



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
LAND & ENVIRONMENT COURT
CIVIL APPEAL NO.181 OF 2010

NICHOLAS MUCHENE NJAU.....1ST APPELLANT

DAVID KIRUMBA.....2ND APPELLANT

VERSUS

MARY WANGARI WAWERU.....RESPONDENT

RULING

The application herein is dated 10/4/2012 and seeks orders;

1. **THAT the application herein be certified as urgent and prayer Number 2 herein below be granted exparte.**
2. **THAT there be a stay of execution of the decree in NYERI CMCC NUMBER 274 of 2007 pending the hearing and determination of this application.**
3. **THAT there be a stay of execution of the decree in NYERI CMCC NUMBER 274 of 2007 pending the hearing and determination of this appeal.**
4. **THAT costs be provided for.**

The same is supported by the affidavit of Muchene Njau, the 1st appellant herein which is sworn with the authority of 2nd appellant.

The application is grounded on the fact that the lower court issued a warrant of arrest against the appellants in execution of the decree in Nyeri CMCC No.274 of 2007. The second ground is that there is an appeal filed on 26/10/2010 and pending in the High court for hearing. The third ground is that if the

decree is executed the appellant will suffer great and substantial loss. The fourth and last ground is that the appeal is arguable and has high chances of success.

In the supporting affidavit the 1st appellant deposes with the authority of the 2nd appellant that judgment herein was entered in the lower court on the 29th September 2010. The appellants filed a Notice of Appeal on the 26/10/2010 unfortunately, Immediately thereafter, the file went missing when it went for the typing of proceedings in the typing pool. His advocate sought for the file in order to pursue an application for stay of execution but before he could do so a Notice to show cause was issued. He is apprehensive that if stay of execution is not granted, substantial loss will be occasioned upon him and yet the memorandum of appeal discloses an arguable appeal with high chances of success. Moreover he states that the respondent will not suffer prejudice as she is still in possession of the plots the subject of the suit in Nyeri CMCC No.274 of 2007. Lastly he states that the application is meritorious and unless the orders sought are granted the appeal will be rendered nugatory.

The respondent in the replying affidavit sworn and filed on 12/4/2013 states that in the judgment delivered on the 29/9/2010 the court exonerated the 3rd defendant and ordered the applicants to refund her the purchase price of Kshs.180,000 plus costs and ordered the respondent to pay the costs of the 3rd defendant in the lower court which she did. According to the respondent the judgment indicates that the suit properties belongs to the applicants and is categorical that she does not own the suit plots as she does not pay rent or land rates. The applicants have the money and the plot and therefore she should be allowed to proceed. The respondents argues that the file was available in the typing pool and was not missing, therefore the applicants were not diligent enough in filing the application but were prompted by a threat of execution proceedings, and in any event, the application is in conflict with the overriding objective of the Civil Procedure Act which is to facilitate the **just, expeditious, proportionate** and **affordable** resolution to civil disputes governed by the Act. She claims that she has means of refunding the decretal sum should the appeal succeed. Lastly, she states that there is a long delay and that the applicant shall not suffer substantial loss if they pay the money.

The applicants responded by filing a supplementary affidavit whose gist was that judgment was entered against the applicants for Kshs.180,000 and immediately after the judgment his advocate applied for certified copies of judgment and proceedings with a view of lodging an appeal. He states that the memorandum of appeal was filed on 26/10/2010 contemporaneously with an application for stay of execution in the lower court which was dismissed on the 25/5/2013. He states that the court awarded Kshs.180,000 but the amount due now as claimed by the respondent is Kshs.418,951. He does not understand how the figure has been reached. He reiterates that the appeal has very high chances of success and that the respondent may not refund the money if it succeeds. He is willing to abide with conditions that may be set by the court as security for grant of stay of execution and in any event the land in issue is still registered in the names of the respondent.

Having read the application and all affidavits sworn in support of the same and the replying affidavit of the respondent, and having heard the submissions of both counsel, the court finds that this application is properly brought under the provisions of Order **42 Rule 6(1)** of the Civil Procedure Rules Cap 21 Laws of Kenya.

Order 42 rule (6) 2 gives the condition for granting a stay of execution under subrule (1). this conditions are three fold namely.

- a. **The applicant to demonstrate that substantial loss may result if stay is not granted.**
- b. **Security being given for due performance of the decree.**
- c. **The application to be made without unreasonable delay.**

I will begin with the last condition being **unreasonable delay**. According to the applicant he is seeking a stay of execution of the decree in Nyeri CMCC No.274 of 2007 pending the hearing and determination of appeal. In his affidavit sworn on 10/4/2013, the 1st appellant gives the date of judgment as the **29/9/2010** while in the supplementary affidavit he indicates the date of judgment as **20/9/2010**. The respondent in her affidavit has deposed that the judgment was delivered on the **29/9/2010**. This court observes that there is a contradiction in the 1st applicant's affidavits on the date of judgment moreover that the annexed handwritten copy of judgment does not assist as it is not dated and no decree has been annexed to assist the court on the date of judgment **however**, this does not preempt the court from exercising its jurisdiction under **Order 42 rule (6) 2 of** the Civil Procedure Rules. There is evidence that the memorandum of appeal was filed in time on the 26/10/2010 simultaneously with an application for stay of execution of the decree pending appeal.

After filing the application for stay of execution in the court appealed from the applicant failed to prosecute it claiming that efforts to prosecute the same were fruitless as the file was said to have gone for typing. The applicant has annexed the letters, one dated 29/9/2010 to the Executive Officer Nyeri Law Courts and copied to the Deputy Registrar Nyeri Law Courts, Lucy Mwai & Co. Advocates and J.N. Mbuthia & Co. advocates and his clients. The same was received on the 1/10/2010. He paid Kshs.1000 and was issued with a receipt for the same. Neither the applicant nor the respondent has shown the Executive Officer's response to the letter .

On the 2nd November 2010, the applicant through their advocate again wrote to the Executive Officer to avail the file to enable them prosecute the application for stay filed under certificate of urgency, again no response is shown to that letter.

On the 17th June 2011 ,the firm of Lucy Mwai & Co. Advocates wrote to Chief Magistrate, Nyeri complaining of the inability to file an application for the assessment of the plaintiffs costs as the file was in the typing pool. Both the applicant and respondent have not disclosed to the court when the file became available for the prosecution of the application for stay of execution and application for assessment of the plaintiff's costs. However what is evident is that the application for stay of execution was dismissed on 25/3/2012. This court is convinced that the file appears to have been in the typing pool and no action could be done on the same without the permission of the Executive Officer and Deputy Registrar, however at some time before 25/3/2012 the same was available which enabled the applicant to prosecute the application dated 26/10/2010. The application was heard and determined by the court appealed from. The parties have not availed the court a copy of the ruling to enable me understand the reason for dismissal, however this court is not bound by the decision of the court appealed from as it has a jurisdiction to hear the application afresh. This court finds that time began running when the application for stay was dismissed on **25/3/2013**. This application was filed on 10/4/2013, 15 days after the dismissal of the application by the court appealed from and therefore the issue to be determined is whether 15 days delay is unreasonable delay. What amounts to reasonable delay depends on the facts of each case. In this case the applicant ought to have filed his application immediately because he was aware that the process of execution had begun. In the Notice of Motion the issue of urgency was justified on the ground that on the 25th March 2013 the court appealed from had issued a warrant of arrest against the appellants in execution of the decree in the said suit. I do find the delay in filing the application unreasonable and only prompted by the process of execution.

On the issue of **security** the applicant has agreed to abide by any security the court gives and therefore I need not belabor on the same.

On substantial loss, the decretal sum is Kshs.415,000 an amount that the applicant has not demonstrated the respondent's inability of refunding if the same is paid . On the other hand the respondent has stated in his affidavit that she will refund the money if the appeal succeeds. **In Jethma VS Shah t/a Supreme Styles (1989) KLR tat page 198 it was held by JJA Nyarangi, Gicheru and Kwach** that;

“With respect, it is not sufficient for the applicant to swear, he ought to have furnished facts and figures of the dealings. The burden has all time been on the applicant to prove as required that the respondent was impecunious. The respondent had no such burden to establish his healthy financial position by producing bank statements as the burden did not at any stage of the proceedings shift to him”

This court finds that the burden of proof as to the particulars of financial position of the respondent lay on the applicant as he is the one who wished the court to believe that the respondent was not capable of refunding the money. The court finds that the ground that the respondent would not refund the money is not well founded.

For the foregoing reasons the court finds that there is no merit in the Notice of Motion and the same is dismissed. Costs in the Notice of Motion shall be costs in the appeal.

Dated, signed and delivered at Nyeri this 13th day of June 2013.

A. OMBWAYO

JUDGE