



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO , AZANGALALA , KANTAI JJ. A)

CIVIL APPLICATION NO. 8 OF 2014 (UR 4/2014)

BETWEEN

JOSHUA NYAMACHE T. OMASIRE APPELLANT

AND

CHARLES KINANGA MAENA.....RESPONDENT

(Being an application for stay of execution of, and for injunction pending the hearing and determination of an Appeal from a Judgment and Decree of the High

Court of Kenya at Kisii (D. Musinga, J) dated 27th July, 2010

in

KISII HCC No. 153 OF 2003

RULING OF THE COURT

By the Notice of Motion dated 26th February, 2014 brought under Sections 3A and 3B of the Appellate Jurisdiction Act and Rules 5 (2) (b) and 47 of this Courts Rules the Applicant Joshua Nyamache Omasire seeks various orders. These are in essence that we grant a stay of execution of the judgement of the High Court of Kenya at Kisii delivered on 27th July, 2010 in HCCC No. 153 of 2003 pending hearing and determination of Civil Appeal No. 151 of 2012 and further that we grant injunctive orders against the respondent Charles Kinanga Maena and his agents. The motion is supported by grounds set out and an affidavit sworn by the applicant on 26th February, 2014.

The genesis of the whole matter is a land dispute between the applicant and the respondent where the applicant, as plaintiff, sued the respondent before the High Court which in the said Judgement dismissed the applicants suit and decreed that the disputed parcel of land belonged to the respondent. As the issues in dispute are subject of the said appeal we shall in this Ruling endeavour not to trespass into the realm of the bench which will hear the appeal but concentrate only on areas that will assist in

determination of the Motion before us.

In applications such as the application before us this Court is concerned with a determination whether the applicant is able to demonstrate that the appeal is arguable and that the appeal, if successful, would be rendered nugatory if the orders sought are not granted - see decisions such as in **Reliance Bank Limited v Norlake Investments Limited [2002] IEA 227** and **Silvester v Chesoni [2002] IEA 296**.

Has the applicant demonstrated that the appeal is arguable and that the appeal would be rendered nugatory if orders sought are not granted?

When the judgement of the High Court was delivered on 27th July, 2010 the applicant filed an application before that court and obtained an order of stay of execution which was given on 30th December, 2011. That order was to await the hearing and determination of a then intended appeal. The respondent was dissatisfied with that order and filed an appeal to this Court being Civil Appeal No. 93 of 2012. In a judgment delivered on 21st February, 2014 this court found inter alia that the learned judge of the High Court had erred in the exercise of his discretion in granting the orders for stay of execution and in the event the orders were set aside

In the said affidavit of the applicant in support of the Motion before us it is deponed inter alia:

“12. THAT however, again, on the 2nd August, 2011, the Respondent, himself and together with his sons and hired thugs, armed with pangas and runguns, and an assortment of crude weapons, invaded and destroyed the fence separating the parties' respective properties, cutting down, destroying and bringing down the coffee plantation, forest/trees, residential houses, tenanted houses, chased away the tenants, destroyed the tenants' household goods, rendered stay and business in the entire my property unmanageable, thereby destroying my entire livelihood, and generally interfered with mine and my dependants' peace and quiet in my entire property, which I had acquired from the Settlement Fund Trustee in 1964 and comprising the entire Gesima Settlement Scheme/96, inclusive of the disputed 3.3. hectares or so in KISII HCC NO. 153 OF 2003, and which I have occupied, used and had in my possession, to the exclusion of the Respondent to date

13. THAT this Court, on 30th December, 2011, granted me orders of stay of execution of the judgment and decree appealed against. However, on the 21st February, 2014 this Court set it aside, for reasons stated, leaving me with the option to file the present application before this Honourable Court. Annexed as JNTO 7 are copies of the Order and Judgment above mentioned.

14. THAT I am now apprehensive that the respondent shall invade the disputed property and destroy the developments I have made therein or alienate the same, to my detriment.

15. THAT if the respondent takes over the disputed property and developments therein, and alters them either by destroying the crops and buildings or chasing away my tenants, he shall completely alter the suit property itself and my interest in the same, which shall destroy the substratum of this appeal and render the appeal already filed nugatory.....

.....

20. THAT unless interim orders are granted as prayed for, I shall suffer irreparable loss and substantial loss as the property also has sentimental value to me for I am old and have stayed in and used it from the year 1964 to date.”

The respondent swore an affidavit on 28th March, 2014 where it is deponed inter alia:

“20. THAT notwithstanding the foregoing, I know of my own knowledge that the Applicant was

Evicted from the portion of land under reference on the 20th day of March, 2014. Consequently, the Applicant ceased to be in occupation of the portion of land under reference. Annexed hereto and marked “CKM 3 (a) (b) & (c) are copies of the Eviction Order, Order on Provision of Security and the Return by the nominated Auctioneer attesting to the implementation of the Eviction Order.

21. THAT besides, I also retained a Photographer who photographed the events ensuing during the Implementation of the Eviction Orders. Annexed hereto and marked “CKM 4” as a Bundle are copies of the Photographs to that effect.

22. THAT in view of the foregoing, the Applicant herein stands evicted from the portion of land under reference. Consequently, the Order of Stay of Execution pending the hearing and determination of the Appeal, is overtaken by events and hence legally untenable.

23. THAT in event, I am credibly informed by my Advocates on record, which information I verily believe to be true, that to the extent that Eviction has already taken place, this Honourable Court is not seized of Jurisdiction to grant the Orders sought.

24. THAT besides, upon the Eviction of the Applicant herein from the portion of the land under reference, I entered upon and thereby took Possession of the said portion. In the premises, I am now effectively in occupation of the suit portion of land, which I have even fenced.”

Among the documents annexed to the respondents affidavit is an eviction order issued by the High Court of Kenya, Kisii, on 13th March, 2014 ordering M/s Omwoyo Auctioneers to evict the applicant from the disputed parcel of land and a letter dated 20th March, 2014 by the said auctioneers to the said court confirming that eviction had indeed taken place on the said 20th March, 2014.

Mr. A. Ombwayo, the learned counsel for the applicant, in submissions before us faulted the learned judge for believing evidence of the defendants witnesses but not those of the plaintiff. Counsel submitted further that it was wrong for the learned judge to allow the counter – claim which counter-claim was according to counsel statute – barred. On the nugatory aspect of the application counsel submitted that although there was no evidence to that effect the respondent could sell or otherwise alienate the land. Mr. J. M. Oguttu, the learned counsel for the respondent submitted that orders for stay of execution of the judgement could not be granted because the application had been overtaken by events when the applicant was evicted in accordance with the orders of the High Court.

Learned Counsel for the applicant only proceeded on prayers 5 and 7 of the Motion. These prayers are to the following effect:

“5. THAT pending the hearing and determination of the appeal already filed in the Court of Appeal No. 151 of 2012 Kisumu, the Respondent, his agents, employees, assigns, be and are hereby restrained from entering, destroying, uprooting, the building, trees, fence, from barring the Applicant from peacefully and without any interference using and or deriving any income from, the entire property comprising Gesima Settlement / 96, inclusive of the disputed portion comprising 3.3. hectares or so, and further from alienating, annexing or in any manner charging and or purporting to charge any part of that entire property.

7. THAT costs of the application be provided for.”

There is uncontroverted evidence that the applicant was evicted from the disputed land and there is no evidence, by affidavit or otherwise, that the respondent intends to dispose of the land in any way at all.

The applicant has not satisfied either limb of the principles on which we exercise jurisdiction in an

application such as this one. The application has no merit and we dismiss it with costs to the respondent.

Dated and Delivered at Kisumu this 23rd day of May, 2014

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR