



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MURANG'A
CIVIL APPEAL NO 59 OF 2015

(Formerly Nyeri High Court Criminal Civil Appeal No.131 of 2010)

MAWA FAMILY COMPANY LIMITED.....1ST RESPONDENT/APPLICANT

VERSUS

INDUSTRIAL & COMMERCIAL DEVELOPMENT

CORPORATION.....APPELLANT/RESPONDENT

AND

FREDRICK MWAURA KARANJA.....2ND RESPONDENT/RESPONDENT

R U L I N G

1. This ruling concerns prayer 6 of the **notice of motion dated 28/05/2015** in which the 1st Respondent in the appeal seeks stay of execution of the decree of this court passed on 24/04/2015 pending hearing and determination of an appeal to the **Court of Appeal**. The other prayers in the application (including prayer 4 for enlargement of time for giving notice of appeal and leave to lodge appeal out of time) were disposed of by a consent order entered on 30/07/2015.

2. The entire application is stated to be brought under **sections 1A, 1B, 3A, 63(e) and 72 of the Civil Procedure Act, Cap 21** and also under **Order 9, Rules 9 (a) & 10, Order 22, Rule 22 (1), Order 50, Rule 6 and Order 51, Rule 1 of the Civil Procedure Rules, 2010**. The prayer for stay of execution is premised upon the grounds –

- i. That the 1st Respondent has a good and arguable appeal which raises substantial issues of law with high chances of success.
- ii. That should execution proceed the substratum of the appeal will be destroyed and thus render the appeal, if successful, nugatory.
- iii. That the 1st Respondent will abide by any conditions that the court may be pleased to impose, including on security.
- iv. That the application has been brought without undue delay.

3. The application is supported by an affidavit sworn by one **Josephine Mukami Maina** who has stated that she is duly authorized by the board of directors of the 1st Respondent to swear the affidavit. A copy

of a draft memorandum of appeal (to the *Court of Appeal*) and other documents are annexed thereto.

4. The Appellant and the 2nd Respondent (in the appeal) have opposed the application for stay of execution by **grounds of opposition dated 25/06/2015** and a **replying affidavit filed on 04/11/2015** which is sworn by one **Peter Mugi Kuruga**, the Appellant's **Debt Recovery Manager**. Stay is opposed upon the following grounds –

- i. That the intended appeal has no merit and is not even arguable.
- ii. That an order of stay will deprive the Appellant and 2nd Respondent the fruits of their judgement which they have waited for for 7 years.
- iii. That there is danger that if the 1st Respondent remains in the suit premises it will expose it to waste.
- iv. That in any case the 1st Respondent can be adequately compensated by damages should it succeed in its appeal.
- v. That an order of stay will be unduly oppressive to the Appellant and 2nd Respondent.
- vi. That the application was brought “after delay”.

5. I heard arguments on 04/11/2015 when the ruling was scheduled for 11/12/2015. However, the same could not be delivered then as I was on my annual leave.

6. I have considered the submissions of the learned counsels appearing; they were more or less a rehash of the contents of their supporting and opposing papers.

7. The notice of appeal lodged on 15/05/2015 out of time was subsequently validated by the consent order of 30/07/2015. So, for purposes of the application for stay of execution, there is a valid appeal in place.

8. The appeal involves competing interests in land. But it should not be forgotten that the Appellant and 2nd Respondent have a judgement in their favour delivered by this court in its appellate jurisdiction. Likewise it should not be forgotten that the 1st Respondent is in possession of the suit premises and is trading therein; the manner of its entry therein (forcibly or otherwise) would probably be important when canvassing the intended appeal.

9. I note that the suit property was purchased at KShs 150,000/00 seven or eight years ago. There is no doubt that it is now much more valuable than that given the trend of appreciation of property values in this country. I also note that the property would attract some rental income.

10. I am satisfied that the application for stay was made without unreasonable delay in the circumstances of this case. I am also satisfied that an order of stay of execution will have the effect of preserving the suit property pending disposal of the intended appeal. I will therefore grant the stay of execution sought. But at the end of the day, in the event that the intended appeal is dismissed, the Appellant and 2nd Respondent will have been kept out of their judgement (and property) for a long time. So, I will impose the condition that the 1st Respondent/Applicant shall deposit in court security in form of KShs 300,000/00 within fourteen (14) days of delivery of this ruling. In default the stay of execution shall automatically lapse. It is so ordered.

11. Costs of the application shall be in the intended appeal. In the event that no appeal is ultimately filed, the Appellant/Respondent and 2nd Respondent/Respondent shall have costs of the application.

DATED AND SIGNED AT MURANG'A THIS 25TH DAY OF FEBRUARY 2016

HPG WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 26TH DAY OF FEBRUARY 2016