



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 201 OF 2008

JANE MARETE PLAINTIFF

VERSUS

JOSEPH WAITIKI NDEGWA & 2 OTHERS.....DEFENDANTS

RULING

(Application by plaintiff to review orders that were made on her application for stay pending appeal; 2nd defendant having a parallel application for eviction of the plaintiff; plaintiff having a sale agreement with the 1st defendant for sale of a property and taking possession; plaintiff suing for specific performance of a sale agreement between her and the 1st defendant; same property having been sold to the 2nd defendant; 2nd defendant filing a counterclaim for vacant possession; plaintiff failing in her suit for specific performance and ordered to pay mesne profits to the 2nd defendant; plaintiff filing a notice of appeal and an application for stay pending appeal; application compromised by consent where plaintiff was to deposit Kshs. 5 million as a condition for stay; plaintiff failing to deposit this amount but instead preferring another application for stay at the Court of Appeal; that application dismissed; plaintiff now coming back seeking review of the order for deposit of Kshs. 5 million on basis that she cannot raise it; no good reason provided to review the order; application dismissed; application by 2nd defendant for vacant possession allowed)

1. There are two applications before me. One is dated 28 February 2019 filed by the 2nd defendant (Irene Juliet Otinga). The other is dated 7 April 2021 filed by the plaintiff. The application by the 2nd defendant seeks orders for security to the bailiff to remove the plaintiff from the property in dispute. The application by the plaintiff seeks orders to review orders of stay granted in her favour. I directed that the two applications be heard together and this is the consolidated ruling on both applications.

2. To put matters into context, the plaintiff filed this suit on 7 August 2008. It was her case that sometimes in the year 2006, the 1st defendant sold to her the property LR No. 5608 (Original No. 5203/22) Section I, Mainland North for a consideration of Kshs. 4.5 million. She averred that she paid Kshs. 1.5 million and was ready to pay the balance only that the 1st defendant failed to avail the completion documents. In the meantime, sometimes in the year 2007, the 1st defendant sold the suit property to the 2nd defendant and transfer was effected to the 2nd defendant. The plaintiff filed suit seeking orders of specific performance. In the alternative, she sought refund of the sum of Kshs. 1.5 million and an additional sum of Kshs. 7,150,075/= which she claimed she used to renovate the house. The defence of the 1st defendant was that the plaintiff never paid the balance of the purchase price in accordance with the contract and that he was properly entitled to sell the property to the 2nd defendant. The 2nd defendant filed defence and counterclaim. She asserted that the property was sold to her above board and claimed mesne profits for the period that the plaintiff continued being in possession.

3. The matter was heard by Omollo J and she delivered judgment on 25 October 2018. She found that the plaintiff failed to pay the balance of the purchase price within the time specified in the agreement. She did not think that the plaintiff is thus entitled to the order for specific performance. She however ordered the 1st defendant to refund the sum of Kshs. 1.5 million to the plaintiff. The prayer for renovation costs was dismissed. On the counterclaim by the 2nd defendant, the Honourable Judge was of opinion that the same was merited. She inter alia entered judgment in her favour for the sum of Kshs. 500,000/= per year from the date of filing suit till vacant possession and she also ordered the plaintiff to vacate the premises within 45 days of the judgment.

4. Aggrieved by the judgment, the plaintiff filed a notice of appeal. She also sought a stay of the judgment pending appeal through an application dated 8 November 2018. That application was compromised by consent on 7 December 2018. In a nutshell, it was agreed that there may be stay on terms that the plaintiff deposits the sum of Kshs. 5,000,000/= within 30 days in a joint interest earning account. She was also to continue paying into that account, the sum of Kshs. 500,000/= annually which amount was to be paid quarterly for the period that the appeal would remain pending. In default, the defendants were at liberty to execute. It is these orders that the plaintiff now seeks to be reviewed in her application dated 7 April 2021.

5. In her supporting affidavit, the plaintiff states that out of the Kshs. 5,000,000/= that she was ordered to deposit, she only deposited Kshs.

1,800,000/=. She also proceeded to file another application for stay pending appeal before the Court of Appeal which application was dismissed. She avers that the Court of Appeal held the view that she was better off applying for review if she found the security amount of Kshs. 5,000,000/= to be unconscionable. She contends that she has sufficient grounds to warrant a review as the 2nd defendant never tendered documentary evidence to prove that she was the registered owner of the suit property. She also states that she is genuinely unable to raise the amount of Kshs. 5,000,000/= in cash and that this is out of her reach. She adds that she is ready to surrender an original title deed of another property.

6. The 2nd defendant has opposed the plaintiff's application through a replying affidavit. She has inter alia pointed out that the plaintiff failed to comply with the conditions of stay and that her application to the Court of Appeal was dismissed. In her application of 28 February 2019, she wants the plaintiff evicted from the premises.

7. I have considered the above together with the submissions of Ms. Chala, learned counsel for the plaintiff, and Mr. Munyithya, learned counsel for the 2nd defendant. The 1st defendant was said to be deceased and counsel for the 1st defendant did not participate in the application. In any event, I do note that the two applications are squarely between the plaintiff and the 2nd defendant.

8. It will be seen that the plaintiff seeks a review of the orders of stay that were made on 7 December 2018. Review is covered in Order 45 and Order 45 Rule 1 provides as follows :-

Application for review of decree or order [Order 45, rule 1.]

(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed,

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

It will be seen from the above that a party can apply for review on three grounds :-

a) Discovery of new evidence that was not available at the time that the order was made;

b) Mistake or error apparent on the face of record; or

c) Any other sufficient cause.

Such application must also be made without unreasonable delay.

9. I will assess the plaintiff's application in light of the above. Starting with the issue of delay, the order sought to be reviewed was made on 7 December 2018. This application was filed on 7 March 2021. It is more than two years since the order was made. This delay, in my opinion, is unreasonable. If at all the plaintiff could not raise the sum of Kshs. 5,000,000/= as ordered, and she wished for this to be reviewed, she ought to have sought a review of that much earlier. She did not need to wait for more than two years to apply for review. In fact, from what I can see, she took this time to try her luck at the Court of Appeal and she lost. She cannot be allowed to play Russian roulette and abuse the judicial process. She was before this court and she by consent agreed to abide by some conditions for stay. She went to the Court of Appeal and lost. Why is she now back to this court seeking to review the order of stay when the Court of Appeal has already decided the issue? And by the way, despite the plaintiff saying that the Court of Appeal held the view that she would have been better placed to seek a review, I have not seen any such statement made by the Court of Appeal. This application fails for being filed after unreasonable delay.

10. Even if I was to consider the substantial grounds for review, the application would still fail. This application is not based on any discovery of new evidence, and neither is it based on any error on the face of record. The plaintiff hinges her application on the basis that there is "sufficient reason" to entitle her to a review of the orders in issue. I am afraid to tell the plaintiff that she has not demonstrated any sufficient reason. The mere fact that she is unable to raise the amount of Kshs. 5,000,000/= as ordered is by itself not sufficient reason to entitle her to an order for review. It should be remembered that this amount was meant to be security so as to cover the mesne profits due to the 2nd defendant for the 10 or so years that had passed from the time the suit was filed to the date of judgment. The order for security was not made for the convenience of the plaintiff; it was made for the benefit of the 2nd defendant, such that if it cannot be raised, then there is no reason for the plaintiff to continue being in possession, because she will have demonstrated inability to compensate the 2nd defendant in the event that she lost the appeal. In fact, if it is the position of the plaintiff that she cannot offer security, then she should graciously cede possession of the suit property, so as to stem further losses to the 2nd defendant, which she acknowledges she is unable to make good. She can still pursue her appeal while residing out of the disputed property.

11. Within her application, the plaintiff has stated that alternative security can be offered and she has annexed a copy of a title deed. I have looked at it. That title deed is for a property in Thika. It is not even in the name of the plaintiff but in the name of one Joyce Wanjiku Ndira. There is no affidavit from the said Joyce Wanjiku Ndira to say that she is ready to offer this property as security. Neither is there any valuation to say how much the property is worth. I am afraid that it cannot override the order for deposit of the sum of Kshs. 5,000,000/=. In

any event, the order that she deposits the sum of Kshs. 5,000,000/= was made by consent. A consent has the effect of a contract. The plaintiff cannot without the agreement of the 2nd defendant now supplant what was agreed as security with something else.

12. Whichever way I look at the application by the plaintiff, I find absolutely no merit in it. The application is hereby dismissed with costs.

13. Having dismissed the application by the plaintiff, I have no reason to deny the 2nd defendant her application for vacant possession and for security to the bailiff. The same is allowed. I give the plaintiff 7 days to graciously vacate the disputed premises and give vacant possession of the suit property. If she does not do so within this period of time, the 2nd defendant is at liberty to appoint a court bailiff and proceed to evict the plaintiff. In such event, the OCS, Nyali Police Station is hereby ordered to provide security to the court bailiff while executing the warrants. The plaintiff will shoulder the costs of the application dated 28 February 2019 and also shoulder any costs that the 2nd defendant may incur on the eviction.

14. Orders accordingly.

DATED AND DELIVERED THIS 28TH DAY OF APRIL 2022.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA