



REPUBLIC OF KENYA
IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 239 OF 2012

ROBERT NGARUIYA CHUTHA.....PLAINTIFF

VERSUS

JOSEPH CHEGE NDUNGU.....DEFENDANT

RULING

The Defendant's Applications

There are two applications being considered in this ruling, both of which have been filed by the Defendant. The first application is a Notice of Motion dated 12/4/2013 in which the Defendant seeks orders that:

- a. The Court be pleased to order a stay of execution of the ruling and all subsequent orders made by the court on 16/11/2012.
- b. The Court be pleased to review, vary and/or set aside its orders made on 16/11/2012.

The application is premised on grounds that the Defendant has appealed against the orders made on 16/11/2012, and if execution proceeds the same shall render the appeal, which has high chances of success, nugatory. The Defendant avers that he stands to suffer prejudice, irreparable loss and damage in the event that the Plaintiff executes the decree. The application is supported by an affidavit sworn by the Defendant on 12/4/2013. The Defendant depones therein that on 16/11/2012, the Court issued injunction orders restraining him from entering, trespassing, and/or continuing with construction of any structures on or interfering with LR. No. Ruiru West/Block 1/673 where he resides. Being aggrieved with the orders, the Defendant depones that he filed an appeal in **Civil Appeal No. 239 of 2012**. It is his deposition that his appeal has high chances of success and shall be rendered nugatory if the Plaintiff executes the said orders. Further, that he stands to suffer insurmountable loss and damage if the stay of execution is not granted.

The Defendant filed a subsequent second application by way of a Notice of Motion dated 7/8/2013, seeking an order that the application dated 12/4/2013 be heard and determined during the High Court Vacation period. The additional grounds of the application were that the Defendant has a counterclaim in the suit, and that the Plaintiff has proceeded to enter into the parcel of land and is interfering with the structures thereon. The Defendant also stated that there was a danger of interference from the local police and neighbours which may result to a breach of peace. He gave details of these grounds in his supporting affidavit sworn on 7/8/2011. The Defendant also filed a Further Affidavit sworn on 8/11/2013 wherein he deponed that the Plaintiff does not merit the orders granted on 16/12/2012 and proceeded to give the reasons why this was the case.

The Plaintiff's Response

The Defendant's first application was opposed by the Plaintiff who swore a Replying Affidavit on 11/7/2013. The Plaintiff deponed that on 21/1/2013 he enforced the Court order made on 16/11/2012 with the assistance of the OCS Ruiru Police Station and took possession and occupation of the property, but did not demolish the structures thereon as stipulated in the Court Order. The Plaintiff contends that the Defendant continues to trespass on to the suit property in disregard and contempt of the court order, and as such he has no right of audience for non-compliance of the said orders.

The Plaintiff further deponed that there are no new material facts to justify the review, varying and/or setting aside of the said Court orders as provided in Order 45 of the Civil Procedure Rules. Further, that the intended appeal has no likelihood of success in view of the fact that the Defendant lacks a title to the property, and that the case has not gone to hearing. The Plaintiff states that in any event the Defendant has not undertaken to pay damages, and as such his application lacks merit.

The Defendant's second application was also opposed by the Plaintiff who swore a Replying Affidavit on 19/8/2013 and a Supplementary Replying Affidavit on 26/5/2014. The Plaintiff denied interfering with the Defendant's structures as alleged, and contended that he was in compliance with the order of the court dated 16/12/2012. The Plaintiff also deponed that the Defendant cannot bar him from erecting a chain-link fence around the suit property. The Plaintiff contended that there is no tension between the parties as alleged save that the Defendant is defiant of the authority of the court.

The Plaintiff in his Supplementary Replying Affidavit deponed that the annexures attached to the Defendant's Further Affidavit are the ones he relied on during the application that culminated in the order which is the subject matter of the current applications, and which the court examined in coming up with its ruling.

The Issues and Determination.

Both applications were canvassed by way of written submissions. Ongicho-Ongicho & Co. Advocates for the Defendant filed submissions dated 19/11/2013 wherein counsel reiterated that the order delivered on 16/12/2012 was made without full material facts being presented, hence the application for review. Counsel submitted that the title to the property held by the Plaintiff having been found to have been fraudulently obtained, the Court therefore ought to apply Article 40(6) of the Constitution which provides that the rights under that Article do not extend to any property that has been found to have been unlawfully acquired. Counsel urged the Court to allow the application as well as order for restriction under Section 13(7)(g) of the Environment and Land Court Act.

Gitau J.H. Mwara Co. Advocates for the Plaintiff filed submissions dated 19/8/2013 and 26/5/2014 wherein counsel reiterated that the Defendant's applications had been overtaken by events as the orders had already been enforced on 21/1/2013, thus it is an exercise in futility to issue an order for stay of execution or review. It was also submitted that filing an appeal at the Court of Appeal against an order and making an application for review of the same order at the High Court amounts to abuse of the Court process. Counsel further submitted that the Court of Appeal has ruled many a times that it is a waste of precious judicial time to appeal interlocutory orders while the main suit is yet to be heard and determined by the trial court. In that regard, counsel urged the court to dismiss the application.

I have carefully considered the pleadings and submissions filed herein, and find that the two questions for determination are whether the execution of the orders made on 16/11/2012 can be stayed, and secondly whether the said orders are amenable to be set aside and/or reviewed.

Order 42 Rule 6 of the Civil Procedure Rules provides for stay of execution pending appeal. 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 first question is whether the Defendant has shown that he stands to suffer substantial loss if the order of stay is not granted. From the pleadings and affidavit in support of the application, the Defendant reiterates that he stands to suffer irreparable loss. However, the Defendant does not state how he shall suffer the loss. Suffice to say, whereas the order made on 16/11/2012 barred the Defendant from trespassing or continuing with construction on the suit property, the Court in the same order barred the Plaintiff from demolishing or interfering with any structures constructed thereon by the Defendant pending the determination of the suit. Other than the Plaintiff taking over possession of the suit property and erected a chain-link fence around it, there is no averment made by the Defendant as to demolition or disposal of the property. The Court of Appeal in the case of **Charles Wahome Gethi v Angela Wairimu Gethi**, Civil Appl. No. 302 of 2007 [2008] eKLR held that:

“... it is not enough for the applicants 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 the 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.

The second ground is that of unreasonable delay. This application was filed on 12/4/2013 seeking to stay the execution of an order granted on 16/11/2012. Order 45 Rule 6(2) (a) requires that such applications be made without unreasonable delay. An application made 5 months after the order is granted is, in my view, unreasonably long. Additionally, the Defendant has offered no explanation as to why the application was filed late in the day. It is also noteworthy that the Plaintiff contends that he has already executed the orders.

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. Notably, however, this application is brought under Order 22 Rule 25 of the Civil Procedure Rules, which provides:

Where a suit is pending in any court against the holder of a decree of such court in the name of the person against whom the decree was passed, the court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided.

This provision requires that the court does prescribe terms as to security, as it thinks fit. These provisions notwithstanding, this court has already found that the application has been filed after an unexplained lapse of 5 months hence unreasonable delay, and that the Defendant has failed to establish that he shall suffer irreparable loss if the orders sought are not granted. In that regard, it would be of no consequence to consider the issue of security.

On the second issue as to whether the orders made on 16/11/2012 can be reviewed, varied and/or set aside, the applicable law is section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules. Section 80 of the Civil Procedure Act provides as follows with regards to review:

“Any person who considers himself aggrieved—

(a) by a decree or order from which an appeal is allowed by this Act, but from which no

appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

Order 45 Rule 1 of the Civil Procedure Rules elaborates on the grounds on which a judgment or decree can be set aside as follows:

“ (1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed,

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

It is evident from these provisions that the relief of review is only available where an appeal has not been preferred as against an order. Once an appeal is preferred against an order then the door is closed on review of the same and for good reason, as the Appellant is on appeal seeking a re-examination of the affected order on its merits, and the court whose order is appealed from cannot further interfere with the said order as such action is likely to affect the outcome of the appeal.

The Defendant has stated that he has already filed an appeal against the orders made on in **Civil Appeal No. 239 of 2012**. He attached a copy of his Notice of Appeal dated 27th November 2012 and filed on the same date as annexure “JCN “ to his supporting affidavit sworn on 12th April 2013 . The relief of review and/or setting aside the orders made on 16/11/2012 is therefore in the circumstances not available to the Defendant, as these are the orders he is appealing against.

I accordingly decline to grant the orders sought in the Defendant’s Notice of Motion dated 12th April 2013 for the foregoing reasons, and the Defendant shall bear the costs of both the Notice of Motion of 12 April 2013 and that of 7th August 2013.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____15th____ day of ____October____, 2014.

P. NYAMWEYA

JUDGE