



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL CASE NO. 154 OF 2010

DANIEL LANGAT.....1ST PLAINTIFF

GEOFFREY LANGAT.....2ND PLAINTIFF

VERSUS

FRANCIS MAINA MWANGI.....1ST DEFENDANT

TERESIAH MUTHONI MAINA.....2ND DEFENDANT

RULING

1. This Ruling relates to a Notice of Motion dated 14th January 2014 and filed on 15th January 2014, wherein the Second Defendant (*Applicant herein*) sought, *inter alia*, a stay of execution of the the judgment of this court delivered on 7th November 2013 pending the hearing and determination of the Applicant's Appeal.

2. The Motion was based upon the grounds on the face thereof and the Supporting Affidavit of Teresia Muthoni Maina sworn on 14th January 2014 and was opposed by the Replying Affidavit of Geoffrey Langat, the Second Respondent, sworn on 17th February 2014. By the consent of the parties, the application was canvassed by way of written submissions; the Applicant's were filed on 4th March 2014 while the Respondents' were filed on 26th March 2014.

3. The Applicant submitted that her intended appeal stood a high chance of success, and unless the order of stay is granted, the appeal would be rendered worthless. She contended that the net effect of the judgment made on 7th November 2013 was to take away the Applicant's proprietary interest in the property known as L.R. NO. MOLO SOUTH/LANGWENDA BLOCK 8/5 (*the suit land*) which was registered in the name of her husband, the first Defendant. She was apprehensive that the survey, demarcation and subsequent transfer of the suit property to the Plaintiffs would not only deny her any claim over the suit premises but would also vest in the Plaintiffs an indefeasible title. As registered owners the Plaintiffs would be free to deal with the property as they wished including transferring it to third parties without any consideration of her interest. This, she alleged would not only occasion her substantial loss but would also render her appeal, if successful, nugatory as the property may already have been wasted.

4. On the issue of security, the Applicant submitted that she was not in a financial position to deposit a sum of money equivalent to the suit premises. However she was ready to deposit the title to the suit premises in court and abide by any other conditions that the court may impose. Finally the Applicant submitted that she had filed the present application and Notice of Appeal without unreasonable delay and

urged the court to allow the application.

5. In the submissions filed on behalf of the Plaintiffs (Respondents) on 26th March 2014, the Plaintiffs reiterated the averments in the Replying Affidavit sworn in opposition to the application. They contended that the application herein had been brought in bad faith with the intention of denying them the fruits of the judgment delivered in their favour, that the Applicant had failed to demonstrate that she will suffer any substantial damage if the order of stay is not granted as the Plaintiffs have been in occupation of the suit land since 1995 to date where they have built permanent homes and settled with their families. The Plaintiffs argued that the success of the intended appeal is not a basis for grant of the orders sought and urged the court to dismiss the application with costs.

6. I have considered the respective arguments of the parties. The law relating to stay of execution is set out in Order 42 rule 6(1) and (2) of the Civil Procedure Rules. For a stay of execution to be granted, an applicant must satisfy the conditions of rule 6 (2) aforesaid, that -

(a) the application for stay must be made without unreasonable delay from the date of the decree or order to be stayed;

(b) the applicant must show that he will suffer substantial loss if the orders of stay is not granted, and

(c) the applicant offers such security as the court may order to bind him to satisfy any ultimate orders the court may make binding upon him.

7. In this case, the orders to be stayed were made on 7th November 2013. The Applicant lodged a Notice of Appeal in this court on 21st November 2013 and filed the application for stay of the judgment of the court on 15th January 2014 about two months after the date of the judgment. It is my view that this period of time was not unreasonable and the Applicant satisfied the requirement of Order 42 rule 6(2)(a).

8. Under Order 42 Rule (6)(2) the court is not required to inquire into the merits of the intended appeal as that is a question that can only be determined by the Court of Appeal. Of primary consideration by the court is whether if the order of stay is not granted the Applicant will suffer substantial loss and as a result defeat the purpose of the appeal. The Court of Appeal in **MUKUMU V ABUOGA [1988] KLR 645** addressed itself to what amounts to substantial loss as follows:

“...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

9. In the judgment the subject of this application, this court found that the first Defendant's title to the parcel of land known MOLO SOUTH/LANGWENDA/BLOCK 8/5 comprising of four acres had been extinguished by the Plaintiffs' adverse possession and that the Defendants held the title in relation to the four acres in trust for the Plaintiffs. The court therefore directed the Plaintiffs to commission the District Surveyor Nakuru to survey and demarcate two respective parcels of land for each of the Plaintiff within 90 days of the judgment and that the Deputy Registrar of the court shall sign the transfer to the Plaintiffs in respect of their respective two acre parcels of land.

10. I agree with the Applicant that by the above orders, the ownership of the suit premises will be vested upon the Plaintiffs. There is a danger that if the execution of these orders is not stayed, the Plaintiffs by virtue of being the registered owners may deal with the property in a manner that is detrimental to the Applicant's interest and to the pending appeal. It is therefore my finding that it is in the interest of justice that the status quo of the property, that is to say, the current registered ownership itself and the Respondents' occupation of the four acres thereof be maintained subject to the following conditions:-

(a) the execution of the entire judgment delivered by the court on 7th November 2013 and the orders therein are subject to paragraph (b) hereof hereby stayed pending the hearing and determination of the appeal filed against the judgment.

(b) the Applicant shall deposit in this court the document of title to the land known as L.R No. MOLO SOUTH/LANGWENDA/BLOCK 8/5 within 30 days from the date of this ruling failure to which execution of the judgment shall proceed.

(c) Each party shall bear its own costs.

11. It is so ordered.

Dated, signed and delivered at Nakuru this 27th day of June, 2014

M. J. ANYARA EMUKULE

JUDGE