



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE 106 OF 2008

PETER KARURI WAWERU.....1ST
PLAINTIFF/RESPONDENT
MARY NYAMBURA KARURI.....2ND
PLAINTIFF/RESPONDENT

VERSUS

HANNAH MUGURE KARAGO.....DEFENDANT/
APPLICANT

RULING

By the application dated 9/5/2012, the applicant, Hannah Mugure Kerago seeks an order of stay of execution of the decree of this court flowing from the judgment delivered on 27/4/2012, pending the hearing of an appeal. The applicant fears that the respondent may execute the decree by transferring the suit property to themselves and evict the applicant. The application is premised on the supporting affidavit sworn by the applicant on 9/5/2012. The applicant is dissatisfied with the decision of this court in which she was allowed 15 days within which to sign the transfer forms or the Deputy Registrar of the Court to sign and have the three acres (suit land) transferred to the respondent. The applicant has annexed a draft memorandum of appeal, and notice of appeal. She avers that if the order sought is not granted, the appeal will be rendered nugatory. The applicant was represented by Mrs Ndeda.

The respondent opposed the application. The 1st respondent swore an affidavit dated 30/5/2012 in which he depones that the application is defective because so far, there is no decree in existence because the parties were still engaged in correspondence and there is no way the property could be transferred without requiring the applicant to transfer the property; that the decree is now ready and dated 16/5/2012 and it was an abuse of the court process to seek a stay on 9/5/2012, when no decree existed. It was also deponed that the applicant has not complied with the conditions precedent to grant of a stay order under **Order 42 Rule 6** of the **Civil Procedure Rules**. He further deponed that he carried out an valuation of the suit land and the open market value is 39,500,000/- for 5 acres while 3 acres are valued at 23,700,000/- (PKW1); that if the court grants an order of stay then the applicant should be required to provide security of Kshs.23,700,000/- for due performance of the decree.

In opposing the application, Mr. Kayai, counsel for the respondent urged that no decree had been extracted by the time the application dated 9/5/2012 was filed and the court was rushed into granting an interim order of stay of execution of the decree and it amounts to an abuse of the court process. Counsel also urged that the applicant has not satisfied the conditions for grant of an order of stay under **Order 42 (6)(2)** of the **Civil Procedure Code**. That instead the applicant's counsel has urged the conditions required under **Rule 5(2)(b)** of the **Appellate Jurisdiction Act** which apply on an application of stay in the Court of Appeal. He urged the court to discharge the interim order and not grant the prayers sought in

the Notice Motion dated 9/5/2012 because there was no decree on record. It was also urged that the applicant has not offered any security for costs and that if the court was inclined to grant the order for stay then the applicant should be asked to provide security of Kshs.23,700,000/- the correct market value of the suit plot.

I have considered the application, the affidavits in support of the application, those in opposition and submissions by both counsel. I do agree with Mr. Kayai that the conditions precedent to the grant of an order of stay in the High Court are different from those of the Court of Appeal. In the Court of Appeal, the jurisdiction to grant an order of stay pending appeal is **Rule 5(2)(b) of the Appellate Jurisdiction Act**. Under that rule, a party is required to demonstrate that he has an arguable appeal or that the appeal is not frivolous and that if stay is not granted, the appeal may be rendered nugatory. In the case of **Chevron Kenya Limited (Caltex) v Kanyotta Holdings Limited CA 81/09**, the Court of Appeal in considering an application of stay pending execution of decree under **Rule 5(2)(b) of the Appellate Jurisdiction Act** said:-

“In order to succeed on the prayer (3), the onus is on the applicants to show, not only, that the intended appeal is arguable or is not frivolous, even on a solitary ground, but also that if the order for stay of execution is not granted, the intended appeal, if successful, will be rendered nugatory.”

The arguments by Mrs Ndeda that they have an arguable appeal that may be rendered nugatory if an order of stay is not granted do not apply to an application under **Order 42 Rule 6(2) of the Civil Procedure Rules**. Under **Order 42 Rule 6(2)** the applicant is required to demonstrate the following:-

- (1) That the application was brought without unreasonable delay;**
- (2) That if an order of stay is not granted the applicant will suffer substantial loss;**
- (3) The applicant should provide security for due performance of the decree.**

The court delivered its judgment on 27/4/2012 and the applicant moved this court for an order of stay of execution on 9/5/2012. The applicant moved with alacrity. There was no delay.

I do agree with the respondent that as of 9/5/2012, when the applicant moved the court and obtained interim orders of stay, there was no decree that could be stayed. However, a decree was extracted on 16/5/2012 (MNK2). If this court were to suspend or set aside the interim order or decree to grant stay, the question is would the applicant suffer substantial loss? The claim herein involves land. According to the respondent, it is prime land whose value is estimated at about Kshs.23,700,000/-. The applicant has demonstrated that she is keen on filing an appeal against the decision of this court and indeed notice of appeal has been filed and draft memorandum of appeal exhibited. That is why she moved this court even before a decree was extracted. This court cannot fail to recognize the fact that land issues are very sensitive in Kenya. If the land were to be transferred to the respondent and the applicant was evicted, the applicant would suffer substantially.

The applicant did not offer any security for the due performance of the decree. The respondent urged the court to order that the applicant provide security equivalent to the market value of the disputed plot, that is Kshs.23,700,000/-. In **Bontempi Luigi and Elizabeth Ngege v Sharrif Mohamed A. Omar & Bouganvillae Cottages Ltd CA 267 of 2009**, the Court of Appeal when considering the issue of security for costs had the following to say:-

“We recognize that in exercising our discretion under Rule 5(2)(b), we are required in accordance with the overriding objectives to facilitate, inter alia, proportionate justice. We are thus required to ensure that justice is also done to the respondents. We could like the superior court impose conditions. However, we are of the view, that the conditions imposed by both Sergon, J. and Azangalal, J. was onerous and incapable of being satisfied by the 1st applicant. Further more, there was no justification for imposing such an onerous condition, as the decree was not specifically a money decree It seems that the order for deposit of such a large sum of money was both

speculative and pre-emptory and was tantamount to refusal of stay.”

In the above case, the security given was Kshs.25,000,000/- but was later reduced to Kshs.15,000,000/- which the applicant found to be out of reach. The Court of Appeal found the security to be onerous and gave stay without imposing any conditions because doing so would have been tantamount to denial of the stay order. Again in **Chevron Kenya Ltd Caltex** (supra) the court found that the amount of Kshs.44 million required as security to be enormous by any standards instead the court ordered the party to provide Insurance Bond from a reputable Insurance Company for a less sum.

In the instant case, although there was no decree to be stayed at the time the application of 9/5/2012 was filed, there is now a decree in place and if stay is not granted the decree may be executed resulting in transfer of the land to the respondent, thus substantial loss to the applicant. In the exercise of this court's discretion and having regard to **Section 159(2)(d)** of the **Constitution** which enjoins this court to do substantive justice without undue regard to technicalities, and the overriding objectives of the **Civil Procedure Rules** under **Section 1A** and **1B**, I hereby treat this application as having been duly filed and proper. In the end, I hereby grant an order of stay as prayed, and there be stay of execution of the decree of this court dated 16/5/2012, on condition that a sum of Kshs.500,000/- is deposited in a joint account of both the counsel for the applicant and the respondent within 21 days as security, pending hearing of the appeal. In default the order of stay do vacate automatically. I, however, dismiss the application dated 17/5/2012, with each party bearing its own costs. As for the application dated 9/5/2012, the costs will abide the appeal.

DATED and DELIVERED this 20th day of July, 2012.

R.P.V. WENDOH
JUDGE

PRESENT:

Mrs Ndeda for the defendant/applicant

Mr. Kayai for the plaintiff/respondent

Kennedy – Court Clerk