



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA LAW COURTS

ELC CIVIL APPEAL NO.16 OF 2017

MIRIAM WAMBUI GITAU.....APPELLANT/APPLICANT

-VERSUS-

BONIFACE MWANGI KIHIA.....RESPONDENT

RULING

The matter for determination is the Appellant's/Applicant's *Notice of Motion* application dated 9th October 2017, brought under Order 42 Rule 6, Order 50 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act and all the enabling provisions of law. The Applicant has sought for the following orders:-

1. Spent.

2. Spent.

3. That pending the hearing and determination of this Appeal, there be a stay of execution of the Kiambu Chief Magistrate's Court's orders/decrees dated 12th September 2017 in CMCC No.226 of 2014.

4. The costs of this application be in the cause.

The application is premised among the following grounds:-

a. Sometime in January 2010, the Applicant and the Respondent entered into an agreement for sale wherein the Applicant was to sell to the Respondent 4 parcels of land in Kiambu County, more specifically title Nos.Karai/Gikambura/2758, 2759, 2760 and 2761. The agreed purchase price was Kshs.2,500,000/=. Part of the purchase price was to be paid directly to K-Rep Bank for service of a loan the Applicant had borrowed from the said Bank. This amounted to Kshs.1,419,437/=. The balance was to be paid directly to the Vendor. The Law Society Conditions of Sale (1989) were to apply. To date, the agreement remains unfulfilled.

b. The suit land is agricultural and as such, subject to the provisions of the Land Control Act requiring consent by the (Gikambura) Land Control Board. The Applicant was categorical in the lower court that this consent was not sought and/or obtained. She states that the applicant never appeared before the board as alleged by the Respondent; no evidence was produced at the trial to show that the parties all appeared before the Board. The documents produced by the Respondent are therefore of dubious authenticity belatedly obtained to defeat the Applicant's claim. This means that the Respondent has no equitable or legal claim over the suit land.

c. The Learned Magistrate failed to appreciate the import of Section 3(3) of the Law of Contract, the Land Control Act provisions on consent and that there was no enforceable contract between the parties herein, the Respondent having frustrated completion. The Learned Magistrate failed to appreciate the import of issuance of a completion notice issued by the Applicant's Advocates Opondo & Co. and that the remedy of specific performance was not available in the circumstances obtaining thereby occasioning injustice to the Appellant herein.

d. The Appeal herein has overwhelming chances of success. If an order of stay is not granted the Appellant runs the risk of suffering substantial loss as her property may be sold to third parties to her exclusion thereby rendering the Appeal hereto an academic exercise.

e. It is just and inequitable that an order of stay do issue in the circumstances obtaining to prevent further wastage of the

Appellant's property or alienation whose threat is real as the 30 days stay orders in the subordinate court expires on the 11th day of October 2017.

f. This application has been made timeously and the Applicant is ready to offer such security for due performance of the same.

The application is also supported by the **affidavit** of the Appellant herein who reiterated most of the contents of the grounds in support of the application. She averred that the dispute herein is between himself and the Respondent over the sale and purchase of land parcels **No.Karai/**

Gikambura/2758, 2759, 2760 and 2761 wherein she filed a suit at the **Chief Magistrate's Court at Kiambu** being **CMCC No.226 of 2014**, but despite tendering sufficient evidence, the trial Magistrate failed to appreciate the same and found for the Respondent. She further averred that she filed an Appeal against the **Decree** of the trial Magistrate and she believe that she has an arguable Appeal with overwhelming chances of success as is evident from **Draft Memorandum of Appeal, annexure B**. She urged the Court to allow her application to prevent further wastage of the suit property, and/or alienation. She also averred that she will suffer substantial loss if the stay is not granted as the suit property may be sold to third parties.

The application is **opposed** and the Respondent herein **Boniface Mwangi Kihia**, filed a **Replying Affidavit** sworn on **27th October 2017**, in opposition. He averred that the Appellant/Applicant had charged her suit properties known as **LR.Nos.Karai/Gikambura/2758, 2759, 2760 and**

2761 to K-Rep Bank Ltd for a loan of **Kshs.1,200,000/=**. However, the Appellant failed to service the said loan prompting the Bank to exercise its Statutory Power of Sale and the sale of the suit properties was scheduled for **18th January 2010**, as per the **Notification of Sale** issued by **Regent Auctioneers**. Faced with the impending sale of her properties, the Appellant approached the Respondent on **18th January 2010**, to purchase the suit properties for **Kshs.2,500,000/=** being the forced sale value as per the **Valuation Report** dated **14th April 2009**. The Respondent was to pay off the entire debt owed to **K-Rep Bank Ltd** to stop the sale by **Public Auction** and the balance was to be paid directly to the Appellant. He further averred that the Appellant then sought permission from the Bank to enter into a Sale Agreement with the Respondent. Thereafter the Appellant and Respondent executed a sale agreement for sale and purchase of the suit property for a consideration of **Kshs.2,500,000/=**. The said sale agreement was executed on **15th January 2010**. He contended that after the said execution, the Respondent paid all the debt owed to **K-Rep Bank Ltd**, by the Appellant and paid the balance to the Appellant.

However, even after clearing payment of the debt owed to **K-Rep Bank Ltd** by the Appellant, the Appellant failed to avail all the completion documents. By then the Respondent had taken possession of the suit properties. Thereafter the Appellant filed a suit against the Respondent at the **Chief Magistrate's Court, Kiambu** and the Respondent also filed a **Counter-claim** and after the full hearing, Judgement was entered in his favour as per the Counter-claim and he was ordered to pay the balance of **Kshs.6563/=** which he duly paid on **24th October 2017**, vide transaction **No.LJ044CAEY**.

He further contended that he took possession of the suit property in **January 2010**, after paying the Appellant's/Applicant's debt to **K-Rep Bank Ltd**. He also alleged that since he has been in possession of the suit premises since **January 2010**, there is no threat of wastage of the properties or alienation of the same as alleged by the Appellant. Therefore the Appellant has not shown that she will suffer any substantial loss if the orders sought are not granted. Further that the Appellant has already received the full purchase price of her properties and this application is only meant to disentitle him from enjoying the fruits of his Judgement. It was his further contention that this application was brought with undue delay and should not be allowed. He urged the Court to dismiss the instant application with costs.

The Court directed the parties to canvass the instant application by way of written submissions and in compliance thereof, the **Law Firm of Macharia Kahonge & Co. Advocates** for the Appellant filed the written submissions on **1st December 2017**, and urged the Court to allow the said application so that the intended Appeal is not rendered an academic exercise. She also reiterated that the Appeal has overwhelming chances of success and since the Respondent has already moved into the suit premises with surveyors who are busy partitioning it into portions, the Applicant is apprehensive that the said properties may be sold to third parties and therefore the Applicant risks losing a lifetime savings thus suffering substantial loss.

On the part of the Respondent, the **Law Firm of Calvin Otieno Law** filed the written submissions on **7th December 2017**, and urged the Court to dismiss the instant application. The Respondent also relied on the provisions of Order 42 Rule 6(2) and various provisions of law. He specifically relied on the case of **Carter & Sons Ltd....Vs...Deposit Protection Fund Board & 2 Others, Civil Appeal No.291 of 1997**, where the Court held that:-

“...the mere fact that there are strong grounds of Appeal would not in itself justify an order for stay....the Applicant must establish a sufficient cause; secondly, the court must be satisfied that substantial loss would ensue from a refusal to grant a stay and thirdly, the Applicant must furnish security and the application must of course be made without unreasonable delay”.

This Court has carefully considered the instant application and annexures thereto. The Court has also considered the written submissions, the cited authorities and the relevant provisions of law and makes the following findings:-

There is no doubt that Judgement was entered in favour of the Defendant on **12th September 2017**, by the **Chief Magistrate's Court,**

Kiambu. The Court had entered an **Order of Specific Performance** compelling the Plaintiff to perform her part of the contract by effecting the transfers of the suit properties within a period of **30 days** from the date of the said Judgement.

There is also no doubt that the Appellant herein was dissatisfied with the said Judgement and she filed a **Memorandum of Appeal** and the instant application on **9th October 2017**.

The issue now for determination is whether the Applicant is deserving of the orders sought.

The application for Stay of Execution is governed by Order 42 Rule 6(2) which provides as follows:-

(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.

It is trite that the Court has discretion to issue orders of stay of execution. However the said discretion must be exercised judicially. See the case of ***Fina Bank Ltd...Vs...Spare and Industries Ltd, Civil Appl. No.25 of 2000 LLR 5844(CAK)***, where the Court held that:-

“It is trite law that the jurisdiction of the court under that rule is discretionary and the discretion being judicial is exercisable on the basis of facts and sound legal principles”.

As the Court considers whether to allow the orders sought or not, it will take into account that the purpose of stay of execution pending Appeal

is to preserve the subject matter in dispute. See the case of ***Consolidated Marine...Vs...Nampijja & Another, Civil App.No.93 of 1989 (Nairobi)***, where the Court held that:-

“The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory”.

The Court also takes into account that in this kind of an application, there are two competing interest that must be considered. See the case of ***Kenya Commercial Bank Ltd....Vs...Sun City Properties Ltd & 5 Others (2012) eKLR***, where the Court held that:-

“In an application for stay, there are always two competing interest that must be considered. These are that a successful litigant should not be denied the fruits of his Judgement and that an unsuccessful litigant exercising his undoubted right of Appeal should be safeguarded from his Appeal being rendered nugatory. These two competing interests should always be balanced”.

This Court will now consider the conditions to be considered in granting an order of stay of execution as provided by Order 42 Rule 6(2) and then juxtapose them for the available evidence and circumstances to determine whether the Applicant is deserving of the orders sought. The conditions to be considered are:-

i. Whether the Applicant will suffer substantial loss if the order of stay is not granted.

ii. Whether the application is brought without undue delay.

iii. Whether the Applicant has provided security for the due performance of the decree.

iv. Whether the Applicant has established sufficient cause for grant of the orders of stay of execution.

See the case of ***Stephen Wanjohi...Vs...Central Glass Industries Ltd, Nairobi HCC No.6726 of 1991***, where the Court held that:-

“For the court to order a stay of execution there must be:-

i. Sufficient cause

ii. Substantial loss

iii. No unreasonable delay

iv. Security and the grant of stay is discretionary”.

Firstly, the Applicant has to establish that she will suffer substantial loss if the orders of stay of execution are not granted. It is evident that the Appellant herein had charged the suit properties to ***K-Rep Bank Ltd*** for a loan of ***Kshs.1,200,000/=***. When the said properties were charged, they became a commodity for sale. It is also evident that the Appellant had defaulted in payment of the said loan and the Bank attempted to exercise its Statutory Power of Sale. If the Respondent had not purchased the suit properties through the private sale agreement, then the suit properties would have been sold by the Bank. Had the suit properties been sold by the Bank, would the Applicant still be alleging that she would suffer substantial loss? Further the Respondent has alleged that he took possession of the suit properties in ***January***

2010 after paying the debt owed to the Bank by the Appellant. The Applicant has not disputed that allegation. If the Respondent has been in possession, then the Appellant cannot allege that the Respondent will waste the suit properties or alienate them. The Appellant alleged that the Respondent has taken surveyors to the suit properties who are now subdividing the suit properties into various portions ready to sell them to third parties. However, there is no evidence of such subdivisions and without such tangible evidence, the Appellant's allegations remain mere allegations. The Court will be persuaded by the case of Machira T/A Machira & Co. Advocates...Vs...East African Standard (No.2) (2002) KLR 63, where the court held that:-

“In this kind of application for stay, it is not enough for the Applicant to merely state that substantial loss will result. He must prove specific details and particulars.... where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay...”

Equally in this matter, the Appellant has not shown what substantial loss she will suffer if the stay of execution is not issued.

On whether the application was brought without undue delay, it is evident that the **Judgement** was delivered on **12th September 2017**. The Appellant was granted 30 days to sign the transfer documents from the date

of the said Judgement. The Application herein was brought on **9th October 2017**, only three days to the last day of the timeline granted by the Court. Why did the Appellant wait until the last minute to bring the application for stay of execution? The Court will adopt the reasoning in the case of Jaber Mohsen Ali & Another...Vs...Priscillah Boit & Another, ELC No.200 of 2012 (2014) eKLR, where the Court held that:-

“The question that arises is whether the application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after the Judgement could be unreasonable depending on the Judgement of the court and any order given thereafter...”

It is evident that the Appellant was supposed to perform her part of the contract by effecting the transfers of the suit properties within a period of **30 days** from the date of the Judgement. She waited until the **27th day** to file this application. Taking into account the circumstances of the case and the nature of the orders issued herein, the application was brought after undue delay.

On whether the Appellant has provided security for the due performance of the decree as provided by Order 42 Rule 6(2)(b) of the Civil Procedure Rules which provides:-

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

(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.

The Court finds that the Appellant has not at all offered any security for the due performance of the decree. The above requirement is mandatory and since the Appellant has failed to offer such security, the Court finds that she has not met the conditions for grant of stay of execution. See the case of Equity Bank Ltd...Vs...Taiga Adams Co.Ltd, where the Court held that:-

“.....of even greater impact is the fact that an applicant has not offered security at all and this is one of the mandatory tenets under which the application is brought..... let me conclude by stressing that all the four, and not one or some, must be met before this court can grant an order of stay....”

On the forth condition that the Applicant must establish sufficient cause for grant of the orders of stay of execution, it is evident that the Respondent herein is the successful litigant and he should enjoy the fruits of the Judgement. However, stay of a such Judgement can be allowed if the Appellant is able to establish sufficient cause to deprive such successful litigant the fruits of his Judgement. In the instant case, the Appellant has alleged that if the Respondent is allowed to execute the Judgement of the Court, then the Appeal filed will be an exercise in futility or an academic exercise. Further that the Appellant will lose her lifetime savings. However, it is evident that the suit properties were in the verge of being sold by the Bank through Public Auction. If that had happened, the Appellant would have lost the properties. The Respondent paid all the debt that the Appellant owed the Bank and has also paid about 85 % of the purchase price. In case the Appeal is successful, then what would have been done will be undone and the Appellant has not shown sufficient cause to warrant this Court to deny the Respondent the fruits of his Judgement. The Court will rely on the case of Antoine Ndiaye...Vs...African Virtue University (2015) eKLR, where the Court held that:-

“The discretionary relief of stay of execution pending Appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserved. This is in recognition that both parties have rights. The Appellant to his Appeal which includes the prospects that the Appeal will not be rendered nugatory and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination”

The Court finds that the Appellant has not established sufficient cause to warrant the Court grant her a stay of execution.

Having now carefully considered the instant **Notice of Motion** application dated **9th October 2017**, the **Court finds it not merited** and consequently, the said **application is dismissed entirely with costs to the Respondent**.

For avoidance of doubt, the ***temporary stay of execution in force is hereby discharged.***

Further, the Appellant is directed to file her Records of Appeal within the next 15 days from the date hereof and thereafter set the matter down for directions before the Judge as provided by Section 79(B) and 79(C) of the Civil Procedure Act.

It is so ordered.

Dated, Signed and Delivered at Thika this 16th day of March 2018.

L. GACHERU

JUDGE

In the presence of

No appearance for Appellant/Applicant though aware of the Ruling date.

Mr. Otieno for Respondent

Lucy - Court clerk.

L. GACHERU

JUDGE

Court – Ruling read in open court in the presence of Mr. Otieno for the Respondent and absence of the Applicant and her advocate though aware of the Ruling date.

L. GACHERU

JUDGE

16/3/2018