REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENTAL & LAND DIVISION

ELC NO. 1747 OF 2007

JANE WANJIRU NJOROGE...PLAINTIFF

-VERSUS-

ELIZABETH WAIRIMU MWARENGE..DEFENDANT

RULING

The application before me is dated 21st November, 2014. It seeks stay of execution of this Honourable Court's decree issued on 28th September, 2012 as varied or corrected on 17th November, 2014. The decree was made in favour of the Plaintiff.

Briefly, the Plaintiff had claimed in her suit specific performance of a Sale Agreement and in particular an order directing or compelling the Defendant to transfer a portion of land known as L.R. No. 12410/41 to the Plaintiff. After trial, the court on 25th September, 2012 found in favour of the Plaintiff and entered judgment accordingly. The Defendant was to excise one acre from the suit land and transfer the same to the Plaintiff.

The Defendant did not do so. The Defendant was dissatisfied with the judgment and promptly filed a Notice of Appeal. The Defendant also applied for a transcript of the proceedings. With the Notice of Appeal filed, the court was pursuant to the provisions of Order 43 Rule 6(4) of the Civil Procedure Rules conferred with jurisdiction to hear the current motion of stay of execution pending appeal.

The requirements for grant of stay of execution pending appeal are well settled and indeed outlined in Rule 6(2) of Order 42. The Rule reads as follows:

> *"6(2) No order for stay of execution shall be made under sub-rule (1) unless (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and application has been made without unreasonable delay and (b) such security as the court orders for the performance of such decree or order as may ultimately be binding on him has been given the applicant".*

The court effectively needs to consider and be satisfied in only three matters. Has there been unreasonable delay in making the application? Does the applicant stand to suffer substantial loss? Thirdly, is the applicant ready to offer any security for the due performance of the decree ultimately? Those are the three questions, I need to answer in the current application.

Starting with the issue of delay, the application has been filed after a lapse of over two years. In the circumstances of this case, the same appears inordinate and unreasonable. The excuse advanced by the Defendant is that the decree was inoperable until it was corrected on 17th November, 2014 and for that matter the Defendant did not see any reason to move the court earlier. The Defendant in these respects was suggesting that if the decree had not been corrected by the court no application for stay of execution would have been filed. Secondly, the Defendant was also suggesting that until November this year the decree was simply unenforceable. I would certainly not agree. The decree even as previously drawn was unenforceable. It was a decree for specific performance. That was the substance and all the Plaintiff needed to do was to move the court for a vesting order under the Trustee Act (Cap 167) and the same would have been enforced. The Plaintiff however took the longer route of seeking to correct a rather obvious slip in the decree. I do not find the explanation by the Defendant for the two year delay tenable. I find that there was unreasonable delay in filing the application for stay of execution which directed this court's discretion to grant the stay orders now sought.

The conditions laid out under Order 42 rule 6(2) ought to be sequentially satisfied in my view the Applicant has failed to satisfy the first condition and that should lead to the dismissal of the current application.

Lest I am held fallible in principle, I would consider the other two conditions. The Defendant has stated that she will suffer substantial loss if stay is not granted. The basis is that the decree involves land. True land has an intrinsic value at times beyond monetary compensation. However, when the holder of the real property has himself or herself let out the property as part of a commercial entity then the intrinsic value itself must be shaded off. The Defendant herein entered into a contract to dispose of the portion of land that has been ordered by the court to be transferred to the Plaintiff. The parties themselves then mutually placed a specific value to the land and to the transaction. I would not in the circumstances view it that the Defendant will suffer substantial loss if the decree is executed and the intended appeal is ultimately successful. The value can be easily ascertainable if no counter specific restitution can be ordered.

Noting that "substantial loss" referred to under Order 42 Rule 6(2) is not equivalent t irreparable loss or damage and noting further that there is no suggestion by the Defendant that the Plaintiff will not be in a position to effect any restitution if the appeal is successful, I hold the view that the Defendant will not suffer substantial loss if the Plaintiff is now allowed to enjoy the fruits of judgment.

Finally on the issue of security, I did not hear the Defendant volunteer any security for the due performance of the decree. Rather, the Defendant held the unfortunate view that he decree can never be honoured as even the Land Control Boards consent was never obtained. Of course the Defendant must have forgotten that the Court of Appeal where the Defendant is now headed for reprieve has recently ruled in the case of **Mwangi & 87 others –v- Davidson Mwangi [2014] eKLR, CACA No. 6 of 2011** that lack of a Land Control Board consent cannot vitiate automatically an agreement for sale of land. Yet too, performance of a specific performance decree can only be assured through a deposit of the title documents or the registration of a prohibitory order against the title. That however is not what the Defendant is volunteering. I consequently find that an order conditional on security in the circumstances would be unsuitable.

In the end, even though the Defendant is entitled to exercise her undoubted right of appeal the circumstances of the case dictate that the plaintiff should not be driven away from new seal of judgment. I would consequently dismiss the Defendants application with costs.

It is so dismissed.

Dated, signed and delivered at Nairobi this 18th day of December, 2014.

J. L. ONGUTO

JUDGE

In the presence of:-

....for the Plaintiff

....for the Defendant