



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 117 OF 2016**

**CHRISTABEL MURUNGA..... 1<sup>ST</sup> APPELLANT**

**JUSTUS MURUNGA MAKOKHA ..... 2<sup>ND</sup> APPELLANT**

**- V E R S U S -**

**ADETI LIMITED .....RESPONDENT**

**RULING**

1. The appellants **Christabel Murunga** and **Justus Murunga Makokha** took out a motion dated 18<sup>th</sup> April 2016 where they sought orders to wit:

- 1. That this application be certified as urgent and it be heard ex parte in the first instance.***
- 2. That there be a stay of execution of the judgment and subsequent decree of the Hon. R. Ngetich, CM dated 25<sup>th</sup> February 2016 pending the hearing inter partes hereof.***
- 3. That there be a stay of execution of the judgment and subsequent decree of the Hon. R. Ngetich, CM dated 25<sup>th</sup> February, 2016 pending the hearing and determination of the appeal filed herein.***
- 4. That the costs of this application be provided for.***

2. When the matter came up for interparties hearing on 12<sup>th</sup> May 2016, the parties agreed to have the matter disposed of by way of written submissions which submissions I have taken into consideration. I have also perused the affidavits filed for and against the application and considered the facts deponed therein. The appellants/applicants submitted that they will suffer substantial loss if they are made to pay kshs.720,000/= to the respondent since the 2<sup>nd</sup> appellant sold the plots to the respondent and ceded possession. They claimed that the 2<sup>nd</sup> appellant being an allottee could only execute the agreement for sale and his allotment, which he did and in so doing his obligations to the respondent ended there. They contended that the respondent did not produce any other Agreement for Sale yet they are now claiming ownership of another plot, issued courtesy of another number membership certificate of plot number 012498. They added that a sum of kshs.720,000/= is a substantial amount.

The appellants further submitted that the application has been made without unreasonable delay given that the judgment was delivered on 25<sup>th</sup> February 2016 and the appeal preferred on 17<sup>th</sup> March 2016 together with the application. They further averred that they are willing to abide and offer security that the court may order.

3. The respondents on their part submitted that the appellant has not explained how the loss of the decretal sum of kshs.720,000/= would occasion them substantial loss. They argued that the appellants have not shown that the respondents are not persons of means who would not be in a position to repay the decretal sum in the event the appeal succeeds. They asserted that the decretal amount is not a colossal one or one that appellants cannot pay, since they have failed to show the loss that they would suffer. They further contended that the appellants have not offered security in their supporting affidavit and though they have offered it in their submissions, the same ought to be clearly captured in the supporting affidavit.

4. The application, the subject of this ruling has been brought under Order 42 Rule 6 of the Civil Procedure Rules. The principles highlighted under that rule includes the fact that an applicant must be at a risk of suffering substantial loss if the orders for stay of execution fail to issue. The application must also have been brought without undue delay and the provision of security should also be considered.

5. On the first limb, the appellants claims that the decretal sum of kssh.720,000/= plus costs and interests is a substantial sum. They claim that they will suffer substantial loss but they have failed to show what the loss amounts to. It is not enough to merely state that one will suffer substantial loss. That loss should be demonstrated and explained for the court to consider before issuing the order of execution. The appellant has attempted to explain the substantial loss by summarising the cause of action in this suit as it was before the trial court. They have tried to show that the court erred in its holding. In my humble view that does not explain the substantial loss they would suffer as a result. The issues raised therein are the subject of this appeal and can only be determined at the hearing of the appeal. In a nutshell, the appellants have not established that they will suffer substantial loss if order for stay is denied.

6. On the second limb, it is apparent that the application for stay of execution was filed within a reasonable time.

7. On the third limb, the applicant is required to offer security, for the due performance of the decree. The appellant did not offer security in their supporting affidavit but instead they did so in their submissions. The cardinal point is that, whether or not the appellants make an offer for security, the court is enjoined by law to consider the issue before determining the application. The main consideration in this motion is whether or not the applicants have shown the substantial loss they would suffer if the order for stay is denied. In this case the applicants failed to satisfy that requirement. Since the other principles are dependent on the first principle the motion, fails.

8. In the end, the motion is ordered dismissed with costs to the respondent.

Dated, Signed and Delivered in open court this 29<sup>th</sup> day of September, 2016.

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellants

..... for the Respondent