



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

COMMERICAL & TAX DIVISION

CIVIL SUIT NO 194 OF 2007

JOSEPH MWANGI WAHOMEPLAINTIFF

VERSUS

HOUSING FINANCE COMPANY OF KENYA LIMITED1ST DEFENDANT

CYPRIAN MUTABARI M'EKANDI2ND DEFENDANT

RULING

1. In a Judgment of 21st February 2020, this Court entered Judgment for Cyprian Mutabari M'ekandi (**the 2nd Defendant/Respondent**) whose effect would be to obtain vacant possession over LR No. 9509/36 from Joseph Mwangi Wahome (**the Plaintiff/Applicant**). Possession was to be granted within 60 days of that order.

2. The Plaintiff has signified his intention to Appeal against the said decision and has filed a Notice of Appeal in that respect. He now seeks the protection the Court under the auspices of Order 42 Rule 1 and 6 of the Civil Procedure Rules for the following orders:-

(3) That this Honourable Court deem it fit to stay execution of the Decree and order given by Honourable Justice Tuiyott on 21st February 2020 pending the hearing and determination of the Appeal to the Court of Appeal.

(4) That this Honourable Court grant an injunction to restrain the 2nd Defendant from selling, transferring, charging or in any way alienating or encumbering LR No. 9509/36 pending the hearing of this application and the Appeal to the Court of Appeal.

3. It is in a Notice of Motion of 19th March 2020.

4. In an affidavit made in pitch of the application, the Applicant deposes that he has been in possession of the suit premises for more than 3 decades and that it is family property. His apprehension is that not only would he be dispossessed of the land but that the land could be put beyond the reach of the parties if transferred by the Respondent to a third party.

5. Resisting the Motion, the Respondent states that he bought the suit property in the year 2005 for a sum of Kshs.6,000,000/= and has been in possession since. He states that he has been denied much needed income accruing from ownership of the suit property for the last 15 years. He makes the point that disposal of this suit has taken 13 years.

6. It is common ground that prior to the sale, the suit property was registered in the name of Joseph Mwangi Wahome, then the chargor. He passed on during the pendency of these proceedings. Charles Maina Mwangi, who is the Administrator of the Deceased's estate, is the current Plaintiff and Applicant. The Respondent argues that the Applicant does not have any proprietary interest in the suit property.

7. The Respondent nevertheless proposes that should the Court grant stay then it should be on condition that all rental income earned from suit property since he purchased it be deposited in Court.

8. The Court has given due regard to the submissions made by the respective sides.

9. Order 42 Rule 6 of the Civil Procedure Rules provides-

“6. Stay in case of appeal [Order 42, rule 6.]

(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under subrule (1) unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

10. The provisions set out the conditions to be met in an application of the nature before Court. In addition, but not expressed there, is that it needs to be brought without undue delay.

11. It is common ground that the estate of Joseph Mwangi Wahome is in possession of the suit property. In exercise of its undoubted right to appeal, the Estate has moved the Court of Appeal. There is no predicting what the Appellant Court would make out of High Court decision. A possible outcome is its reversal. If then the Applicant will have been dispossessed of the land, the loss suffered would be substantial. This Court would think a stay is deserved.

12. Yet it has to be on some condition. The Respondent proposes that rental income which has accrued therefrom since the deceased bought the property should be deposited in Court. I would think such a condition to be too onerous because the Respondent did not bespeak for mesne profits at trial. However, since the Respondent’s interests in the property obtained Court approval on 21st February 2020 when judgment was delivered in his favour and possession was to happen within 60 days, then any rent earned by the property from the 61st day of the decision ought to be to the account of the Respondent. In my view a just outcome is to grant the stay but on condition that rent on the property from 22nd April 2020 be deposited in a joint earning account between the lawyers for the two parties. In default on the side of Applicant, the stay to lapse forthwith.

Dated, Signed and Delivered in Court at Nairobi this 21st Day of September 2020

F. TUIYOTT JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17th April 2020, this Ruling has been delivered to the parties through virtual platform.

F. TUIYOTT JUDGE

Wilson for the Respondent.

Mbigi for the Applicant