



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI HIGH COURT
CIVIL CASE NO 1565 OF 2001

RAPHAEL JOSEPH KARURI.....PLAINTIFF

VERSUS

HOUSING FINANCE COMPANY

OF KENYA LTD.....1ST DEFENDANT

PAUL WAITHAKA MACHARIA.....2ND DEFENDANT

SALOME WANGUI KAMAU.....3RD DEFENDANT

RULING

1. By a Notice of Motion dated 15.12.2015 the Applicant seeks the following orders;
 1. *Spent*
 2. **THAT the Honourable court be please to grant temporary injunction restraining the 2nd and 3rd Defendants/Respondents by themselves or through their agents, servants or anybody claiming through them from selling, disposing of, transferring or in any other way interfering with the title to the suit property namely; Land Reference No. Ngong/2421.**
 3. *Spent*
 4. **THAT there be a stay of execution of the Judgement of Justice C. Kariuki delivered on 2nd December, 2015 pending hearing and determination of this application.**
 5. **THAT the cost of this application be provided for.**
2. The application is supported by the Applicants affidavit sworn on the 15.12.2015 and is based on the grounds that the Plaintiff sued the Defendants to nullify sale of suit property on account that the Land Board Consent issued on 3.10.2001 by the Local Land Control Board was null and void and that the 1st Defendant was in breach of contract entered between itself and the Plaintiff and that the exercise of the power of sale of the suit marred by deceit, conspiracy and fraud inter alia.
3. The matter proceeded for hearing and the court dismissed the suit defendants and entered judgement for the 2nd Defendant for the counter claim for Kshs.10000/= per month from the date of lodging counter claim to date possession of suit property vests in him and Kshs.45,000/= for valuation. The Plaintiff was also ordered to give 2nd Defendant vacant possession and/or be evicted plus costs.
4. The Plaintiff being aggrieved by the decision aforesaid filed a Notice of appeal and lodged the

instant motion for the purposes of preserving status quo pending appeal.

5. The Applicant submits that he has satisfied the 3 conditions prescribed for granting stay pending appeal under Order 42 Rule 6 namely; the application was lodged without delay as prescribed by the rules. He relies on the case of PETER UNDADE VS. PAUL M. GICHUKI (2006) eKLR which stated;

“to enable court grant stay or extension sought;... it must be established that substantial loss may result to Applicant if stay is not granted... the application must be filed without un reasonable delay and the Applicant must provide security”

He also relied on the case of KISIANGANI /TYTIENGA & 2 OTHERS VS. PAUL WAFULA & 2 OTHES (1998) eKLR which held that; *‘unreasonable delay means reasonable time which amounts to reasonable time which is a matter of good common sense’*. The court went ahead to state that; *‘in each case it depends on its own circumstance’*.

6. In the instant case, the application was made within 13 days after judgement. On the issue of substantial loss to be sustained by the Applicant, the Applicant submits that the auction orders is going to deprive the income which comes from the suit property if stay is not granted. On substantial loss aspect the Plaintiff relies on the Case of WAIGWA & ANOTHER BW. KIBARUA (2009) eKLR . Also on SILVESTEIN VS. CHESONI (2002) EA 296.
7. On security for performance of the decree, the Applicant says that he will not be able to satisfy decree should appeal fail. The 1st Defendant opposes the application of Raphael Joseph Kariuki and the grounds of opposition dated 13.1.2016. The 1st Defendant argues that the Plaintiff’s suit was only dismissed as against it and it was only the costs which were awarded to its side thus the sought as against it is to stay recovery of the costs. It submits that no orders of stay can be granted in respect of the costs; thus the 1st Defendant prays for the dismissal of the application with costs.
8. The Defendants No.2 and 3 oppose the application via a Replying Affidavit sworn by the 2nd Defendant on 13.1.2016. The 2nd and 3rd Defendants submits that the conditions for grant of stay pending appeal under Order 42 Rule 6 CPR have not been satisfied to warrant grant of Orders sought. They argue that an substantial loss on which application for stay pending appeal is anchored, there is no tangible value disclosed which would amount to substantial loss.
9. A successful litigant is entitled to the fruits of his judgement. There are 2 competing interest. The defendants No.2 and 3 took loan to purchase suit property. They expect to reside and earn income from the suit premises. On security as a condition for stay they argue that the Plaintiff should deposit Kshs.1,593,060 in interest earning account or in court.
10. After going through the pleadings, affidavits and the parties submissions, I find the only issue is whether the Applicant has satisfied the conditions for stay to enable court grant the orders sought under Order 41 Rule 6. The Applicant is under an obligation to establish that he has satisfied the 3 conditions for grant of stay of execution pending appeal. These are;
 - a. The application was filed without un reasonable delay;
 - b. The Applicant will suffer substantial loss if stay is not granted;
 - c. The Applicant has also to provide security.
11. On whether the application was filed timely, the same is not contested as the motion was lodged within 13 days.
12. On issue of substantial loss likely to be sustained by the Plaintiff if stay is not granted, the Plaintiff submits that the eviction and/or dispossession would inflict him loss of income which emanates from the suit property. In any event his deceased wife was buried therein.
13. The 1st Defendant submits that the only order as against the Plaintiff is only the costs which the court is entitled to recover. There is nothing to stay as recovery costs cannot be stayed as held in KABAA VS. WAMBUI C.A NAI 298/1996. The Defendants No.2 and 3 submits that as they took loan to purchase suit property, they are the ones who are suffering loss. They seek an alternative substantial loss to be deposited in interest earning account pending appeal.

14. The Plaintiff has not offered security but has only averred that it is not shown that decretal amount will not be recovered. The Applicant has satisfied the 1st conditions of stay that the application was filed without unreasonable delay. As for substantial loss, the court finds that the Plaintiff income comes from the rent collected by the tenant in occupation. There is nothing which indicates that the same cannot be quantified and be refunded if he wins the appeal. In any event he has been collecting rent since 2001 or thereabout when suit property was sold to the Defendants 2 & 3.

15. The court however finds that the Defendants no.2 & 3 are ready to concede a conditional stay. The court will thus make the following orders;

1. The Plaintiff/Applicant shall pay agreed or assessed costs of the suit to the 1st Defendant.
2. The Kshs.1.5. million shall be deposited in interest earning account to be opened in the joint names of the Plaintiff and Defendants No.2 and 3 advocates within 30 days.
3. 50% of the rents accruing from the suit premises to be going to the said account in (2) above with effect from June 2016 if condition No.2 is fulfilled.
4. The stay granted as prayed on the above conditions 1,2, & 3.
5. Any default of the above conditions, the stay orders to stand vacated and execution to issue without any further application. Costs of the application to abide with result of the appeal.

Dated, signed and delivered in court at Nairobi this 22nd day of April, 2016.

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C. KARIUKI

JUDGE