



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 1492 OF 2000

MAURICE ALDOUS OPAR.....PLAINTIFF

- V E R S U S -

TRINITY PRIME INVESTMENTS LTD..... 1ST DEFENDANT

ERIC ANANDA2ND DEFENDANT

JOSEPHINE MONGARE

T/A WAMBUA & CO. ADVOCATES 3RD DEFENDANT

JOSEPH NJENGA NJOROGE

T/A JENEN MARPA AGENCIES..... 4TH DEFENDANT

RULING

1. This ruling is the outcome of two motions. The first motion is dated 5th August 2016 while the second motion is dated 12th August 2016. The motion dated 5th August 2016 is taken out by Maurice Aldous Opar in which he sought for *inter alia* an order for stay of execution of the judgment and decree of this court of 3rd February 2016 and all consequential proceedings issued pending appeal. The motion is supported by the affidavit of the plaintiff sworn on 5th August 2016. When the motion was placed before the Hon. Mr. Justice Mbogholi, the learned judge issued *ex parte* orders of stay to last for 21 days. When the order lapsed after 21 days, the court re issued the orders for stay on 29.8.2016 to last upto 10th October 2016 pursuant to the motion dated 23rd August 2016. The interim order was subsequently extended on various occasions. Trinity Prime Investment Ltd, the 1st defendant herein, opted to file the motion dated 12th August 2016 in response to the motion dated 5th August 2016. In the aforesaid motion, the 1st defendant sought for *inter alia*, the *ex parte* orders issued by Justice Mbogholi on 5th August 2016 to be set aside. When served with the motion dated 12th August 2016, the plaintiff filed a replying affidavit he swore to oppose the motion. This motion was treated as a response to the motion dated 5th August 2016 hence the two motions were heard together. This court further gave directions to have the two applications disposed of by written submissions.

2. I have considered the grounds stated on the face of the motions and the facts deponed in the affidavits filed in support and against the applications. I have further considered the written submissions. I think it is appropriate at this stage to first determine the motion dated 12th August 2016. I have already stated that the 1st defendant is basically seeking to have the order issued by Justice Mbogholi on 5th August

2016 set aside. It is the submission of the 1st defendant that the plaintiff obtained the aforesaid orders by failing to disclose material facts which would have negatively affected his case. It is argued that the plaintiff failed to disclose to Justice Mbogholi that after delivery of judgement, the plaintiff made an application to be given time to vacate the suit premises and was on 21st April 2016 granted an extension of 45 days. According to the 1st defendant, by making the application, the plaintiff is deemed to have waived his right of appeal. It is also pointed out that the plaintiff has failed to make payments as agreed and he is using this court to buy time therefore this court was urged to set aside the aforesaid orders. The plaintiff filed a replying affidavit to resist the 1st defendant's motion. It is the plaintiff's submission that on 3rd February 2016, Lady Justice Ougo delivered her judgement requiring the plaintiff to vacate L.R no. 209/11542/3 within 30 days. It is said that the plaintiff had representative in court on the date of delivery of judgment on 4th March 2016. When the 30 days given by court had lapsed, the plaintiff argued that it was therefore necessary to apply for an extension of time to enable his advocate study the judgment and make the necessary formal application. The plaintiff further avers that his advocate was aware of the date of delivery of judgment but did not have the contents or details of the judgment. The plaintiff stated that he eventually gave instructions to his advocate to lodge a notice of appeal. In a nutshell, the plaintiff is of the view that the application dated 14.3.2016, was not an application for stay of execution pending appeal but was an application for enlargement of time to enable his advocates read the judgment and make the appropriate application. The question posed to this court is whether or not the plaintiff had waived his right of appeal when he sought for the enlargement of time to vacate vide the motion dated 14th March 2016. I have carefully looked at the aforesaid motion plus the certificate of urgency filed by Miller Bwire, the plaintiff's advocate to accompany the aforesaid motion it is expressly stated in para.(d) as follows:

“The plaintiff only became aware of the substance of the judgment and the order that he yields vacant possession to the defendant in thirty (30) days on 4th March 2016 when the judgment was received, and accordingly the plaintiff having resided on the suit premises for over twenty (20) years, requires an accommodation for a period of 45 days to organise his family and make necessary formal applications”

3. In paragraph d of the aforesaid motion, the plaintiff states as follows:

“The plaintiff only became aware of the substance of the judgment and the order that he yields vacant possession to the defendant in thirty (30) days on 4th March 2016 when the judgment was received, and accordingly the plaintiff having resided on suit premises for over twenty (20) years requires an accommodation for a period of 45 days to organise his family and make necessary formal applications”

4. The plaintiff in paragraphs 7 and 9 of the affidavit sworn on 14.3.2016 avers as follows

“7. I have resided on the suit property for over twenty (20) years now and require sometime to organise my family on vacant possession and to make formal applications as shall be necessary.

9. I am also advised by my advocates on record which advice I truly believe that it is extremely necessary for the court to certify the delay in issuance of the judgment to enable explanation on filing Notice of Appeal or justify the enlargement of time on service of the Notice of Appeal.”

5. After a careful consideration of the aforesaid material, I am convinced that the plaintiff did not waive his right of appeal when he sought for extension of time to vacate the suit premises. I therefore find no merit in the motion dated 12th August 2016. The 1st defendant had specifically sought to have the order issued by Justice Mbogholi on 5.8.2016 set aside. A careful perusal of the record will reveal that the order issued by Justice Mbogholi lapsed on 26th August 2016 but this court re-issued fresh orders on 29.8.2016 which orders were subsequently extended on various occasions. It is clear to me that technically, the orders issued by Justice Mbogholi had lapsed therefore there is no order to be set aside.

6. Having disposed of the motion dated 12th August 2016, let me now determine the merits or otherwise

of the motion dated 5th August 2016.

7. There is no dispute that on 3rd February 2016, Lady Justice Ougo, delivered judgment which was in the following terms inter alia:

i. The plaintiff to give vacant possession L.R no. 209/11542/3, Dik Dik Gardens to the 1st defendant.

ii. The plaintiff to pay kshs.12,960,000/= as mesne profits to the 1st defendant.

iii. The plaintiff to pay a refund of ksh.1,000,000/= being expenses incurred by the 1st defendant on behalf of prime Bank plus interest.

iv. Costs of the suit.

8. The plaintiff is saying he is dissatisfied with aforesaid decision and has expressed his intention to challenge the decision on appeal by filing a notice of appeal. He has now taken out the motion dated 5th August 2016 seeking for an order for stay of execution pending appeal. It is the argument that unless the order for stay is given the plaintiff would suffer substantial loss in that he will be forcefully evicted from L.R no. 209/111542/3 Dik Dik Gardens where he has lived with his family for over 20 years. The plaintiff offered to provide security for the due performance of the decree. The 1st defendant did not deny the fact that it is ready to have the plaintiff evicted from the aforesaid premises. The 1st defendant stated that the plaintiff had breached an undertaking to pay the decretal sum and buy back the house after agreement after failing to move out at the lapse of 45 days given by this court. It is said that the plaintiff has so far paid ksh.2,000,000/= as part payment of the decretal sum and has failed to settle the rest. It was pointed out that by entertaining the current motion, this court will in essence be seeking to re-write the agreement between the parties freely executed. The 1st defendant further argued that the plaintiff should not be allowed to go behind his promise to move out.

9. The principles to be considered in deciding an application for stay of execution are well settled. An examination of the provisions of Order 42 rule 6 of the Civil Procedure Rules will reveal that the principles are threefold. First, an applicant must show that unless the order for stay is given, he would suffer substantial loss.

10. Secondly, the application for stay must be filed without unreasonable delay.

11. Thirdly, the court should consider the form of security for the due performance of the decree. Applying the above principles to this matter, there is dispute that the motion dated 5.8.2016 was timeously filed. The next question is whether the applicant will suffer substantial loss if the order is denied. On this principle, I think the consequence of denying the plaintiff the order is that the 1st defendant will be at liberty to execute the decree by an order of eviction and attachment. In my view this is a substantial loss which may be visited upon the plaintiff before exhausting his undoubted right of appeal.

12. The next consideration to be taken into account is the form of security the plaintiff should give for the due performance of the decree. The plaintiff has expressly deponed in para. 6(f) of his affidavit as follows:

“6(f) As further security, the respondent is ready, able and willing to offer security that the court shall deem reasonable and appropriate.”

13. This court is of the opinion that as regards the liquidated sum, the plaintiff should deposit in an interest earning account in the joint names of the learned advocates or firms of advocates. As regards delivery of vacant possession of L.R no. 209/11542/3, the plaintiff should continue paying the sum of

kshs.60,000 per month as mesne profits in another separate account in the joint names of advocates or firms of advocates on a monthly basis.

14. In the end, I make the following orders:

(i) The 1st defendant's motion dated 12th August 2016 is dismissed with no order as to costs.

(ii) The plaintiff's motion dated 5th August 2016 is allowed on the following conditions:

a) The plaintiff to deposit in an interest earning account in the joint names of learned advocates or firms of advocates appearing in this matter a sum of ksh.11,960,000/=(i.e 13,960,000-2,000,000=11,960,000/=) within a period of 60 days from the date hereof.

b) The plaintiff to deposit ksh.60,000/= on a monthly basis in an interest earning account in the joint names of the advocates or firms of advocates appearing in this matter with effect from 1st March 2016 until the appeal is heard and determined. Such payments should be made within the next 60 days from the date of this ruling.

c) In default of (a) and (b) above, the 1st defendant shall be at liberty to execute the decree without prior reference to this court.

(iii) Costs of the motion to await the outcome of the appeal.

Dated, Signed and Delivered in open court this 25th day of May, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant