



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 687 OF 2002

GEORGE MWAI MBURU.....PLAINTIFF/APPLICANT

- V E R S U S -

MARY WAMAITHA KAITTANY.....1ST RESPONDENT

NAIROBI CITY COUNCIL2ND RESPONDENT

RULING

1) George Mwai Mburu the plaintiff/applicant herein took out two Notices of Motion dated 26/10/2015 and 3/11/2015, the subject matters of this ruling. In the motion dated 26/10/2015, the applicant sought for the following orders:

1) That this application be certified as very urgent and service thereof be dispensed with in the first instance.

2) That there be a temporary stay of execution of the judgement delivered on the 9th October 2012, by the Hon. Justice H.P.G. Waweru pending the hearing and determination of this application

3) That there be a stay of execution of the judgement delivered on the 9th October 2012, by the Hon. Justice H.P.G. Waweru pending the hearing and determination of the applicants Court of Appeal Civil Application no. 262 of 2015 (UR 221/2015) seeking the said Hon. Court orders for extension of time within which the applicants appeal will be reinstated and/or filed afresh.

4) That the costs of this application be in the cause.

In the motion dated 26/10/2015 the applicant applied for the following orders:

1. That this application be certified as very urgent and service thereof be dispensed with the 1st instance.

2. That the eviction order issued on the 26th October 2015 against the applicant requiring that he be removed from all that piece of land known as plot B1 and B2 Gikomba Light Industrial Area, Kombo Munyi Road Nairobi. (The suit property) be stayed, suspended and/or set aside.

3. That the costs of this application be in the cause.

2. Both motions are supported by the affidavit of George Mwai Mburu. When served the 1st respondent/1st defendant filed the replying affidavit of Mary Wamaitha Kaitanny to oppose the same.
3. When the motions came up for interpartes hearing, learned counsels appearing in the matter recorded a consent order that the two motions be heard together and be disposed of by written submissions.
4. I have considered the grounds stated on the faces of the motions and the facts deponed in the affidavits filed in support and against the applications. In the two motions the applicant is basically seeking from this honourable court to be granted with an for order stay of execution.
5. In the motion dated 26/10/2015 the applicant is seeking for stay of execution of the judgment delivered by the Hon. Justice H.P.G. Waweru on 9th October 2012, pending the hearing and determination of applicant's application for extension of time pending before the Court of Appeal will be reinstated and or filed afresh. The applicant avers that his application was timeously filed. further that the 1st and 2nd respondent will not suffer any prejudice by the grant of the stay order because the 1st respondent continues to enjoy mesne profits. The applicant further avers that he will suffer irreparable harm and damage if he was to be evicted from the suit property before ventilating his appeal on merit
6. The 1st respondent on the other hand avers that the applicant's application is frivolous, devoid of merit and ought not to be allowed. The 1st respondent avers that she has suffered and continues to suffer being kept from the fruits of her judgment and lasting that the applicant is not deserving of the orders sought as he has not demonstrated sufficient grounds for granting of the same.
7. First an applicant must show the substantial loss he would suffer if the order is denied. Secondly, the application for stay should be filed without unreasonable delay. Thirdly, the provision for security for the due performance of the decree or order must be considered.

I will now deal with the two motions separately as it related to the stay orders sought.

8. On the first principle, the applicant is of the view that he would suffer substantial loss if the order for stay is denied in that he will be evicted from the suit property if stay is not granted. The 1st respondent on the other hand is saying that the applicant has sublet the suit property and therefore the issue of substantial loss does not arise and more so, it is the 1st respondent who suffers loss because she only gets a meagre figure of kshs.30,000/= in mesne profits. With respect, I am convinced that the applicant has shown that he would suffer substantial loss if the order for stay of execution is denied.
9. The second principle is that the application should be filed without unreasonable delay. It is clear on the face of record that judgement was entered on 9/10/2015 and the motion was filed on 26/10/2015. The motion was not timeously filed.
10. The third principle is the provision of security for the due performance of the decree. The applicant avers that he is willing to comply with the direction on this as court will give. The 1st respondent on the other hand is saying that if the order for stay of execution order is to be granted, then it should be on condition that the mesne profit payable by applicant to the 1st respondent be adjusted upwards.
11. In the circumstances of this case I think there is no need to impose conditions for the grant of the order for stay.
12. In the end, the order for stay is granted as sought in prayer 3 of the motion dated 26.10.2015. costs of the motion to abide the outcome of the appeal.
13. In the motion dated 3/11/15 the applicant is seeking for stay of execution against eviction/removal from plot B1 & B2 Gikomba Light Industrial Area, Kombo Muniyiri Road Nairobi.

14. The applicant avers that the execution of the eviction order would be unlawful and would cause him irreparable harm and damage. The applicant avers that the said eviction order was acquired without notice to show cause to him and therefore it offends Order 22 Rule 18 of the Civil Procedure Rules.

15. The 1st respondent on the other hand avers that there is still a valid eviction order and she continues to be denied the fruits of judgment delivered in her favour.

16. The principles to consider in determining such an application are well settled.

First an applicant must show the substantial loss he would suffer if the order is denied. Secondly, the application for stay should be filed without unreasonable delay. Thirdly, the provision for security for the due performance of the decree order must be considered.

17. Despite the applicant not filing this motion timeously in that judgement was delivered on 9/10/15 and the motion filed on 3/11/15, he has demonstrated the substantial loss he will incur if stay is not granted because the execution order will be executed and he will be evicted from the suit property. Consequently the motion dated 3/11/2015 is allowed in terms of prayer 2 with costs abiding the outcome of the intended appeal.

Dated, Signed and Delivered in open court this 18th day of August, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Respondent