain act, such as, respectively, the reinstatement of an evicted tenant or the eviction of the tenant in possession. An order for status quo merely leaves the situation or things as they stand pending the hearing of the reference or complaint. In its negative form, however, an injunction may have the same effect as an order for status quo.”

26. In the case of Pricillah Wanja kibui v. James Kiongo kibui & another (2014)eKLR Ombwayo J. quoting the above observation by Murithi J. stated:-

“In other words a restraining injunction has the same effect as status quo order, as they preserve the state as it is at the date of the order. The status in this matter was that the documents had been executed but the charge had not been Registered at the lands office. From the proceedings so far we can see that the charge was in the process of being registered. The question is then to determine whether as at the date the order was issued, the property was in the defendant's control. From the annexures the bank accepted the loan application by the 2nd defendant on the 27th October 2011, and 2nd defendant had already signed the charge by the 2nd Nov, 2011. So the status quo as ordered could also include what was happening as at the date of the order which could also include the registration process which might have had commenced as at then, as its not known when charge was presented at the lands office.”

27. Although the order served on the respondent did not detail the activities that the respondent was not to undertake on the suit property, the court record makes it clear that the complaint that led to issuance of the order of maintenance of status quo was the cutting down of trees. In this regard see the proceedings of 14th November, 2014 which are as follows:-

“.....The application is under certificate of urgency. We pray for a temporary stay of execution. The respondent is cutting down the trees. The applicant stands to loose....”

28. My view of this matter is that if the respondent did not understand what status quo was to be maintained, he ought to have moved the court for interpretation of the order as opposed to interpreting it to suit his purposes.

29. Being satisfied that the respondent violated the order of maintenance of status quo by removing the trees he had already cut and cutting down more trees during the pendency of this application, I am satisfied that a case for contempt of court has been made out against the respondent. Consequently, I direct that, within seven days of delivery of this ruling, the respondent files an affidavit to show cause why he should not be punished for his said contemptuous conduct.

30. With regard to the application dated 20th November, 2014, which seeks to, *inter alia*, permanently restrain the defendant/respondent, his agents, servants and or employees or any other person whomsoever acting under the defendants instructions from interfering, threatening, harassing the plaintiff/applicant and/or interfering with the plaintiff's quiet possession of the suit property (parcel No. Mwerua/Kanyokora/131); my view concerning the application is that its success or failure is tied to the outcome of the respondent's application for stay pending appeal. I say so because unless an order for stay pending appeal is issued in favour of the respondent, the respondent would no longer have any rights of supervision of the suit property pending appeal. In this regard, this court has already considered and made a determination on the respondent's application for stay pending appeal. As pointed out herein

above, the respondent failed to meet the legal threshold for stay pending appeal. The legal implication of that finding is that the plaintiff is free to enjoy the fruits of his judgment, the intended appeal notwithstanding.

31. For the applicant to enjoy the fruits of his judgment unhindered, it is important that he be protected from any claims in respect thereof by the respondent. However, as the orders of this court are subject to the outcome of the appeal filed by the respondent, the orders issued in favour of the applicant shall abide the outcome of the appeal.

32. The upshot of the foregoing is that the application by the applicant is allowed to the extent that an order of temporary injunction is issued restraining the respondent by himself, his agents, employees or any person whomsoever acting under his instructions from harassing the plaintiff and/or interfering with the plaintiff's quiet possession of the suit property pending the hearing and determination of the intended appeal.

33. Prayer 4 and 5 are issued as prayed.

Dated, Signed and Delivered at Nyeri this 2nd day of November, 2015.

L N WAITHAKA

JUDGE

In the presence of:

Sospetr Murimi Karithi – respondent

N/A for the defendant

Both counsels absent

Court assistant - Lydia