



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MURGOR, JA - IN CHAMBERS)

CIVIL APPLICATION NO. 94 OF 2018

BETWEEN

JOHN MULWA NZIOKI.....APPLICANT

AND

PHILIP KIBUBA NZIOKA.....1ST RESPONDENT

JOSEPH MUNYAO KIILU.....2ND RESPONDENT

(Being an Application for injunction and/or stay of execution of the Judgment and decree of the Environment and Land Court delivered on 2nd March 2018 by Angote, J.

in

Environment and Land Court Case No. 282 of 1996)

RULING

On the 17th January 2018, I declined to certify this matter as urgent for reasons that no urgent circumstances were present to warrant the issuance of a certificate of urgency.

Being displeased with the judgment of the Environment and Land Court, the applicant *John Mulwa Nzioki*, filed a Notice of Appeal on 9th March 2018, and a Certificate of Urgency and Notice of Motion dated 29th March 2018 together with a supporting affidavit. The motion sought orders for the application to be certified urgent and the same be heard ex parte in the first instance; that there be a stay of execution of the judgment of the Environment and Land Court until the hearing and final determination of the intended appeal; that a temporary injunction do issue to restrain the respondents whether by themselves, their servants and/or agents from implementing the decree against which the appeal is intended from any change of status or interfering with the applicant’s peaceful possession of the property known as Machakos Town Block 11/285 (*the disputed premises*), until the appeal was heard and determined.

As a brief background, the applicant’s case is that upto 9th September 1978 when he purchased it, he was a tenant in the disputed premises which had previously belonged to the respondents. He contended that by an agreement made on the 9th September 1978, he purchased the 1st respondent’s share for a sum of Kshs. 50,000, and that it was a term of the agreement that the 1st respondent was to collect rent for one year; that since purchasing the share, he had not been paying rent, and had substantively developed that portion and was receiving rent. The applicant further contended that the 1st respondent’s interest in the disputed premises had been diminished, as twelve (12) years had lapsed since 9th September 1979, as a result of which, he had acquired it by reason of adverse possession. He therefore sought an order of specific performance directing the 1st respondent to transfer the share to him and a declaration that he had acquired the disputed property through adverse possession.

The 1st respondent denied entering into a sale agreement with the applicant, but stated that if he had, he

had refunded the sum back to the applicant in 1982, or alternatively, that the sum received converted into rent.

In the judgment, the learned judge dismissed the suit after concluding that the sale agreement of 9th September 1979 was rescinded, and that the applicant had not established that he had acquired the disputed premises through adverse possession.

In his submissions, **Mr. F.M. Mulwa**, learned counsel for the applicant submitted that it was common ground that the Environment and Land Court had dismissed the suit with costs, and that the evidence showed that subsequently, a letter was written requiring the tenants to vacate the premises within 7 days. Counsel further submitted that the 2nd respondent's replying affidavit did not address the question of urgency of the application but dwelt on the substantive issues in the Notice of Motion. Counsel asserted that the applicant was entitled to have his motion for stay of execution determined and that there was no reason why it could not be heard without delay; that in any event, disposal of the application would be beneficial to both parties.

On her part, **Mrs. Nzei** relied on replying affidavit sworn by Joseph Munyao Kiilu on the 24th May, 2018 and submitted that **rule 47 (1)** of the **Court of Appeal rules** required an applicant to demonstrate the urgency; that the applicant's affidavit in support of the application showed only one ground which was that during the pendency of the suit, the 1st respondent had purported to sell the disputed premises, as a result of which the substratum of the suit would be removed. Counsel asserted that this was a hollow averment because the pleadings showed that the suit was provoked by the intended sale by the 1st respondent's to the 2nd respondent of his share of the disputed premises, and that by the time the trial court had heard and determined the suit, the portion had long since been sold. It was also submitted that subsequently, the trial court dismissed the suit.

Counsel continued that the disputed premises, the subject of the appeal, no longer belonged to the 1st respondent as the Government leasehold expired in 2000, and the property had reverted to the Government; that the 2nd respondent applied for the issuance of a new lease which lease was accordingly granted to him by the Government for a period of 66 years, so that at this point in time the dispute appertains to a different interest in the land.

It was counsel's assertion that the affidavit in support did not show urgency, that the 2nd respondent did indeed issue notices to the illegal tenants who had been installed by the 1st respondent prior to the determination of the suit, but that there was no threat by the 2nd respondent to dispose of the disputed premises. **Mr. Mulwa** responded that the question of ownership of the disputed premises was not a matter that was in contention at this stage, but that the letter notifying the applicant to vacate the dispute premises remains an imminent threat to date.

I have carefully considered the pleadings and the arguments urged before me, the history of the entire matter, the parties' affidavits, as well as the learned judge's judgment.

Under **rule 47 (5)** of this Court's rules, for an applicant to succeed in an application for urgency he or she must demonstrate that the application sought to be heard is indeed urgent. In the case at hand, the applicant has averred in the affidavit in support of urgency that, during the pendency of the suit before the Environment and Land Court, that the 1st respondent had purported to sell the disputed premises to the 2nd respondent and unless the motion was heard and determined as a matter of urgency, there is every likelihood of the status of the premises changing which will remove the substratum of the intended appeal. The applicant has also pointed to a letter from Nzei & Company Advocates dated 24th March 2018 notifying him that if he does not vacate the disputed premises in 7 days, he would be evicted.

Indeed, a notice was issued in March 2018, but since then the applicant has not provided any other material to demonstrate that he is in real danger of immediate and unlawful eviction, which was the reason why I declined to certify the matter as urgent. My view is that there is a process of eviction that the 2nd respondent will need to undertake before an actual eviction can take place. As at the time the parties appeared before me, nothing seemed to have changed. The applicant continues to rely on the same letter of 28th March 2018, leaving me with no option but to hold the same view that at this point in time, the application is not urgent.

Consequently, I decline to certify the application as urgent.

It is so ordered.

Dated and delivered at Nairobi this 13th day of July, 2018.

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR