



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
HIGH COURT CIVIL CASE NO. 3087 OF 1981

MARGARET ROSE WAMBUI.....PLAINTIFF

VERSUS

SILVESTER JOHN NJOROGE.....DEFENDANT

RULING

The Respondent (Plaintiff) in this application sued the Applicant (Defendant) seeking the sharing of their matrimonial property wherein judgment was entered in her favour against the Defendant for half of all the parcels of land mentioned in paragraph 8(a) (b) and (c) of the affidavit in support of the Originating Summons as well as 50% of plot No.s Ndeiya/Kiroe/T365 and T197 if still in existence and if not 50% of the sale price if they have been sold plus costs and interest. Subsequently on 30th November, 2011 the Plaintiff filed a Notice of Motion dated 18th November, 2011 seeking among othersthat, the tenants in L.R. No. 209/66/43 Mogotio Road Parklands, Nairobi be ordered to deposit the monthly rent in court. By his ruling delivered on 16th July, 2012, Odunga, J. allowed the said application prompting the instant application (Notice of Motion dated 30th July, 2012) brought under **Order 42 rule 6** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act** in which the Defendant essentially seeks an order of stay of execution of the order made by this court on the 16th of July 2012 pending hearing and final determination of his appeal. He also seeks that costs be provided for.

The application is based on the following grounds that; the intended appeal is arguable with probability of success; that if the stay of execution is not granted the applicants/Defendant's appeal will be rendered nugatory and he will suffer irreparable loss; unless this application is granted the Plaintiff threatens to levy execution against the Defendant; the Defendant cannot abide by the order since the premise L.R. No. 209/66/43 does not belong to him as it is his deceased father's property and that the application has been made without unreasonable delay.

There is a supporting affidavit and a further supporting affidavit sworn on 30th July, 2012 and 19th November, 2012 by the applicant/ Defendant in which he gives the evidentiary basis of the grounds of his application. In the supporting affidavit the applicant deposes as follows in brief, that he is aggrieved and dissatisfied with the said ruling and wants to appeal and he filed a notice of appeal on the 19th of July 2012 and that on the same day he applied for certified copy of the ruling and proceedings. At paragraphs 2,3,6 to 18 he gives a background of the issues between him and the respondent which have been subject of previous rulings in this suit. The applicant avers that the intended appeal will be rendered nugatory if the application is not allowed and he will suffer loss and damage. In the further supporting affidavit the applicant reiterates what he deponed in his supporting affidavit.

The Plaintiff has filed a replying affidavit to the effect that; the application is frivolous, vexatious and otherwise an abuse of the court and it should be dismissed; that the appeal has no probability of success and it does not meet the principles of granting stay; the court is left guessing given that no draft grounds for appeal are annexed to the application for stay; the Defendant is introducing the same old issues that the court has dealt with and dismissed severally and they cannot form the basis and or the foundation for granting stay and that the Defendant will not suffer any prejudice if the orders sought are not granted given that he is a contemnor who has failed and or refused to obey court orders.

Parties filed submissions which I have considered. This application is premised on the provisions of Order 42 rule 6 of the Civil Procedure Rules which vests in the High Court power to grant a stay of execution of proceedings if sufficient cause is shown. The jurisdiction of the High Court governed by Order 42 rule 6 of the Civil Procedure Rules outlines four (4) conditions to be met before a stay can be granted, namely that there must be sufficient cause; that the applicant may suffer substantial loss unless an order of stay is granted; that the application for stay must be brought without unreasonable delay and; that the applicant must give an undertaking as to security. The first issue is whether the applicant has demonstrated sufficient cause? The applicant's main reason is that his intended appeal will be rendered nugatory and that he will suffer irreparable loss. I find that the applicant has not adequately explained the loss he will suffer. Justice Odunga in his ruling ordered that the monthly rents of tenants in LR NO. 209/66/43 Mogotio Road parklands Nairobi are deposited in court. In my view this order is not prejudicial to any of the parties as the judge directed his mind on where the money should be deposited as parties continue to litigate. I note that the application was not brought without delay however the applicant has failed to give his undertaking as to security. I agree with the Respondents submissions that the issues the applicant raises were dealt with by Mbitio J and Mwera J in their previous rulings. I note that no execution has begun in this matter. For these reasons I find no merit in the application and decline to grant the order of stay as sought by the applicant in the application dated 30th July 2012 and the same is dismissed with costs to the Respondent.

Orders accordingly.

Dated, signed and delivered this 15th Day of May 2013.

R. E. OUGO

JUDGE

In the Presence of:-

.....**Plaintiff/Respondent**

.....**Defendant/Applicant**

.....**Court clerk**

