



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

ELCA CASE NO. 6 OF 2015

MARY WANJIKU KAMONDE Suing as the Administrator

of the Estate of STEPHANO KAMONDE KUBUTA.....APPELLANT

VERSUS

DANIEL MURIITHI.....RESPONDENT

**RULING**

The appellant/applicant herein has moved this Court citing the provisions of Section 42 Rule 6(1) and (6) of the Civil Procedure Rules (she must have meant Order 42 Rule 6(1) and (6) of the Civil Procedure Rules) seeking the following substantive orders:-

1. ***Spent.***

2. ***Spent.***

3. ***This Court do order that the status quo on land parcel No. MUTIRA/KAGUYU/281 be maintained and the respondent be restrained from evicting the appellant or interfering with her quiet occupation of the land or sub-dividing it pending the hearing and determination of the appeal herein.***

4. ***This Court do stay further proceedings in Baricho Civil Case No. 98 of 2013 pending determination of this application and thereafter pending determination of the appeal.***

5. ***Costs of the application be provided for.***

The application which is supported by the applicant's affidavit is based on the grounds, inter alia, that the applicant has a life interest over the suit land as issued by the Court of Appeal at Nyeri in Civil Appeal No. 348 of 2005 yet the respondent wants to evict her from the land and her application in the subordinate Court to restrain him from doing so was dismissed by the Court hence this application. Further, the respondent wants to sub-divide the said land which will lead to the applicant being displaced.

The application is opposed and in his replying affidavit, the respondent has deponed, inter alia, that the

applicant only holds a life interest in the land and cannot seek protection orders for purchasers including one JAMES MWANGI KAIGURI who has forcefully occupied the entire parcel of land yet the applicant has no capacity to dispose the said land. That if this Court maintains the status quo, it will mean that the applicant will continue to illegally entertain settlers to work on his land yet the Court of Appeal gave him two acres. Further, that the applicant is only interested in the respondent's portion because he is her step-son but has no problem with the other portion occupied by her sons. That the applicant should fast-track the proceedings in the lower Court rather than abusing the Court process by prolonging litigation which must come to an end.

Submissions have been filed by both Ms Thungu advocate for the applicant and Mr. Ngangah advocate for the respondent.

I have considered the application, the rival affidavits and annexures thereto as well as the submissions by counsels.

This is yet again one of those unfortunate but common land disputes involving a parent and her child. The respondent it would appear is the step-son of the applicant and as per her affidavit in support of this application, he intends to evict her from the portion of land she is occupying and shift her to another portion and therefore interfere with her tea bushes which is her only means of livelihood. He has also destroyed her nappier grass and is selling part of the land to one EPHANTUS MWAI MBOI. The respondent's case is that in fact it is the applicant who has received money from one JAMES MWANGI KAIGURI whom she is trying to protect and thereby entertaining illegal settlers on the land.

**Order 42 of the Civil Procedure Rules** deals with stay of execution pending appeal. The order sought to be appealed is the ruling of the trial magistrate dismissing the applicant's application

for injunction. The magistrate did not order any party to do anything or refrain from doing anything. Therefore, there is nothing which can be executed from the dismissal order except only for payment of costs. Where there is no order directing any of the parties to do or refrain from doing anything, there would be no position or enforceable order to be stayed - See **REPUBLIC VS KENYA WILDLIFE SERVICE & TWO OTHERS, CIVIL APPLICATION NO. 12 OF 2007** and also **NAIROBI METROPOLITAN PSV SACCOS UNION LTD & OTHERS VS COUNTY OF NAIROBI GOVERNMENT C.A CIVIL APPLICATION NO. 16 OF 2014 (NBI)**. Therefore, in so far as this application seeks a stay of execution of the trial Court's ruling dismissing the applicant's application for injunction, it is devoid of merit and must be dismissed which I hereby do.

The applicant also seeks maintenance of the status quo obtaining on the land and an order restraining the respondent from evicting her or interfering with her occupation of the land pending the hearing of the appeal. The applicant is essentially seeking a temporary injunction. The power donated by **Order 40 of the Civil Procedure Rules** to this Court to issue temporary injunctions limits those powers "**until the disposal of the suit or until further orders**". This Court's powers to issue temporary injunctions can only be exercised in its original and not appellate jurisdiction. The Court of Appeal for East Africa dealt with this issue in the case of **WESTERN COLLEGE OF ARTS AND APPLIED SCIENCES VS ORANGA & OTHERS 1976-80 I K.L.R 78 at page 81** in the following terms:-

***"The High Court has no specific power to issue a temporary injunction in connection with an order for stay of execution of a decree or order which is the subject of an appeal to the High Court"***

In the circumstances, the application for injunction is similarly dismissed.

Lastly, the applicant seeks stay of proceedings in Baricho Principal Magistrate's Court Civil Case No. 98 of 2013 pending determination of this application and thereafter, pending determination of this appeal. Her argument is that her appeal has high chances of success. It is curious that under **Order 42 Rule 6(1) of the Civil Procedure Rules** which stipulate the conditions upon which a Court may grant stay of execution orders, no similar conditions are provided under which the Courts may grant stay of proceedings orders. In the circumstances, it can only be concluded that the framers of the law left it to the discretion of the Court to determine any such application before it and in doing so, consider whether or not the appeal before it would be rendered nugatory if the application for stay of proceedings is rejected. The Court of Appeal in exercising similar jurisdiction considers the following:-

***a. Whether there is an arguable appeal and***

***b. Whether the appeal would be rendered nugatory if the application is rejected.***

I will be guided by the same principles remembering always that each case must be determined on its own peculiar circumstances and further, that a Court's discretion must always be exercised judiciously.

Having said so, I am not persuaded, for reasons given earlier, that the applicant has any arguable appeal which would be rendered nugatory if this application is rejected. The dispute between the parties is still alive in the trial Court and each is at liberty to move that Court for any appropriate orders should the need arise. My only advise to the parties who are related is that they should pursue their respective claims in the subordinate Court expeditiously and they should be able to agree on some compromise that would ensure that the substratum of the litigation is not destroyed while the case is still in the Court. Their counsels are encouraged to guide and assist their respective clients in achieving this objective.

Ultimately therefore, the application dated 24<sup>th</sup> March 2015 is dismissed with no order as to costs as the parties are family.

**B.N. OLAO**

**JUDGE**

**13<sup>TH</sup> NOVEMBER, 2015**

13/11/2015

Before

B.N. Olao – Judge

Gichia – CC

Ms Thungu for Appellant – present

Mr. Gitonga for Ngangah for Respondent – present

COURT: Ruling dated, delivered and signed this 13<sup>th</sup> day of November, 2015 in open Court.

**B.N. OLAO**

**JUDGE**

**13<sup>TH</sup> NOVEMBER, 2015**



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