Keter & another v Keter & another (Environment and Land Appeal E003 of 2024) [2024] KEELC 3437 (KLR) (30 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3437 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ENVIRONMENT AND LAND APPEAL E003 OF 2024

EO OBAGA, J

APRIL 30, 2024

BETWEEN

WILSON KIPTUM KETER ..... 1ST APPELLANT

DAVID KETER ..... 2ND APPELLANT

AND

DANIEL KIPKOSGEI KETER ..... 1ST RESPONDENT

ANTHONY NJUGUNA WAWERU ..... 2ND RESPONDENT

RULING

Introduction

1. This is a ruling in respect of a Notice of motion dated 23.1.2024 in which the Appellants/Applicants are seeking orders of stay of execution of the Judgement delivered on 8.12.2023 in Eldoret Chief Magistrates ELC No. 34 of 2020 pending the hearing and determination of the appeal filed herein.

Background;

2. The Applicants are step brothers of the 1st Respondent. Their father Kipketer Kiplagat Rongoei (Deceased) was a partner in Ego Letyo and Partners. The father died on 17.12.2006. Their father was entitled to 11.75 hectares. The 1st Applicant who is the administrator of the estate of Kipketer Kiplagat Rongei obtained title in respect of LR. No. Olare/Burnt Forest Block 14 (Ngeny)/4 on 22.1.2016 (suit property).

3. The 1st Respondent who is from the second house of the Deceased moved into the suit property claiming that he was entitled to a share of the same as he was a beneficiary of the estate of the deceased. This is what prompted the Applicants to file a suit before the Chief Magistrate's court in which the 1st Applicant sought for a declaration that he was the sole owner of the suit property. The Applicants

also sought injunctive orders against the Respondents restraining them from interfering with the suit property pending determination of succession proceedings.

4. The Respondent filed a counter claim in the suit. In a judgement delivered on 8.12.2023, the trial magistrate found that the suit property belonged to the estate of the deceased and was subject to distribution in the succession cause pending before the Chief Magistrates court. He also proceeded to cancel title in the name of the 1st Applicant. This is what prompted the Applicants to prefer an appeal to this court hence the application for stay pending appeal.

Applicants' contention;

5. The Applicants contend that they are the ones who have been utilizing the suit property since the early 1960's and that the 1st Respondent trespassed to the same prompting them to file a suit against him and the 2nd Respondent. They want the status quo maintained pending the hearing and determination of their appeal which they say has high chance of success.

First Respondent's contention;

6. The 1st Respondent contends that the Applicants' application is unmeritorious, frivolous and is an abuse of the court process. The 1st Respondent contends that the Applicants have not met the threshold for grant of stay pending appeal. He states that the Applicants voluntarily gave him 3 acres out of the suit property which he has fenced and that as the suit property belonged to the deceased, it should be subjected to succession. He states that he has every right to utilize part of the suit property pending finalization of Eldoret Chief Magistrate succession cause No. 59 of 2016.

7. The 1st Respondent further contends that there is no substantial loss which the Applicants will suffer if their application is dismissed.

Analysis and determination;

8. The parties agreed to dispose of the application by way of written submissions. They were each given 7 days to file their submissions on 12.2.2024. The Respondents' filed their submissions on 1.3.2024. On 5.3.2024, the Applicants were given leave to file a further affidavit and file written submissions within 7 days. As at the time of writing this ruling on 20.4.2024, neither the further affidavit nor submissions had been filed.

9. The Respondents submitted that the Applicants have not demonstrated that they will suffer substantial loss. They relied on the case of Charles Wahome Gethi (2008) eKLR where the Court of Appeal stated as follows:-

> "...it is not enough for the Applicants to say 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 the suit against them."

10. The Respondent also relied on the case of *James Wangalwa & Another –vs- Agnes Naliaka Chesoto* (2012) eKLR where the Court stated as follows:-

> "No doubt, in law, the fact that the process of execution has been put in motion, or it is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under order 42Rule 6 of the CPR. This is because execution is a lawful process. The applicant must establish the other factors

> which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."

11. Under order 42 Rule 6(1) an applicant must show that the application has been brought without unreasonable delay. The applicant has to demonstrate that he will suffer substantial loss if stay is not granted. He has also to give such security for costs as may ultimately be binding upon the applicant on the decree.

12. The only issue for determination is whether the Applicants have met the threshold for grant of stay pending appeal. In the instant case, the impugned judgment was delivered on 8.12.2023. This application was filed on 23.1.2024. under order 50 Rule 4 of the Civil Procedure Rules the period between twenty first December in any year and the thirteenth day of January in the next following year, both days included, are omitted from computation of time. I therefore find that the application was filed without unreasonable delay.

13. On whether the Applicants will suffer substantial loss, it is important to note that the Applicants' suit was not allowed. This being the case, there can be no stay granted as what was given was a negative order which is incapable of being stayed. I did not have the benefit of seeing what the Respondents had prayed for in their counter-claim. The trial magistrate did not say anything on the counter-claim. I however notice that the trial magistrate ordered cancellation of the title held by the 1st Applicant. He did not make any orders other than stating that the suit belonged to the deceased and was therefore subject to succession which is pending before the Chief Magistrate's Court.

14. The Respondents were never ordered to do or not to do anything pursuant to the cancellation. The land will await succession. There is therefore no loss which the Applicants will suffer if stay is not granted. The trial court's orders will not render the Applicants' appeal nugatory. In any case, the 1st Respondent stated in his replying affidavit that he had been given 3 acres as a result of negotiations with the Applicants. This was not rebutted by way of a further affidavit whose leave was granted to the Applicants. I therefore find that the Applicants have not demonstrated that they will suffer substantial loss.

15. The order for security would have been addressed if the Applicants had demonstrated substantial loss.

Disposition;

16. From the above analysis, it is clear that the Applicants' application is devoid of merit. The same is dismissed with costs to the Respondents.

    It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 30TH DAY OF APRIL, 2024.

E. O. OBAGA

JUDGE

In the virtual presence of;

Mr. Tarigo for the Appellant/Applicant

Mr. Murgor for Respondent.

Court Assistant –Laban

30TH APRIL, 2024