



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 290 OF 2013

EMMY BUNEI.....PLAINTIFF/RESPONDENT

VERSUS

CHRISTINE WANGARI MUNGA.....1ST DEFENDANT/APPLICANT

DAVID MWAURA.....2ND DEFENDANT/APPLICANT

RULING

On the **2nd of December, 2013** the Defendants/Applicant filed the Notice of Motion under order 51 of the Civil Procedure Rules and section 3 A 34 of civil procedure Act. They seek the following orders;

- a. That the Honourable Court be pleased to order that the Plaintiff/Respondent do deposit a further sum of Kshs. 540,000.00/- into the account No. 0019063971002 at Chase Bank Limited within fourteen days or within such time as may be determined by this Honourable Court.
- b. That this Plaintiff be ordered to pay monthly sums equivalent to the rent at the prevailing market rate into the said bank account No. 0019063971002 at Chase Bank Limited until further orders of the Court.
- c. That in default of payment of the sum ordered in prayer (a) and /or (b) above, the Defendants be at liberty to enforce the eviction orders given on the 3rd day of May, 2012.

The application is supported by supporting affidavit the 1st Defendant/ Applicant dated 2nd December, 2013. In her affidavit she depones that summary judgment was entered against the plaintiff, in favour of the defendant in the 3rd of May 2011 requiring the plaintiff to pay a sum of Kenya shillings 1, 025, 700.00/= .The Plaintiff appealed against the same judgment and an order of stay was granted on condition of that the Plaintiff deposit a sum of Kshs 1.5 million in an interest earning account in the joint name of the plaintiff and defendant advocate. The said sum was deposited in a bank account in Chase Bank as security for due performance. Thereafter the plaintiff has not taken any steps towards preparing the appeal and has been enjoying staying orders while at the same time denying them the benefits of profits of the suit premises. That the monthly rent/profits from the suit property was estimated at about Kshs 30,000/- when the judgment was entered. That the amount outstanding at the monthly rate of the figure applied in the year 2012 of Kshs 30,000/= is Kshs 540,000.00/= and it is unfair that the plaintiff do continue enjoy the status quo without giving consideration for occupation of the defendant property.

The application was opposed. The plaintiff filed a replying affidavit dated 19th May, 2014. She depones that her lawyers have prepared a record of appeal and the money deposited in the joint account of their respective lawyers earns interest and if she loses the appeal the Defendant will benefit from the same that the application is not brought in good faith. The parties filed written submissions which I have read.

The applicant submitted that Section 34 of the Civil Procedure Act, allows making of such application where they questions arising between the parties in suit in which a decree has been passed and related to the executions / discharge of the decree. That the sum they claim of Kshs. 30,000/- per month is compensation of the period after June, 2012. That the plaintiff continues to remain in the premises without any benefit accruing to the defendant. That the sum sort is to secure the defendant interest in the suit. That the sum paid by the plaintiff and the joint interest account does not satisfy the rationale of the payment of security pending appeal nor does it cover the defendant erstwhile titement in the suit property was June, 2012. That the condition of stay granted by the Court was with their understanding that the intended appeal was concluded expeditiously.

That the Court should note that the Record of Appeal is yet to be lodged more than 2 years down the line and it is within the discretion of the Court to deter either party from delaying the intended appeal. Counsel submitted that the order sought will not only secure the eventual outcome of the appeal but also nudge the parties to move with speed to conclude the intended appeal. The applicant relied in two cases namely; *HCC Civil Suit 60/ 2001* the case of *Paul Mathu vs Ebrahim Kariuki Gichimu* and HCC 2463/1996 *Reuben indiatsi Nasib And Another vs Attorney General & Another*

The respondent merely reiterated the facts deponing their replying affidavit.

I have considered the facts as deponed and read authorities relied on. There is no dispute that judgment was entered against the plaintiff and thereafter the plaintiff deposited a sum of Kshs 1.1 million in a joint account. The applicant main concern is that the plaintiff respondent has failed to take any step to prosecute the intended appeal and also that she continues to enjoy the suit property without paying rent. The respondent argues that the amount deposited will earn interest and the defendant will benefit from same. With due respect to the respondent one cannot stay in the premises for 2 years without paying rent. I agree with the defendant that the plaintiff continue to enjoy the status quo without giving considerations for occupying the same property. Under section 34 of the Civil procedure Acts the Court can determine questions arising between parties to which decree has been passed relating to the execution this discharge or satisfaction of the decree. Section 3A of the Civil Procedure Act gives this Court inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. The applicants have moved to Court because of the sluggish conduct of the Plaintiff/Respondent. The record of appeal has not even been filed, this was no challenged by the respondent .It is in order that the Plaintiff deposits a further sum in Court. I therefore finds merit in the application and order that the Plaintiff/Respondent shall deposit a further sum of Kshs 540,000/- into the account No. **001906371002** at Chase Bank Limited within 30 days on the date of this ruling and in default the defendant shall be at liberty to enforce the eviction order given on 12th May, 2012. Cost to the applicant.

Orders accordingly

Dated, signed and delivered this **29th** Day of October 2014.

R.E. OUGO

JUDGE

In the Presence of:-

..... **For the Defendants/ Applicants**

.....**For the Respondent**

.....**Court Clerk**