



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: E. M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED, JJA.

CIVIL APPLICATION NO. 50 OF 2018

BETWEEN

ANNE JEPKEMBOI NGENY.....APPLICANT

AND

JOSEPH TIREITO.....FIRST RESPONDENT

JACOB KIPSUGUT ARAP LAGAT.....SECOND RESPONDENT

AND

JOSEPH TIREITO.....PLAINTIFF

VERSUS

JACOB KIPSUGUT ARAP LAGAT.....FIRST DEFENDANT

ANNE JEPKEMBOI NGENY.....SECOND DEFENDANT

(Being an application for stay of execution of the judgment and/or decree

of the Environment and Land Court at Eldoret (Sila Munyao, J.)

dated 26th February, 2014

in

ENVIRONMENT AND LAND COURT CASE NO. 441 OF 2012)

RULING OF THE COURT

[1] On the 26th February, 2014, the Environment & Land Court (Munyao J) delivered a judgment in which it declared **Joseph Tireito** (1st respondent) the rightful owner of 26.5 acres of land originally comprised in LR NO. 779/359 but which was at the time of the judgment comprised partly (24 acres) in Eldoret Municipality Block 25(Luliet/1) and partly (2.5 acres of land) in parcel Eldoret Municipality Block 25 (Luliet/2). Consequently, the learned judge ordered the cancellation of the title of Jacob Kipsugut Arap Lagat (2nd respondent) in Eldoret Municipality Block 25(Luliet/1) and ordered that the acreage of land parcel Eldoret Municipality Block 25(Luliet/2) be reduced by 2.5 acres.

[2] In addition, the learned judge directed the District Land Registrar, Uasin Gishu and the District Land Surveyor, Uasin Gishu and or any other personnel to excise 2.5 acres from land parcel Eldoret Municipality Block 25(Luliet/2) and include it in the title Eldoret Municipality Block 25(Luliet/1) and a new title comprising 26.5 acres be issued to Joseph Tireito for land parcel Eldoret Municipality Block 25(Luliet/1). Further, the learned judge issued an order of permanent injunction restraining the 2nd respondent and Anne Jepkemboi Ngeny (applicant),

their servants or agents from being on, utilizing, dealing with or in any way interfering with the 1st respondent's occupation and possession of the 26.5 acres.

[3] By a notice of motion, dated 26th March, 2014, the appellant and the 2nd respondent moved the Environment and Land Court for orders of stay of execution of the judgment delivered on 26th February, 2014. In a ruling delivered on 30th September, 2014, the High Court ordered the 2nd respondent and the applicant who are the registered proprietors of land parcels Eldoret Municipality Block 25(Luliet)/1 and Eldoret Municipality Block 25(Luliet)/2 respectfully, not to sell, charge, lease or otherwise encumber the two land parcels.

[4] The learned judge also issued an order of inhibition inhibiting the registration of any disposition involving Eldoret Municipality Block 25(Luliet)/1 and Eldoret Municipality Block 25(Luliet)/2 and further ordered possession of the 26.5 acres in dispute to remain with the 1st respondent subject to the 1st respondent not destroying any existing structures or in any other way altering the character of the said land.

[5] On the 26th of April, 2014, the applicant filed a notice of appeal against the judgment of 26th February, 2014. By a notice of motion dated 3rd May, 2017, the 1st respondent moved this Court to strike out the notice of appeal that had been filed by the applicant on two grounds, firstly, though two years had passed since the filing of the notice, no record of appeal had been filed. Secondly, the 2nd respondent had passed on, and the intended appeal against him had abated as no substitution had been made. That application was compromised when the 1st respondent withdrew it on condition that the applicant files and serves the record of appeal within thirty (30) days.

[6] On 26th January, 2016, the 1st respondent moved the Land and Environment Court for orders that the appellant be committed to civil jail for contempt of the court order of 30th September, 2014. The 1st respondent contended that contrary to the court order, that he (the 1st respondent) be given possession of the 26.5 acres, the appellant had fenced off 2½ acres and closed the road leading to the 1st respondent's land. In a ruling delivered on 6th November, 2017, the learned judge (Ombwayo J) found the applicant to be in contempt of the court order and ordered her to pay a fine of Kshs.100,000/= or in default be jailed for 2 months. The applicant was further ordered to comply with the court order of 30th September, 2014 by immediately giving the 2nd respondent possession as ordered by the court.

[7] By a notice of motion dated 4th November, 2017, (later amended to read 4th December, 2017), filed in the Environment and Land Court, the 1st respondent sought, *inter alia*, to have the orders made by the court on 30th September, 2014, reviewed and the order of stay of execution lifted. The 1st respondent claimed that the applicant and the 2nd respondent had not complied with the order of the court regarding the filing of an appeal, but had instead disobeyed court orders. That application which was contested was heard by (Ombwayo J).

[8] In a ruling delivered on 8th March, 2018, Ombwayo J found that the applicant had for the second time disobeyed the orders of the court. The learned judge ordered that she pays a fine of Kshs.200,000/= or in default be jailed for a period of two (2) months. In addition, the appellant was ordered to comply with the orders made in the judgment of the court by immediately giving the 1st respondent possession.

[9] With that background, the applicant now urges the Court to issue an order of stay of execution of the judgment delivered by the Environment and Land Court on 26th February, 2014 and all other subsequent orders pending the hearing of her appeal. The applicant maintains that the 1st respondent and the Environment and Land Court were unfairly arm-twisting her to give away the subject matter of the appeal so as to render her intended appeal nugatory. The applicant contends that her efforts to obtain proceedings and ruling of the Environment and Land Court for purposes of appeal had been impeded by the fact that there had been many applications in the Environment and Land Court making it impossible for the proceedings to be compiled as the file was always active.

[10] The applicant contends that he has an arguable appeal as evidenced by the memorandum of appeal filed in Eldoret Civil Appeal No. 1 of 2018. In particular, the applicant points out that there is a pertinent issue to be canvassed at the hearing, to wit, that there was no written agreement for the sale of the disputed land and that under **section 3(3)** of the **Law of Contract Act** no suit can be anchored on an unwritten agreement. Secondly, that the 1st respondent was allegedly a buyer of the disputed land, but the person who sold to the 1st respondent claimed to have sold only 24 acres of land, which is contrary to the finding of the court that 26½ acres was due to the 1st respondent.

[11] On the nugatory aspect, the applicant submitted that she was in possession of the disputed land which she farms and lives on with her family. She urged that it would cause her extreme hardship at her 82 years of age to move from the land. The applicant pleaded that the order of stay of execution granted by the Environment and Land Court had onerous conditions making it impossible for her to comply.

[12] The 1st respondent objected to the applicant's motion through a replying affidavit in which the 1st respondent swore that the appellant was undeserving of the orders sought, as she has demonstrated disrespect to court orders by contravening orders issued by the court on several occasions. The 1st respondent pointed out that the orders made by the court on 8th May, 2018, were issued as a result of the disobedience and contempt of the court orders displayed by the appellant.

[13] Furthermore, the 1st respondent contended that the applicant's motion was frivolous and an abuse of the judicial process as the applicant had by the date of her application not filed any notice of appeal; and that the issues raised in the applicant's motion were *res judicata* in light of the ruling made by the court on 30th September, 2014. It was argued that the intended appeal was not arguable as there was a consent recorded by the parties admitting that the 1st respondent owned the 26½ acres of land. In addition, it was admitted that there was a written sale agreement. The court was urged to compel the applicant to comply with the court orders.

[14] In response to the objection raised by the 1st respondent to the applicant's motion, it was argued that the applicant was moving the court in its original jurisdiction under **Rule 5(2)(b)** of the Court Rules and **section 3(1)&(2)** of the Appellate Jurisdiction Act, which gives the court jurisdiction to hear matters relating to, or incidental to the hearing of appeals. Referring to **Hadkinson vs Hadkinson [1952] 2 ALL ER 567**, it was argued that being in contempt of court was not a bar to one being heard in an appellate court, the guiding principle being

whether the disobedience impeded the court. It was argued that the court was not so impeded.

[15] We have elaborately set out the background to the application before us. This is because although the application before us is one for stay of execution, in which the Court would ordinarily only be concerned with the twin principles, whether the intended appeal is arguable and whether if the order sought is not granted the appeal would be rendered nugatory, the background to the motion before us, and the submissions made by the parties, an issue arises as to whether the applicant’s motion is frivolous or an abuse of the process of the court.

[16] It is not disputed that in response to the applicant’s application for an order of stay of execution, the Environment and Land Court did issue a conditional order of stay of execution of the judgment delivered on 26th February, 2014, way back on 30th September, 2014. It is also not in dispute that to date the conditions that were given by the court have not been met. To the contrary, there are rulings made by the Environment and Land Court on 6th November, 2017 and 8th May, 2018, wherein the court found the applicant to be in contempt of the court orders, specifically, the condition to give the 1st respondent possession of the disputed portion.

[17] It is now well settled that this Court’s jurisdiction under Rule 5(2)(b) is both original and discretionary (**Ishmael Karuri Kande vs Housing Finance Co. of (K) Limited**, Civil Application No. Nai 157 of 2006.) The following statement made by Githinji JA in **Equity Bank Limited vs West Link Mbo Limited [2013] 2 EA 71 at Page 78 Paragraph b - d**, is instructive:

“It is trite law that in dealing with 5(2)(b) applications, the court exercises discretion as a court of first instance and even where a similar application has been made in the High Court or other similar court under Rule 6(1) of Order 42 C.P. Rules and refused, the court in dealing with a fresh application still exercises an original independent discretion as opposed to appellate jurisdiction (Githuguri vs Jimba Credit Corporation Limited (2) 1988 KLR 838)

From the foregoing, it is clear that Rule 5(2)(b) is a procedural innovation designed to empower the Court to entertain an interlocutory application for preservation of the subject matter of the appeal in order to ensure the just and effective determination of appeals.”

[18] It is evident therefore, that the court has the jurisdiction to independently consider the applicant’s motion for stay of execution. The question is, should the applicant then be allowed to ignore the orders of the lower court by purporting to invoke this Court’s original jurisdiction under Rule 5(2)(b) of the Court Rules? We answer that question with an emphatic “No”.

[19] The applicant had the right to seek an order for stay of execution from this Court immediately after the judgment of 26th February, 2014. The appellant chose not to exercise that right but instead moved the Environment and Land Court for orders of stay of execution. The court having given the orders of stay of execution, albeit with conditions, the applicant cannot be allowed to disobey and ignore those orders particularly when her application is coming more than three years after the orders of stay were given. That is an abuse of the process of the court.

[20] Moreover, the power to grant the orders of stay of execution, is a discretionary power the exercise of which is dependent on the circumstances of the particular case. In this case, the Environment and Land Court gave orders on 30th September, 2014, which restrained the registered proprietors of the disputed parcels i.e. Eldoret Municipality Block 25(Luliet)/1 and Eldoret Municipality Block 25(Luliet)/2 not to sell, charge, lease or otherwise encumber the two land parcels. The court also gave an order of inhibition inhibiting the registration of any disposition involving the two parcels and finally the court directed that the possession of the 26.5 acres do remain with the 1st respondent subject to the 1st respondent not destroying any existing structures or in any other way altering the character of the land. These orders were clearly designed to preserve the subject matter of the dispute.

[21] The applicant is not being sincere when she alleges that her intended appeal is likely to be rendered nugatory. For three years the applicant has not made any efforts to comply with the orders that were made on 30th September, 2014. Her current application coming after the court has found her to be in contempt of the conditional order of stay and directed her to comply with the orders, can only be interpreted as an attempt to impede the cause of justice by circumventing the orders of the court.

[22] It is not without sympathy to the applicant’s age that we come to the conclusion that this application must fail. Accordingly, we dismiss the application and order that the costs shall be in the intended appeal.

DATED and delivered at Kisumu this 18th day of October, 2018.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.