



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYAHURURU

ELCA NO. E006 OF 2021

PETER KARIUKI KAMAU.....1ST APPELLANT

VERONICAH NJAMBI NJOGU.....2ND APPELLANT

VERSUS

KELVIN GACHOGU WANJIKU.....RESPONDENT

RULING

1. The material on record shows that by a judgment dated 10th March, 2021 delivered by Hon. Ocharo Momanyi (PM) in Nyahururu **CMCC No. 103 of 2018**, the trial court entered judgment in favour of the Respondent in the counter-claim by, *inter alia*, directing the Appellants to grant vacant possession of Title No Nyandarua/Oljoro-orok Salient/11944 and to pay the Respondent mesne profits of kshs 3,500/= per month with effect from August, 2014 until vacant possession is granted. The Appellants' suit was dismissed save that the Respondent was directed to pay the Appellants the balance of the purchase price for Nyandarua/Salient Oljoro-orok/4211.

2. Aggrieved by the said judgment and decree, the Appellants filed the instant appeal seeking to have the same overturned. In the meantime, they applied for stay of execution pending appeal before the Magistrate's court. It would appear from the material on record that vide a ruling dated 7th July, 2021 the Appellants were granted a conditional stay subject to making a deposit of kshs 2 million in a joint interest earning account in the names of the parties' advocates within 21 days in default of which the stay was to lapse.

3. It is also apparent from the record that the Appellants defaulted in meeting the condition as to the deposit within the stipulated time or at all. Consequently, vide a notice of motion dated 22nd July, 2021, grounded upon **Order 42 Rule 6, Order 51 of the Civil Procedure Rules, 2010 (the Rules), and all enabling provisions of the law**, the Appellants sought variation or setting aside of the condition for stay made on 7th July, 2021.

4. The said application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the 1st Appellant on 22nd July, 2021. It was contended that the Appellants were unable to raise the deposit of kshs 2 million ordered by the trial court hence they faced imminent eviction. It was further contended that they had been in possession of the suit property for a long time and had developed it extensively.

5. The Respondent filed a replying affidavit sworn on 30th August, 2021 in opposition to the application. It was contended that the application was frivolous, vexatious and otherwise an abuse of the court process. It was contended that upon application the Appellants had been granted a conditional stay by the trial court but they had failed to abide by the set conditions in consequence whereof the stay had lapsed.

6. The Respondent supported the conditional stay granted by the trial court on the basis that the Appellants had occupied his house on the suit property since 2013 without payment of rent and that the mesne profits awarded shall continue to accumulate and attract interest until the date of payment. The Respondent objected to the Appellants' offer of **Parcel 4211** as security for due performance of the decree on the basis that it was also the subject of litigation between the parties.

7. The court has considered the Appellants' notice of motion dated 22nd July, 2021, the Respondent's replying affidavit in opposition thereto, the parties' submissions as well as the material on record. The court is of the opinion that the main question for determination is whether or not the Appellants have made out a case for variation of the terms of the conditional stay granted by the trial court. The main reason why the Appellants are seeking for variation of terms is that they are unable to raise the amount of kshs 2 million as required by the trial court.

8. The court is aware that an application for stay of execution pending appeal requires delicate balancing of two competing interests. On the one hand, there is the right of the successful litigant to enjoy the fruits of his judgment. On the other hand, there is the undoubted right of

the aggrieved litigant to exercise his right of appeal. If execution is allowed to proceed, there might be a risk of the appeal being rendered nugatory should it ultimately succeed whereas if a stay is granted without condition, the Respondent might be left with a barren victory should the appeal ultimately fail.

9. The court is of the opinion that a conditional stay may serve the interests of both the Appellants and the Respondent in the matter. Where a decree involves payment of money, it is usual for the court to impose a condition for deposit of either the entire decretal sum or a portion thereof either in court or an escrow account in the names of the parties' advocates. The court, however, finds that the sum of kshs 2 million is plainly excessive to secure payment of mesne profits of less than kshs 500,000/= since the applicable rate is kshs 3,500/= per month with effect from August, 2014.

10. The court is alive to the fact that the said amount shall continue accumulating on a monthly basis until payment in full or until litigation among the parties is concluded. The instant appeal and subsequent appeals, if any, may take several years to conclude. Accordingly, the court is of the opinion that a security deposit of kshs 500,000/= shall adequately secure the interests of the Respondent whilst the Appellants pursue their appeal. The court is, therefore, inclined to vary the amount from kshs 2 million to kshs 500,000/= as a condition for stay of execution pending appeal.

11. The upshot of the foregoing is that the court finds merit in the Appellants' notice of motion dated 22nd July, 2021 and the same is hereby allowed in the following terms:

- (a) The conditional stay granted by the trial court on 7th July, 2021 is hereby varied by substituting the sum of the security deposit of kshs 2,000,000/= with a sum of kshs 500,000/=**
- (b) The period of 21 days within which to make the deposit is hereby varied to 30 days.**
- (c) The Appellants shall file and serve the record of appeal within 60 days from the date hereof.**
- (d) In the event of the Appellants defaulting on either making the deposit or filing a record of appeal within the stipulated time, the stay shall lapse automatically.**
- (e) Costs of the application shall be costs in the appeal.**

RULING DATED AND SIGNED IN CHAMBERS AT NYAHURURU THIS 17TH DAY OF FEBRUARY, 2022 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

Ms. Muigai holding brief for Ms. Ndegwa for the Appellant

Mr. Kaburu for the Respondent

CA- Carol

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Y. M. ANGIMA

JUDGE