

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL 44 OF 2015

NAOMI MURIUKI.....APPELLANT

VERSUS

BONIFACE NJUKI RUNJI.....RESPONDENT

(Being an appeal from the judgement in CC No 36/14 at Siakago Principal Magistrate's Court by Hon A.N. Makau – SRM on 4th February, 2016)

RULING

1. This is an application for stay of execution brought under Order 42 Rule 6 of the 2010 the Civil Procedure Rules and under section 3A of the Civil Procedure Act (Cap 21) Laws of Kenya. The application is brought by way of notice of motion under certificate of urgency and was certified as such. It is supported by four grounds on the face of the notice of motion and a supporting affidavit of the applicant.

2. The major grounds in support of the application is that the applicant will suffer irreparable loss and damage if the judgement that was delivered on 22nd October 2015 is executed before the appeal is heard and determined. The 2nd major ground is that the appeal shall be rendered nugatory if the said judgement is not stayed.

3. In addition to the grounds on the notice of motion, the applicant has deponed to a 12 paragraph affidavit in support of her application. She has deponed that judgement was delivered on 22nd October 2015 and the parties were advised to lodge an appeal to the High Court within 30 days. She has further deponed that she was aggrieved by the judgement and for that reason she unsuccessfully applied for a stay of execution in the court of the Senior Resident Magistrate at Siakago, which was dismissed on 4th February 2016. Following the advice of her advocate, the applicant believed that the appeal has high chances of success and that this court has powers to stay the said judgement.

4. She has also deponed that unless stay is granted, she stands to suffer irreparable loss and damage, because she will be compelled to recognize the plaintiff/respondent as a beneficiary of 2 acres out of her parcel of land No. Mbeere/Kirima/1871. She has further deponed that the plaintiff/respondent has filed a bill of costs against the applicant. Finally, she has deponed that unless stay of execution is granted, the appeal will be rendered nugatory and that the interest of justice demand that stay be granted.

5. The application is opposed by the plaintiff/respondent. The respondent in his affidavit dated 26th September 2016 has deponed to a 16 paragraph affidavit. He has deponed that the application lacks merit and is an abuse of the court process. He has also deponed that the judgement sought to be stayed was delivered on 22nd October 2015 almost one year ago. Furthermore, he has also deponed that there is nothing urgent in the application and that the applicant has not shown what kind of loss or damage she is likely to suffer if the stay of execution is not granted. He has also deponed that he bought two acres of land from the applicant's late husband, to which he annexed a copy of the sale agreement. Finally, he has deponed that the application has been brought too late in the day and that the allegations of alleged loss or damage are not supported by evidence.

6. Applications for stay of execution are governed by Order 42 Rule 6 of the 2010 Civil Procedure Rules. An applicant is required to show that he is likely to suffer substantial loss if stay is not granted.

Additionally, the applicant has to show that the application has been filed without unreasonable delay. Thirdly, the applicant must show that he has an arguable case and that unless stay of execution is granted the appeal will be rendered nugatory.

7. I have considered the affidavit evidence of both parties and the applicable law. I have also considered the submissions of both counsel. I find that the judgement sought to be appealed against was delivered on 22nd October 2015. I also find that the applicant sought stay of execution in the court of the Senior Resident Magistrate, which application was dismissed on 11th February 2016. I find from the evidence that there has been a delay of 6 months before the application was filed in this court. This delay has not been explained by the applicant. In the absence of the explanation for the delay, I find that the applicant has not made out a case for the grant for an order of stay of execution in terms of Order 42 Rule 6 of the 2010 Civil Procedure Rules. In the circumstances, I hereby dismiss the applicant's application because the delay is unreasonable.

8. The plaintiff/respondent is entitled to the costs of this application and I therefore make an award in her favour.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **25th** day of **OCTOBER 2016**

In the presence of Mr Ithiga holding brief for Ms Muthoni for the applicant and Ms P. Njiru holding brief for Mr Okwaro for the respondent

Court clerk Njue

J.M. BWONWONGA

JUDGE

25.10.16