



**REPUBLIC OF KENYA**

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

**CIVIL DIVISION**

**CIVIL SUIT NO. 1161 OF 2001**

**ELIZABETH WARUGURU KANG'ETHE.....SUBSTITUTED PLAINTIFF**

**VERSUS**

**1. ELIZABETH WANJIKU KHAINGA**

**2. GITATHURU KARIOBANGI CO. LTD.....DEFENDANTS**

**R U L I N G**

1. The **notice of motion dated 16th January 2014** by the 1<sup>st</sup> Defendant seeks, in the main prayer, a stay of execution of decree pending appeal. The intended appeal is against the decree of the court passed on 18<sup>th</sup> December 2013. That decree gave the Plaintiff judgment in the following terms –

“(a) It is hereby declared that the grant issued in favour of the 1<sup>st</sup> Defendant in respect of L.R. No. 209/8553/141 (IR No. 86070) was obtained fraudulently, and the same is null and void.

(b) The 1<sup>st</sup> Defendant's registration as proprietor of L.R. No. 209/8553/141 (IR No. 86070) is hereby cancelled, and the Substituted Plaintiff shall be registered as proprietor of the same.

(c) The 1<sup>st</sup> Defendant shall give to the Substituted Plaintiff possession of the L.R. No. 209/8553/141 free from any encumbrances (apart from such as may be permitted by law) within fourteen (14) days of delivery of this judgment. In default the 1<sup>st</sup> Defendant shall be forcibly evicted and the Substituted Plaintiff put in possession.

(d) The 1<sup>st</sup> Defendant shall pay to the Substituted Plaintiff *mesne profits* of KShs 35,000/00 per month from the date of filing suit until possession of L.R. No. 209/8553/141 is vested in her.

(e) The Plaintiff shall have costs of the suit.”

2. The application is expressed to be brought under **sections 3A and 63 (c) & (e)** of the **Civil Procedure Act, Cap 21** and **Order 42, rule 6** of the **Civil Procedure Rules** (the **Rules**). It is supported by the affidavit of the 1<sup>st</sup> Defendant.

3. Grounds for the application include –

(i) That part of the suit property is her residential house, which she occupies with her children, and if execution proceeds they would be rendered homeless.

(ii) That the suit property has been their only source of income.

(iii) That it has emerged that the 2<sup>nd</sup> Defendant was not accorded opportunity to participate in the case yet it had evidence that would have assisted the court.

4. The application is opposed by **grounds of opposition filed on 21<sup>st</sup> January 2014**. Those grounds include -

- (i) That the application is incompetent and bad in law.
- (ii) That it has no merit in that the strict requirements of Order 42, rule 6 (2) have not been met.
- (iii) That if the order sought is granted, it will greatly prejudice the Plaintiff as she would be denied the fruits of her judgment.

5. In a **supplementary affidavit sworn on 10<sup>th</sup> February 2014** the 1<sup>st</sup> Defendant deponed that she could raise the decretal amount if given time.

6. I have considered the submissions of the learned counsels appearing, including the cases cited. For purposes of the present application there is an appeal already filed, in that notice of appeal was duly lodged on 24<sup>th</sup> December 2013 under the **Court of Appeal Rules**.

7. Apart from **sufficient cause** under rule 6 (1) of Order 42, the 1<sup>st</sup> Defendant must satisfy the conditions set out in **sub-rule (2)** of the same rule which provides -

**(2) No order for stay of execution shall be made under subrule (1) unless –**

**(a) the court is satisfied that substantial loss may result to the applicant unless the order is made, and that the application has been made without unreasonable delay; and**

**(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”**

8. I will start with the issue of delay in applying. None has been pleaded, and none is apparent. I am satisfied that the application was filed without unreasonable delay. The two issues to occupy the court are substantial loss and security.

#### **Substantial Loss**

9. The 1<sup>st</sup> Defendant has deponed at paragraphs 3, 4, 5 and 6 of her supporting affidavit that the suit property, which comprises residential premises, is occupied by herself together with her children and grandchildren; that if the decree is executed they will all have no home; that she is a widow who lost her husband in 1998 and she single-handedly funds for the children and the children of her deceased son and daughter; that the suit property has been her and her dependants' only source of income; that if the decree is executed she will not be able to educate the grandchildren; and that she is old (76 years) and hypertensive, and that execution of the decree will aggravate her condition.

10. The Plaintiff's answer to these issues is as follows (paragraphs 4, 5 and 13) of the replying affidavit –

- (i) That it is not true that the 1<sup>st</sup> Defendant resides in the suit property as she resides at Githurai with one of her sons.
- (ii) That the suit property comprises 8 residential units, 7 of which the 1<sup>st</sup> Defendant has rented out while her son occupies the 8<sup>th</sup>.
- (iii) That the Plaintiff is equally an old lady.

11. Indeed it was common ground at trial that all the residential unites comprising the development in the suit property except one were always rented out since the days of the original owner, the 1<sup>st</sup> Defendant's late husband, who occupied the 8<sup>th</sup> unit with one of his wives (not the 1<sup>st</sup> Defendant) and their children as well as the 1<sup>st</sup> Defendant's children. (The 1<sup>st</sup> Defendant was then living at her husband's rural home at Kakamega.) All these children are now grown-up and who are presumably taking care of themselves. The 8<sup>th</sup> unit is apparently the one occupied by the 1<sup>st</sup> Defendant's son.

12. The plea that the 1<sup>st</sup> Defendant and her dependants would be rendered homeless if she were to be evicted thus rings hollow, especially bearing in mind the fact (established at trial) that the 1<sup>st</sup> Defendant forcibly took the property from the Substituted Plaintiff's late husband (the purchaser for valuable consideration from the 1<sup>st</sup> Defendant's late husband). The same answer obtains in respect to the plea of loss of income should the decree be executed. This was income which the 1<sup>st</sup> Defendant forcibly took away from the Substituted Plaintiff's late husband, and which would have accrued to her upon the death of her husband soon after he filed this suit.

13. In the judgment herein the court found that the Defendants committed a fraud upon the Substituted Plaintiff's late husband by registering the property in the 1<sup>st</sup> Defendant's name while knowing fully well that her husband had sold the same to the Substituted Plaintiff's husband over 20 years before.

14. I am of course alive to the possibility that my findings of fact and law could be overturned by the **Court of Appeal**, but in the particular circumstances of this case set out in the judgment, I am not satisfied that the 1<sup>st</sup> Defendant has demonstrated that she stands to suffer substantial loss. What will be taken away from her in execution of the decree is simply what she should not have taken away from the Substituted Plaintiff's husband in the first place!

### **Security**

15. The judgement not only decreed the suit property to the Substituted Plaintiff; it also awarded her substantial *mesne profits* at the rate of KShs 35,000/00 per month from the date of filing suit. By the 1<sup>st</sup> Defendant's own calculation that is over KShs 5 million already.

16. The 1<sup>st</sup> Defendant has not offered any security at all in respect to the property itself. As for the monetary award, she stated categorically at paragraph 7 of the supporting affidavit that she cannot raise it at all as she is a widow. Her turn-around in the supplementary affidavit and submissions to the effect that given sufficient time she would raise the decretal sum cannot be serious. She did not even indicate what that sufficient time might be – two months?, 12 months?, five years?

17. Upon the issue of security also I would refuse the application.

18. By way of demonstration of sufficient cause the 1<sup>st</sup> Defendant has alleged that the 2<sup>nd</sup> Defendant was deliberately kept out of the proceedings herein, and that the court did not benefit from important evidence that it would have produced. It is to be noted that hearing of the case took a long period of time before two judges in turn. What prevented the 1<sup>st</sup> Defendant from alerting the 2<sup>nd</sup> Defendant about the case if indeed the 2<sup>nd</sup> Defendant was never served with process? More importantly, what prevented the 1<sup>st</sup> Defendant from calling (or having summoned) officials of the 2<sup>nd</sup> Defendant as her witnesses at the trial? And why is it that the 2<sup>nd</sup> Defendant has not yet, even now, made any application at all? I do not consider that this allegation establishes sufficient cause at all to enable the court to grant the order sought.

19. For the above reasons the 1<sup>st</sup> Defendant's application for stay of execution is refused. It is dismissed with costs. The interim stay of execution now in place is hereby vacated. It is so ordered.

**DATED AT NAIROBI THIS 18<sup>TH</sup> DAY OF MARCH 2014**

**H P G WAWERU**

**JUDGE**

**DELIVERED THIS 21<sup>ST</sup> DAY OF MARCH 2014**