



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL CASE NO. 238 OF 2004

PENINAH WAMBUI MUGO.....PLAINTIFF

VERSUS

MOSES NJARAMBA KAMAU.....1ST DEFENDANT

MARY MUTHONI NJARAMBA.....2ND DEFENDANT

RULING

1. Judgment in this suit was delivered on the 2nd March 2017. Being dissatisfied with the said judgment, the 2nd Defendant **Mary Muthoni Njaramba** has come to court to seek an order of stay of execution pending hearing and determination of her appeal, vide a Notice of Appeal filed on the 24th March 2017 pursuant to **Rule 75 of the Court of Appeal Rules**. The application is dated the 23rd March 2017 and is brought under the provisions of **Sections 3A, 63(e) and 92 of the Civil Procedure Act** and **Order 42 rules 1, and 2 of Civil Procedure Rules**. It is premised on grounds that the applicant is faced with imminent eviction from the suit property known as **LR Nyahururu Municipality Block 6/506** that would cause her irreparable loss by being rendered destitute. She states that the said property is her matrimonial home and has no other place to call home.

2. In her affidavit in support of the application, she deposes that her appeal would be rendered nugatory as the suit property may be sold or charged as it would jeopardise her interests therein being her only source of income. She has offered unidentified security for the due performance of the decree.

3. In opposing the application the Respondent(plaintiff) by her Replying affidavit deposes that no demonstration of any success in the intended appeal has been made and that she has failed to comply with the court orders dated 3rd June 2011 to pay and continue to pay land rates during the pendency of the case and therefore her conduct does not persuade the court to exercise its discretion in her favour.

4. I have considered written submissions by both counsel for the rival parties.

The provisions of **Order 42 Rule 6 Civil Procedure Rules** gives the court wide discretion in the dispensation of justice in staying execution of its judgments pending appeal.

In the case **Absalom Dora -vs- Tarbo Transporters (2013) e KLR** as well as **Antoine Ndiaye -vs- African Virtue University (2015) e KLR** the court rendered that:

“The discretion 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 administer the justice that the case deserves. 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.”

It is indeed the applicant who, by her conduct has exposed the property to likely damage and wastage as a result of the outstanding land rates to the Municipal Council of Laikipia, which she, despite the court orders stated above failed to pay the rates. It is in evidence that the applicant has a home, a matrimonial home at Silibwet. I do not believe that the suit property can be termed as purely matrimonial home, and even if it was, execution of the decree would not expose her to destitution. No persuasive evidence was adduced by the applicant to that effect.

5. Demonstration of substantial loss in an application for stay of execution under **Order 42 Rule 6** is the cornerstone of such an application. In **Antoine Ndiaye Case** (Supra) the court was held that:

“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.”

6. The applicant must show the irreparable loss she would suffer should the order of stay be denied, that the appeal would be totally ruined should execution proceed.

I am minded, that the suit property comprises of both residential and commercial units. The court has not been told how many residential units are comprised therein, nor the number of the commercial units, and the rental income therefrom.

7. While determining whether to grant the order of stay, the court ought to consider that such order would neither advantage or disadvantage the opposing party as well as preserve the subject suit property so as not to render the appeal nugatory should it be successful. See **Scott & Another -vs- Kago & 2 Others (1987) e KLR.**

8. The issues at stake is the balancing of the parties opposing interests. The suit property is a commercial property. The applicant stays in one of the commercial rental house and collects the rent from the rest.

She has failed to pay the land rates for the property despite a court order dated the 30th June 2011 (Hon. W. Ouko as he then was).

It is a rateable property and failure to pay exposes it to attachment and sale under the **Rating Act.**

9. It is trite, and an equitable principle that he who seeks equity must approach the court with clean hands.

It has not been demonstrated why, despite the applicant collecting rent from 2001 has failed to pay rates for the whole period.

10. Having carefully considered all rival arguments and submissions, and the rules governing such an application and being careful not to render the appeal nugatory should it succeed, and at the same time protecting the respondent's interest in the suit property as the registered owner, the orders that comment to me for issue are hereunder:

11. That the application dated the 24th March 2017 is partially allowed and upon conditions that:-

(a) That the appellant/Applicant shall continue to reside in one unit of the residential units (the one she resides in as at date of this ruling) and continue to collect rental income from one commercial unit (to be identified by both parties counsel) out of the suit property Nyahururu Municipality Block 6/506. Such two units shall be identified on a date to be taken, and a report filed with the court.

(b) That all rental income from the other commercial and residential units of the suit property shall be collected and/or deposited with or by an estate agent to be agreed upon jointly by the Advocates for the plaintiff and the 2nd Defendant. The agent shall pay, from the rental income, pay all land rates effective 1st August, 2017 and the balance Net of all other necessary and reasonable expenses shall be deposited in an interest earning joint account of both counsel at KCB Bank – Menengai Branch, Nakuru – pending hearing determination of the appeal, but subject to determination on whether or not there is a valid Appeal on record pursuant to Rule 82 (2) of the Court of Appeal Rules.

(c) That the applicant/2nd Defendant shall pay all outstanding Land Rates as at 30th July 2017, on or before the 30th August 2017 as a pre condition for the grant of the stay order. In default, the order of stay of execution shall terminate unless as may be ordered or varied by the court.

(d) That pending hearing and determination of the Appeal, neither the plaintiff nor the defendants shall adversely deal with the suit property by either charging, selling, altering or in any other way interfering with the suit property.

(e) There shall be no orders as to costs on the application.

(f) There shall be a mention before the court for compliance and further directions with Orders (a), (b), (c) and (d) above, on a date to be taken.

Dated, Signed and Delivered this 27th Day of July 2017.

J. N. MULWA

JUDGE