



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

CIVIL SUIT NO. 265 OF 2003

DR. JACOB NGUCIE..... PLAINTIFF

VERSUS

KAZEHA NGALA..... DEFENDANT

RULING

(1) The Defendant/Applicant seeks a stay of execution of the ruling and order dated 3rd October 2011 pending the hearing and determination of an appeal to the Court of Appeal. The court's ruling of 3/10/2011 dismissed with costs the defendant's application dated 28/6/2011 which sought to set aside a default judgment allegedly entered against the defendant on 15/9/2004, an injunction to restrain the plaintiff from evicting the defendant from the suit property and an order that **"the attempted eviction and demolition of the defendant from houses"** on the suit property on 23/6/2011 by the Court Bailiff be declared illegal.

(2) The defendant's application for stay of execution was supported by grounds set out in the Notice of Motion and by an affidavit sworn by the defendant on 11th October, 2011. The defendant's case, in compliance with the provisions of Order 42 rule 6 of the Civil Procedure Rules, was principally that: -

(a) The defendant had filed a Notice of Appeal to the Court of Appeal pending the filing of the intended appeal.

(b) The defendant who had lived on the suit property since 1960 would together with his family of 48 people suffer substantial loss by being rendered homeless if the stay of execution sought was not granted;

(c) The defendant was willing to abide by reasonable conditions for stay that the court may impose for the grant of stay of execution; and

(d) The defendant's appeal would be rendered nugatory, if successful at the Court of Appeal.

(3) For the Plaintiff/Respondent, an affidavit in reply was sworn by one Jane Wangare Kiama on 25 October, 2011, who stated that she was the registered proprietor of the suit property upon purchase from the Plaintiff for Kshs.26,000,000/= part of which was financed by Equity Bank Ltd loan which she was already repaying. She denied that the Defendant had been living on the suit property since 1960 and that he had 48 people living on the property. She attached photographs of the structure in which the applicant was staying outside the suit premises, upon execution of an eviction order by the court on 23/6/2011. She maintained that an order for stay of execution in the circumstances would amount to an order for reinstatement of the defendant on to the suit property which would jeopardise her plans to develop the property. She prayed that should the court be minded to grant a stay of execution the same should be

conditioned upon the defendant depositing a security of Kshs.30,000,000/= within a limited time because she continued to service the bank loan of Kshs.19,500,00/= part of the purchase price of Kshs.26,000,000/= that she paid for the property.

(4) During the hearing of the application, counsel of the defendant emphasized the substantial loss that the defendant stood to suffer by way of his home which he had occupied allegedly since 1960. He objected to the affidavit of the registered proprietor of the suit property in reply to the defendant's application stating that the said Jane Wangare Kiama is not a party to the proceedings and had no authority to swear the affidavit. However, relying on the agreement for sale attached to the affidavit of the registered proprietor, counsel noted that the same acknowledged the presence of the defendant in the occupation of the land by the stipulation at paragraphs 10 and 12 of the agreement that the purchaser took the property with the squatters on it and undertook to remove them from the property at her own cost without reference to the vendors. Counsel also contended that the attempted eviction of 23/6/2011 deponed to by the registered proprietor was not completed as possession was not given to the Plaintiff but to the Plaintiff's representative. Counsel submitted that the grant of the stay of the ruling on 3/10/2011 would reinstate the order for status quo which existed before the order of 3/10/2011.

(5) Mr. Mogaka for the Plaintiff/Respondent opposed the application for stay on several grounds as follows: -

(a) That the applicant has not attached a draft memorandum of appeal to show that the proposed appeal has an arguable case.

(b) The ruling of 3/10/2011 only dismissed the defendant's application for setting aside an injunction and was therefore incapable of execution which could be stayed by an order for stay of execution. Any order for status quo to be maintained pending the hearing and determination of the application for setting aside lapsed upon the ruling upon 3/10/2011 dismissing the application.

(c) The Defendant did not seek as he could have, to stay execution of the decree of 15/9/2004 and an injunction pending appeal as no order for stay can issue against the order of 3/10/2011.

(d) The Defendant had not made any provision for security for performance of the decree of order under Order 42 (6) (2) (b), of the Civil Procedure Rules.

(e) The affidavit of Jane Wangare Kiama in reply to the defendant's case was competent as a party can produce evidence by calling any person with knowledge of the case as a witness.

Counsel cited the Court of Appeal decisions in (1) **Arvindi Velji Shah vs. Zaverchand Sojpal Jetha Holdings Ltd. C.A. 96 of 2009 Nairobi;** (2) **Consolidated Bank of Kenya (Ltd.) & 2 Others vs. Usafi Ltd. C.A. No. 195 of 2005;** and **Hunker Trading Co. Ltd. Vs. Elf Oil Kenya Ltd C.A. 6 of 2010** in support of the Plaintiff's case.

(6) In his reply, counsel for the Defendant/Applicant contended that there is no requirement for a Memorandum of Appeal in an application for stay before the trial court. An arguable appeal is only necessary in an application in the appellate court as those under Rule 5 (2) (b) of the Court of Appeal Rules. At this stage, an applicant only need lodge a Notice of Appeal to show intention to appeal. He urged the court to give attention to the overriding objective of the Civil Procedure Act under sections 1A and 1B of the Act.

(7) At the end of the hearing of the application for stay, the court reserved ruling for the 29/11/2011 and ordered that status quo be maintained. Using the order for stay, the Defendant moved to the suit property and upon an application by the counsel for the Plaintiff dated 28/10/2011, the court made an order for inspection and report by the Deputy Registrar of the Court under Order 40 Rule 10 of the Civil Procedure Rules. By her report of 2/11/2011, the Deputy Registrar found that **"the Defendant and his family demolished a gate (the red one) and have erected another one. They live on the plot in temporary iron sheet structures they have constructed on the plot"**. There has been no further

developments on the plot, to the court's knowledge, since the report of the Deputy Registrar of 2/11/2011.

(8) I have considered the defendant's application for stay of execution together with the Plaintiff's case as set out in the replying affidavit of Jane Wangare Kiama and the respective submissions by counsel for the parties and find as follows: -

(a) Affidavits may, as with oral testimony, be made by any witness who has evidence of his own knowledge (or in case of interlocutory applications, based on information and belief sources and grounds whereof are disclosed), for purposes of proving any fact. The Defendant's objection with regard to the affidavit of Jane Wangare Kiama is therefore rejected. See Order 19 rule 1, 2 & 3 of the Civil Procedure Rules, 2010.

(b) Although the Memorandum of Appeal (in draft) is essential in demonstrating to the court that the applicant for stay of execution pending appeal has an arguable appeal, the same is not mandatory in an application before the trial court under Order 42 Rule 6 (1) of the Civil Procedure Rules. Under the rule an applicant need only demonstrate that he will suffer substantial loss if the stay is not granted and that he is ready to furnish security for the due performance of the decree or order appealed from. It is added advantage however for an applicant for stay of execution under Order 42 of the Civil Procedure Rules to demonstrate by a draft Memorandum of Appeal that he has serious questions to put before the Court of Appeal for determination - that his appeal is not frivolous.

(c) Before the Court of Appeal, however, an applicant under rule 5 (2) (b) of the Court of Appeal Rules must show that he has an arguable appeal and that if the stay of execution is not granted, his appeal if successful will be rendered nugatory. See **Reliance Bank Ltd v Norlake Investments Ltd (2002) 1 E.A.L.R. 227**. To demonstrate that he has an arguable appeal, the applicant may through the device of the draft Memorandum of Appeal present the issues he seeks to put forward for the court's consideration.

(d) As held in the Court of Appeal decisions of **Consolidated Bank of Kenya & 2 Others vs Usafi Ltd (2006) e.K.L.R** and **Arvind Velji Shah v. Zaverchand Sojpal Jetha Holdings Ltd & 5 Others (2009) e.K.L.R**, where as in this case, the orders of the court cannot be executed because "**they are orders that impose upon the applicant a duty to stop doing something and not a duty to do something**", no stay of execution can be ordered. In this case, the ruling and order of the court of 3/10/2011 only dismissed the applicant's application for setting aside an ex parte judgment and for injunction pending hearing and determination of the application. There being no executive order issued, there can be no stay of execution of such order. Accordingly, the Defendant's application for stay of execution by Notice of Motion dated 13/10/2011 is dismissed with costs to the Plaintiff.

(9) However, this court is obliged to observe the overriding objective of the Civil Procedure Act which is primarily the just determination of proceedings. As held by the Court of Appeal in **Caltex Oil Ltd v. Evanson Wanjihia C.A.C.A. Nai 190 of 2009** cited in **Hunker Trading Co. Ltd v. Elf Oil Kenya Ltd (2010) e.K.L.R: -**

"The powers of this court have recently been enhanced by the incorporation of an overriding objective in sections 3A and 3B of the Appellate Jurisdiction Act Cap 9 and sections 1A and 1B of the Civil Procedure Act Cap 21 following the amendment of the Statute Law (Miscellaneous Amendments) Act No. 6 of 2009. The overriding objective provides that the purpose of the two Acts and the Rules is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes. Although the overriding objective has several aims, the principal aim is for the court to act justly in every situation either when interpreting the law or exercising its power. The court has therefore been given greater latitude to overcome any past technicalities which might hinder the attainment of the overriding objectives".

As observed by counsel for the Plaintiff/Respondent, the defendant should have sought an injunction pending appeal rather than the stay of execution. Injunction pending appeal or **Erinford Properties** injunction, as it is sometimes called, after the leading case of **Erinford Properties Ltd vs Cheshire (1974)2 ALL E.R. 448** which was adopted in Kenya by the **Bhutt v. Rent Restriction Tribunal (1979)**

K.L.R. and Madhupaper International Ltd. vs. Paddy Kerr (1985) K.L.R. 840 is based on the principle that when a party is exercising its undoubted right of appeal the court should see that the appeal, if successful, is not rendered nugatory, and is available from both the trial court and the appellate court.

(10) Having failed to apply for injunction pending appeal in the High Court, the Dependent/Applicant may still apply for the same before the Court of Appeal under Rule 41 of the Court of Appeal Rules which provides as follows: -

“The court may in its discretion entertain an application for stay of execution, injunction, stay of further proceedings or extension of time for the doing of any act authorized or required by these Rules, notwithstanding the fact that no application has been made in the first instance to the superior court”.

The Defendant, may also reapply to the Court of Appeal, if so advised, for a stay of execution pursuant to the provisions of Order 42 rule 6 (1) of the Civil Procedure Rules which provides so far as material that: -

“whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just. ...”

(11) Since the Defendant may yet apply for an injunction pending appeal or a stay of execution before the Court of Appeal and because he is exercising his undoubted right of appeal, the High Court should ensure that the Defendant’s application, if successful, is not rendered nugatory through any action of the Plaintiff in the meantime. That is the import of the **Erinford Properties** injunction and the requirement of the overriding objective of the Civil Procedure Act.

(12) Accordingly, on the basis of the foregoing findings, I make the following orders: -

(a) The Defendant’s Notice of Motion dated 13/10/2011 is dismissed with costs to the Plaintiff.

(b) The Plaintiff through the registered proprietor of the suit property Plot No. 3270 Section I MN is restrained from disposing the land by an order of injunction to be registered against the title for a period of 30 days.

(c) The Plaintiff and the registered proprietor who derives title from him are restrained from interfering with the Defendant’s occupation of the suit property to the extent of occupation, without other construction on the suit property, and the state of structures established by the Deputy Registrar’s Report of 2/11/2011, for a period of 30 days.

(d) The orders in (b) and (c) above to remain in force for 30 days only to enable the Defendant to move the Court of Appeal for appropriate orders, and to lapse if no application is made by the Defendant to the Court of Appeal or if no order is obtained from that court within that period.

Dated and delivered this 13th day of February 2012.

EDWARD M. MURIITHI
JUDGE

In the presence of

.....for the Plaintiff

.....for the Defendant

.....Court Clerk.

EDWARD M. MURIITHI
JUDGE