



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 385 OF 2012

NISHITH YOGENDRA PATEL (Suing as a Legal Representative of

YOGENDRA PURSHOTTAM PATEL).....1ST PLAINTIFF

NILESH PRAHLADBHAI PATEL.....2ND PLAINTIFF

- VERSUS -

NAIBUROME EAST AFRICA LIMITED.....1ST DEFENDANT

CLAUDE LYONS (E.A) COMPANY LIMITED..2ND DEFENDANT

DANIEL KINYUA MUGO.....3RD DEFENDANT

REGINA NYOKABI KURIA.....4TH DEFENDANT

THE COMMISSIONER OF LANDS.....5TH DEFENDANT

CHIEF LAND REGISTRAR.....6TH DEFENDANT

RULING

The plaintiffs filed this suit against the defendants on 3rd July, 2012 seeking the following reliefs;

1. A declaration that the plaintiffs and Pascale Mireille Baksh (nee Patel) (“Pascale”) were the bona fide proprietors of the suit property.
2. A declaration that the fraudulent entries on the title of the suit property were illegal, null and void.
3. A permanent injunction restraining the 1st, 2nd, 3rd and 4th defendants from trespassing, transferring, offering for sale, leasing, subletting, charging or alienating the suit property and/or interfering and/or otherwise dealing in any manner howsoever with the suit property.
4. A mandatory injunction compelling the 2nd, 3rd and 4th defendants to forthwith remove the structures they have erected or caused to be erected on the suit property or any part thereof.
5. An order compelling the 5th and 6th defendants to cancel the fraudulent entries particularly the fraudulent transfer of the suit property to the 1st and 2nd defendants.
6. Damages for trespass.
7. Interest and costs of the suit.

The 1st, 5th and 6th defendants neither entered appearance nor filed a defence. The 2nd, 3rd and 4th defendants filed a joint statement of

defence on 10th October, 2012 in which they denied the plaintiffs' claim in its entirety. On 1st July, 2021, the court entered judgment for the plaintiffs against the defendants on the following terms;

- “1. I declare that the estates of Yogendra Purshottam Patel(deceased) (Y.P.Patel), Prahladbhai Purshottam Patel(deceased) (P.P.Patel) and Rajnikant Purshottam Patel(deceased)(R.P.Patel) are the bona fide proprietors of all that parcel of land known as L.R No. 12442(Original Number 4508/2/1)(suit property).**
- 2. I declare that the entries numbers 7, 8, and 10 in the title of the suit property, Grant No. I.R 33904 made on 10th January, 1994, 18th January, 1994 and 23rd May, 2006 are illegal, null and void.**
- 3. A permanent injunction is issued restraining the 1st, 2nd, 3rd and 4th defendants whether by themselves or through their agents and/or employees or otherwise from trespassing, transferring, offering for sale, leasing, subletting, charging or alienating the suit property and/or otherwise dealing in any other manner howsoever with the suit property.**
- 4. A mandatory injunction is issued compelling the 1st, 2nd, 3rd and 4th defendants to forthwith remove any structures that they have erected or caused to be erected on the suit property or on any part thereof.**
- 5. The 6th defendant shall cancel forthwith entries numbers 7, 8, and 10 in the title of the suit property, Grant No. I.R 33904 made on 10th January, 1994, 18th January, 1994 and 23rd May, 2006 if he has not done so already.**
- 6. The plaintiffs shall have the costs of the suit to be paid by the 1st, 2nd, 3rd and 4th defendants jointly and severally.”**

In the judgment, the court stated as follows in part:

“The burden was upon the 2nd defendant to prove that it acquired the suit property lawfully and that it had no notice of any defect in the title of the 1st defendant. The 2nd defendant placed before the court a copy of the title for the suit property that was disowned by the Land Registry. The 2nd defendant also placed before the court a copy of a sale agreement between it and the 1st defendant dated 21st December, 2005 that was witnessed by an advocate who died on 22nd July, 2000. On how it paid the purchase price, the 2nd defendant made an outrageous claim that it paid a whole Kshs. 120,000,000/- to the 1st defendant in cash through the said deceased advocate. No evidence of such payment was produced in court. There was also no evidence of the source of the said amount. The 2nd defendant claimed that it collected the said purchase price from its members. There was no evidence placed before the court showing that the 2nd defendant had other members apart from its five directors and shareholders. There was also no evidence of contribution of the said Kshs. 120,000,000/- by the alleged members. The 2nd defendant according to the evidence on record had a nominal share capital of Kshs. 100,000/- that was divided into 1000 shares of Kshs. 100/- each of which the 2nd defendant's five directors had subscribed to only 60 shares. I wonder how the 2nd defendant managed to raise Kshs. 120,000,000/-. The elephant in the room however is why the 2nd defendant which was a duly registered limited liability company would keep Kshs. 120,000,000/- in its directors' houses instead of keeping the money in a bank and then take the risk of carrying the said amount of money in sacks or boxes to an advocate's office to pay for land. The evidence that was given by DW1 and DW3 regarding this mode of payment is hard to believe and paints a picture of an illicit transaction if there was indeed any sale transaction which I do not believe there was.

I have also noted that the 4th defendant who is a director of the 2nd defendant was charged, tried and convicted in Criminal Case No. 1603 of 2012 on 10th September, 2019 of procuring the registration of the suit property in the name of the 2nd defendant by false pretences. That judgment has not been stayed, varied or set aside. Before this court and the court that heard the criminal case, the 4th defendant who is a director of the 2nd defendant did not tender any evidence on how the 1st defendant from whom the 2nd defendant allegedly acquired the suit property had acquired the property from the Patels. I am not persuaded that the 2nd defendant was an innocent purchaser of the suit property.

Even if the 2nd defendant was an innocent purchaser that it was not, its interest in the suit property cannot not defeat that of the plaintiffs...The Patels had a legal and not equitable interest in the suit property. It follows therefore that even if the 2nd defendant was an innocent purchaser of the suit property which I have held it was not, the interest that it acquired could not prevail over that of the Patels. In the circumstances, it is my finding that the 2nd defendant did not acquire a valid title over the suit property.”

What is now before me is the 2nd, 3rd and 4th defendants' application dated 12th July, 2021 seeking a stay of execution of the said judgment delivered on 1st July, 2021 and all consequential orders pending the filing of an application for stay of execution pending appeal in the Court of Appeal. The application has been brought on the grounds set out on the face thereof and on the affidavit of the 4th defendant sworn on 12th July, 2021. The 2nd, 3rd and 4th defendants (hereinafter referred to only as “the defendants”) have averred that they are dissatisfied with the judgment of this court and intends to appeal against the same to the Court of Appeal. The defendants have averred that they have filed a Notice of Appeal and have also requested for certified copies of the judgment and typed proceedings. The defendants have averred that it is necessary that the suit property be preserved pending the hearing of their intended appeal to the Court of Appeal. The defendants have averred that they will suffer substantial loss and damage if the orders sought are not granted since they stand the risk of being dispossessed of the suit property that they acquired lawfully. The defendants have averred that their appeal would be rendered nugatory should they succeed in overturning the decision of this court unless the stay sought is granted. The defendants have averred that they have an arguable appeal with high chances of success. The defendants have averred that the plaintiffs will not suffer any prejudice if the orders sought are granted. The defendants have averred that it is in the interest of justice that the stay sought be granted.

In her affidavit in support of the application, the 4th defendant has reiterated the contents of the grounds set out on the face of the application. The 4th defendant has added that the judgment of the court has several glaring errors and the same is likely to be reversed on appeal. The 4th defendant has stated further that the defendants are innocent purchasers for value of the suit property without notice of any defect in the 1st defendant's title. The 4th defendant has stated that the defendants stand to suffer substantial loss if the stay sought is not granted.

The application is opposed by the plaintiffs through a replying affidavit sworn by the 1st plaintiff, Nishith Yogendra Patel on 24th September, 2021 and grounds of opposition of the same date. In their grounds of opposition, the plaintiffs have averred that the application has not satisfied the test for granting a stay. The plaintiffs have contended that the defendants have not provided security and have also not demonstrated that they will suffer substantial loss if the stay sought is not granted. The plaintiffs have averred that the application is intended to delay the execution of the decree in favour of the plaintiffs. The plaintiffs have contended further that declaratory orders cannot be stayed. In his replying affidavit, the 1st plaintiff has stated that the plaintiffs are in possession of the suit property and that the court had declared them to be the bona fide proprietors of the suit property. The 1st plaintiff has averred that the plaintiffs should be allowed to enjoy the fruits of the judgment that has been made in their favour. The 1st plaintiff has averred that the plaintiffs stand to suffer greater prejudice than the defendants if the orders sought are granted.

The application was heard on 28th September, 2021 when Mr. Osundwa advocate appeared for the defendants/applicants while Mr. Kiragu Kimani S.C and Mr. Mwihuri appeared for the plaintiffs/respondents. In his submissions, the defendant's advocate submitted that the defendant only required a temporary stay for 60 days pending the filing of an application for stay pending appeal in the Court of Appeal. He submitted further that the plaintiffs' response to the application was filed out of time without leave of the court. In their submissions in reply, the plaintiffs' advocate reiterated the contents of the plaintiffs' grounds of opposition and replying affidavit. The plaintiffs' advocate submitted further that the orders that were granted by the court were not capable of being stayed and that the defendants were calling upon the court to sit on an appeal against its own judgment. The plaintiffs submitted that the defendants did not need to apply for a stay before this court pending the filing of another application for stay in the Court of Appeal. The plaintiffs submitted that if the defendants wished to apply for a stay in the Court of Appeal, they should have lodged the application in the Court of Appeal directly. On the defendants' contention that the plaintiffs' response was filed out of time, the plaintiffs' advocate submitted that defendants did not suffer any prejudice as a result of the late service. The plaintiffs' advocate admitted that the documents were filed late but contended that there was no basis for striking out the same.

I have considered the application together with the affidavit filed in support thereof. I have also considered the grounds of opposition and replying affidavit filed by the plaintiffs in opposition to the application. Finally, I have considered the submissions of counsels from both sides and the authorities that were filed in support thereof. The defendants' application was brought principally under Order 42 Rule 6(2) of the Civil Procedure Rules. Order 42 Rule 6(2) of the Civil Procedure Rules provides that:

(2) No order for stay of execution shall be made under sub-rule (1) unless—

- a. the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and**
- b. such security as the court orders for the due performance of such decree or order as ultimately be binding on him has been given by the applicant.**

I am in agreement with the plaintiffs that the present application was unnecessary. The defendants had a choice either to make a formal application for stay pending appeal before this court or in the Court of Appeal. There is no provision in the rules for making a formal application for stay of execution before the trial court pending the filing of an application for stay of execution pending appeal in the Court of Appeal. Order 42 Rule 6(3) of the Civil Procedure Rules gives the court power to entertain an informal application for stay of execution pending appeal. Immediately the judgment sought to be stayed was delivered, the defendants sought a temporary stay of execution for 30 days. The application was opposed and the court declined to grant the order. The defendants were directed to file a formal application for stay. I am of the view that at that stage, the defendants had a choice. They could file the formal application for stay of execution before this court or in the Court of Appeal. It is surprising that the defendants decided to come before this court for a temporary stay pending the filing of an application for stay in the Court of Appeal. I am in agreement with the plaintiffs that the defendants should have filed an application for stay of execution pending appeal in the Court of Appeal instead of coming before this court for a temporary stay of execution pending the filing of an application for stay in the Court of Appeal. In my view, the present application has no basis in law. That said, the principles upon which the court exercises its discretion in applications for stay of execution are settled.

In Kenya Shell Limited v Karuga (1982 – 1988) I KAR 1018 the court stated that:

“It is usually a good rule to see if order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay.”

I have set out earlier in the ruling, the reliefs that were granted by the Court. The first two orders that were granted by the court were declarations. I am in agreement with the plaintiffs that these orders cannot be stayed. They just declared the rights of the parties. The third order was a permanent prohibitory injunction restraining the defendants from interfering with the suit property. Again by its nature the order cannot be stayed. A stay would be equivalent to discharging the order. It should be noted that the plaintiffs were granted a temporary injunction pending the hearing and determination of this suit. It was this temporary injunction that was confirmed after the hearing of the suit. The defendants have not satisfied me that they will suffer any substantial loss if the foregoing declaratory orders and the order of prohibitory injunction that were granted by the court are not stayed. The fourth order was a mandatory injunction compelling the defendants to remove any structures they had on the suit property. In their replying affidavit, the plaintiffs averred that the defendants are not in possession of the suit property. The defendants did not contest this fact. This means that the defendants have no structures on the suit property to remove. It follows therefore that a stay of the order will serve no purpose. The fifth order was that requiring the Chief Land

Registrar to cancel some entries in the register of the suit property if he had not done so. Again, the plaintiffs contended that those entries had already been cancelled by the Chief Land Registrar prior to the date of the judgment. The defendants did not dispute this fact. It is not necessary in the circumstances to stay this order. The final order was that on costs. The defendants did not convince me that they will have any difficulty in paying the costs ordered against them or that the plaintiffs would not be able to refund the costs which have not even been assessed in the event that they are successful in their intended appeal.

Due to the foregoing, I am not satisfied that a case has been made out for the stay sought. The defendants have not demonstrated that they stand to suffer substantial loss if the orders that were granted herein by the court are not stayed.

In the final analysis and for the forgoing reasons, the Notice of Motion application dated 12th July, 2021 has no merit. The application is dismissed with costs to the plaintiffs.

DELIVERED AND DATED AT NAIROBI THIS 20TH DAY OF JANUARY, 2022

S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Mwihuri h/b for Mr. Kiragu Kimani for the Plaintiffs

Mr. Osundwa for the 2nd, 3rd and 4th Defendants

Ms. C. Nyokabi-Court Assistant