



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT & LAND CASE NO.72 OF 2013

RACHEL MORAA MOCHAMA..... PLAINTIFF

VERSUS

PAUL TIRIMBA MACHOGU..... DEFENDANT

RULING

1. The Plaintiff brought this suit against the defendant on 20th February, 2013 seeking a declaration that the Plaintiff is the owner of Plot No. B/13 Gekomu within Kisii Municipality (hereinafter referred to as “**the suit property**”), a mandatory injunction directed at the defendant to vacate, open, and give free and full access of the suit property to the Plaintiff, a permanent injunction to restrain the defendant from entering into, locking up and/or in any manner or way interfering with the suit property and general damages. The Plaintiff claimed that she is the owner of the suit property and that the defendant had without any lawful cause or excuse entered the same, forcefully evicted the Plaintiff’s tenant’s therefrom and took possession thereof thereby causing the Plaintiff loss and damage. Together with the plaint, the Plaintiff filed an application by way of Notice of Motion dated 20th February, 2013 seeking a temporary mandatory injunction to compel the defendant to vacate, open up, and/or give free and full access of the suit property to the Plaintiff and a temporary injunction to restrain the defendant from entering into, locking up and/or in any manner interfering with the suit property. The Plaintiff’s application was opposed by the defendant.

2. By a ruling delivered on 29th November, 2013, the court allowed the Plaintiff’s application and granted both mandatory and prohibitory injunction against the defendant. The effect of that ruling was that the defendant was to vacate and hand over to the Plaintiff the suit property which according to the court’s finding he had forcefully taken and to stop any form of interference with the same pending the hearing and determination of this suit. The defendant was dissatisfied with the said decision and proceeded to file a notice of his intention to appeal against the same to the court of appeal. The defendant thereafter filed an application by way of Notice of Motion dated 16th December, 2013 seeking a stay of execution of the said order given by the court on 29th November, 2013 pending the hearing and determination of the intended appeal to the court of appeal. That is the application which is the subject of this ruling. The defendant’s application was brought on the grounds set out in the body thereof and in the affidavit of the defendant sworn on 16th December, 2013. In summary, the application was brought on the following grounds:-

(i) That unless the order given on 29th November, 2013 is stayed, the defendant’s intended appeal would be rendered nugatory thereby causing the defendant substantial loss and prejudice,

(ii) That unless the stay sought is granted, the Plaintiff may enter the suit property and destroy substantial improvements that the defendant has made thereon,

(iii) That the defendant has spent in excess of Kshs. 15 Million in developing the suit property since taking over possession and as such it would be in the interest of justice that the suit property be preserved,

(iv) That the defendant has an arguable and meritorious appeal with good prospects of success and finally,

(v) That the balance of convenience weighs in favour of the defendant owing to the substantial amount of money that he has committed into the suit property.

3. The application was opposed by the Plaintiff. Through a replying affidavit sworn on 18th December, 2013, the Plaintiff opposed the defendant's application on several grounds. First, the Plaintiff contended that she has suffered substantial loss and damage as a result of unlawful eviction from the suit property by the defendant and as such the orders sought if granted would extend her suffering. The Plaintiff contended further that the defendant has approached the seat of justice with unclean hands and as such is not deserving of the relief sought. The Plaintiff further denied that the defendant has developed the suit property to the tune of Kshs. 15 million as alleged and contended that the defendant's intended appeal has no chances of success.

4. The application came up for hearing before me on 19th December, 2013, when the defendant's and the Plaintiff's advocates made oral submissions. I have considered the defendant's application, the Plaintiff's affidavit in reply in opposition thereto and the respective submissions by the defendant's and the Plaintiff's advocates. The law on stay of execution is now well settled. An applicant for an order of stay must satisfy the court that; substantial loss would result unless the stay is granted, that the application has been brought without undue delay and that he has given such security as the court may order for the due performance of such decree or order that is sought to be stayed. The defendant is in possession of the suit property which he claims to have acquired lawfully. The effect of the order sought to be stayed as I have stated above is that the defendant is obliged to hand over possession of the suit property to the Plaintiff. The defendant has claimed that he has spent in excess of Kshs. 15 Million in developing the suit property since the time he took possession thereof. The defendant has also claimed that he has secured a loan in the sum of Kshs. 5 million from Kenya Commercial Bank Limited towards the development of the suit property. It is the defendant's contention that if the stay sought is not granted, the Plaintiff would take possession of the suit property and destroy the developments the defendant has done on the property. The defendant has contended further that if the Plaintiff takes possession of the suit property, the defendant would not be able to utilize the loan that he has secured towards the development of the suit property. The defendant has argued that the destruction of his developments on the suit property and the non-utilization of the loan that has been availed to him by Kenya Commercial Bank Limited would occasion him substantial loss. On the issue of security, the defendant's advocate during his submissions in support of the application did inform the court that the defendant is willing to deposit a security in the sum of Kshs. 300,000.00 for any loss that the Plaintiff may suffer if the stay is granted. In her opposition to the application, the Plaintiff argued that the orders sought should not be granted because the court has already ruled that the defendant took possession of the suit property unlawfully. It should be noted that the application before the court is for a stay of execution pending appeal and the decision of this court to the effect that the defendant had entered the suit property in unlawful manner may be overturned on appeal. This court cannot therefore deny the defendant an order of stay on the basis of the findings that it had made in the decision that is being appealed. The Plaintiff had also contended that the defendant has approached the court with unclean hands and as such he does not deserve the orders sought. Again, this court's finding that the defendant had forcibly evicted the Plaintiff's tenants from the suit property may be overturned on appeal and the defendant's hands may turn out not to be unclean after all. The other argument that the Plaintiff had put forward against the granting of the stay sought was based on her own loss. In the ruling which is sought to be appealed, the court had made a finding that that the Plaintiff had purchased the suit property at Kshs. 3.2 million and that she had rented the same out to a tenant who was paying her rent and as such she would suffer irreparable harm if the orders of injunction that she had sought which included an order compelling the defendant to hand over to her possession of the suit

property was not granted. The Plaintiff's loss although acknowledged by the court in the earlier ruling cannot fetter this court's discretion to grant the stay sought. In my view, the loss likely to be suffered by the Plaintiff is only a factor to be considered by the court when considering the sufficiency or otherwise of the security that has been furnished by the defendant. The Plaintiff had also argued that the defendant has not placed any evidence in support of the developments that he claims to have carried on the suit property and as such his claim that he stands to suffer substantial loss has no basis. I agree with the Plaintiff's argument that there is no evidence of developments that the defendant claims to have carried out on the suit property. The defendant has also not placed any evidence of the alleged loan that he has secured from Kenya Commercial Bank to develop the suit property. I am satisfied however on the material on record that the defendant spent substantial amount of money in purchasing the suit property and has also spent some money towards the development of the same. In this regard, I refer to the sum of Kshs. 8 million paid by the defendant as the purchase price for the suit property, the building plans approval fees, sewer connection fees and the fee paid for the environment impact assessment project report. If the Plaintiff is allowed to re-enter the suit property pursuant to the order given by the court on 29th November, 2013, the status quo would be disturbed and the defendant if he is successful in his intended appeal will have to undertake these processes again thereby subjecting him to substantial loss.

5. Due to the foregoing, I am satisfied that the defendant has met the conditions for granting the orders sought. I am satisfied that the defendant's application has been brought timeously. The order sought to be stayed was made on 29th November, 2013 while this application was filed on 16th December, 2013. The application was therefore brought without unreasonable delay. As stated above, I am equally satisfied that the defendant would suffer substantial loss if the stay sought is not granted. I am however not satisfied with the security that the defendant has offered. The court had ruled that the Plaintiff is entitled to have possession of the suit property pending the hearing and determination of this suit. If that decision is stayed, the Plaintiff would be kept out of the suit property until the appeal is heard and determined. The Plaintiff had contended that she was receiving a rental income of Kshs. 100,000.00 per month from the suit property. In the event that the stay is granted and the defendant loses the intended appeal, the Plaintiff would have lost rental income which she would have otherwise earned if the stay was not granted. The Plaintiff's loss would be Kshs. 100,000.00 per month from the date the defendant took possession of the suit property up to the date when the intended appeal is heard and determined. In the circumstances, the amount of security to be furnished by the defendant should be a reasonable estimate of the actual loss that the Plaintiff is likely to incur for the duration that the appeal is likely to last should the defendant's appeal fails.

6. The upshot of the foregoing is that the defendant's application dated 16th December, 2013 is allowed but conditionally. The order of this court given on 29th November, 2013 is hereby stayed for a period of ten (10) months from the date hereof or until the hearing and determination of the intended appeal to the court of appeal whichever comes earlier. The stay is granted on condition that the defendant shall deposit as a security a sum of Kenya Shillings One Million (Kshs. 1,000,000.00) within 60 days from the date hereof in an interest earning bank account with a reputable bank at Kisii in the joint names of the advocates for the defendant and the advocates for the Plaintiff pending the hearing and determination of the intended appeal. The costs of this application shall be in the cause.

Delivered, dated and signed at KISII this 17th day of January 2014.

S. OKONG'O,

JUDGE.

In the presence of:-

Mr. Soire for Plaintiff

Mr. Bwomote for Defendant

Mr. Ombasa Court Clerk.

S. OKONG'O,

JUDGE.