



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC NO. 387 OF 2013

HALIMA SAADIA ABDI.....PLAINTIFF/APPLICANT
VERSUS
KHADIJA DABAARDEFENDANT/RESPONDENT

RULING

Coming up before me for determination is two applications as follows:

1. The Defendant's Notice of Motion dated 16th December 2013; and,
2. The Plaintiff's Notice of Motion dated 29th April 2014.

In the Notice of Motion dated 16th December 2013, the Defendant seeks for the following orders:

1. Spent.
2. That there be a stay of execution of the orders of this court given on 22nd November 2013 pending the hearing and determination of this Application.
3. That there be a stay of execution of the orders of this court given on 22nd November 2013 pending the hearing and determination of an appeal by the Defendant.
4. That costs of this Application be provided for.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the Defendant, Khadija Dabaar, sworn on 16th December 2013 in which she averred that by the ruling of this court delivered on 22nd November 2013, a temporary injunction was issued against her restraining her from trespassing, interfering, constructing, occupying and /or alienating the Plaintiff's Plot No. 1252 County High School, Garissa pending the hearing and determination of the entire suit herein. She further averred that the plot on which she erected a perimeter wall and a permanent house is Plot No. 20843 situated at Bulla Stadium area within Garissa. She further averred that the Plaintiff however

contends that her plot is the same one on which she has constructed and resides in even though the numbers for the two plots are different noting that the location of the Plaintiff's plot is at County High School and not Bulla Stadium area. She further intimated that she is aggrieved by the court's ruling of 22nd November 2013 and has already filed and served a notice of appeal. She closed by pointing out that she spent nearly Kshs. 3.5 million to put up her house and perimeter wall on the suit premises and she stands to suffer not only substantial loss but also irreparable loss if she is forced to vacate the premises and that unless the stay pending appeal is granted, she may be evicted by force and her appeal rendered nugatory.

The Application is contested. The Plaintiff filed her Replying Affidavit sworn on 13th February 2014 in which she averred that the location of the plot the Defendant is claiming is actually Plot No. 1252 County High School which belongs to her. She further averred that the Defendant is not living in the said plot but has just constructed a semi-permanent house and a perimeter wall.

In the Notice of Motion dated 29th April 2014, the Plaintiff sought for the following orders:

1. Spent.
2. That the Defendant/Respondent be committed and detained in prison for a term not exceeding six months for willfully disobeying and or breaching this court's order of 22nd November 2013 and issued on 26th November 2013 and/or in the alternative;
3. That the Defendant/Respondent be ordered to pay a fine not exceeding Kshs. 1 million for disobeying the court order of 22nd November 2013 and issued on 26th November 2013;
4. That the Defendant/Respondent herein be ordered to demolish the structure build on Plot No. 1252 County High School Garissa and restores the suit property to its original form.
5. That the costs of this Application be awarded to the Plaintiff/Applicant.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the Plaintiff/Applicant, Halima Saadia Abdi, sworn on 16th April 2014 in which she averred that though this court issued restraining orders against the Defendant on 22nd November 2013, and though those orders were served upon the Defendant, the Defendant has disobeyed them warranting her committal to prison.

In the case of **Halai & Another v. Thornton & Turpin (1963) Ltd (1990) KLR 365**, the Court of Appeal held that the High Court's discretion to order a stay of execution of its order or decree is fettered by three conditions. Firstly the applicant must establish a sufficient cause, secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay and thirdly the applicant must furnish security. The application must of course be made without unreasonable delay. Further, in the case of **Butt v. Rent Restriction Tribunal (1982) KLR 417**, the Court of Appeal held that the power of the court to grant or refuse an application for stay of execution is a discretionary power. The court further held that the general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal reverse the judge's discretion.

The Defendant has, as far as I can see, established that she is resident on the suit premises together with her family. This assertion on her part has not been rebutted by the Plaintiff at all. I am therefore convinced that the Defendant is resident on the suit premises together with her family. There is the question whether or not she was resident on the suit premises at the time the Plaintiff filed this suit. I have not seen anything to convince me otherwise. I did grant the Plaintiff an injunction restraining the Defendant from trespassing on the suit premises. The Defendant has appealed against that decision. In the circumstances, I find no difficulty in finding that the Defendant has established sufficient cause and that if no stay is granted, she will indeed suffer substantial loss by being evicted from the suit premises together

with her family pending the hearing and determination of her appeal. Further, having regard to the disclosures made so far, I do not consider the Defendant to be impecunious. Accordingly, I consider that she would be capable of paying the Plaintiff's costs should her appeal fail. To that extent therefore, I will not order the Defendant to furnish any security of costs at this juncture. This Application has also been brought without any unreasonable delay. In the circumstances, I hereby allow the Defendant's Application dated 16th December 2013. Costs shall be in the cause.

Having granted the Defendant a stay of execution of this court's orders delivered on 22nd November 2013, it follows that the Defendant cannot now be held to be in contempt of court as sought by the Plaintiff in her Application dated 29th April 2014. That settles the matter and that Application is hereby dismissed. Costs shall be in the cause.

DELIVERED AND SIGNED AT NAIROBI THIS 23RD DAY OF JANUARY 2015.

MARY M. GITUMBI

JUDGE