



REPUBLIC OF KENYA

High Court at Mombasa

Civil Case 90 of 2008 & 203 OF 2009

DOUGLAS MWANGI MUTERU PLAINTIFF

VERSUS

HOSEA NDERI KAREITHI DEFENDANT

CONSOLIDATED WITH

CIVIL CASE NO. 203 OF 2009

HOSEA NDERI KAREITHI PLAINTIFF

VERSUS

DOUGLAS MWANGI MUTERU DEFENDANT

RULING

1) The Applicant seeks an order for stay of execution pending appeal to the Court of Appeal from the decision of the court made on 8th July 2011 on an application for review of its earlier order of 14th May 2010 herein. The subject matter of the dispute is a parcel of land LR No. 2471/VI/M.N, the subject of a sale agreement between the parties of which the Respondent seeks specific performance, and which Applicant has sought to rescind citing delay in completion on the part of the Respondent.

2) The dispute led to the filing of two suits (a) Msa HCCC 90 of 2008 which was settled on 8th December 2008 by consent of the parties in terms of a further sale agreement of that date following the consent order and (b) Msa HCCC 203 of 2009 where the Applicant herein sued for permanent injunction restraining the Respondent from interfering with the land, claiming a right to rescind the sale agreement for breach by the Respondent. The two suits were consolidated, and upon two applications dated 22nd June 2009 in HCCC 203 of 2009 and 25th November 2009 in HCCC 90 of 2008, respectively seeking injunction against the Respondent and the enforcement of the consent order of 8th December 2008 and stay of the subsequent suit HCCC 203 of 2009, the court on 14th May 2010 dismissed with costs the former application and allowed the second with costs to the Respondent. On 29th June 2010 the Applicant (Plaintiff in HCCC 203 of 2009) applied for review of the said ruling of 14th May 2010 and on the 8th July 2011, the court granted the Respondent a period of 21 days to pay the balance of purchase price to the Applicant and in default the Applicant's application for review to be allowed as prayed. The Applicant was aggrieved by the said order and has sought to appeal to the Court of Appeal by a Notice of Appeal filed and served within time, and has requested for certified copies of the proceedings and order in accordance with the Rules.

3) In urging the application for stay pending appeal, the Applicant submits that the court's ruling of 8th July 2011 authorises the transfer of the suit property which will cause the Applicant a substantial loss; that no security is required as the Applicant has not received the balance of the purchase price and he undertakes to maintain the status quo pending appeal; that the Applicant has a right on appeal which he has exercised without undue delay, as the application was filed within 10 days after ruling was determined. The Applicant offers that the court may impose condition not to transfer the property until the hearing and determination of the appeal.

4) The Respondent opposes the application for stay and submits that the application is merely a delaying tactic against the enforcement of the court orders of 14th May 2010 and 8th July 2011 and amounts in essence to an appeal against the consent order of 8th December 2008, out of time; that the Applicant has not demonstrated an arguable appeal with probability of success; that the Applicant's unilateral rescission of the agreement of 8th December 2008 and disobedience of court order of 14th May 2010 disentitles him to favourable discretion of the court; that leave to file the appeal was not obtained and the application had not satisfied the provisions of Order 42 rules 6 and 7 of the Civil Procedure Rules. The Respondent cited several case law authorities in support of this contention.

5) I have considered the matter and I find that the issue to be determined by the court is the principles to be considered by a trial court on an application for stay pending appeal from its decision. All the case law authorities cited by the Respondent consider the principles of the grant of stay by the Court of Appeal and the High Court in their appellate jurisdiction. I accept as trite law that an application for stay of execution pending appeal must on an application before an appellate court demonstrate an arguable appeal and the possible rendering of the appeal nugatory, if stay is refused.

6) The following principles emerge from Order 42 rule 6 of the Civil Procedure Rules regarding stay of execution pending appeal for consideration by a trial court as opposed to an appellate court, as follows: -

a) Sufficient cause to stay execution;

b) The court must be satisfied that substantial loss may result to the Applicant unless the order is made;

c) The application must have been made without unreasonable delay;

d) The application must give such security as the court orders for the due performance of such decree or order as may ultimately be binding on him and

e) Whether the application for stay of execution pending appeal is granted or refused by the trial court, the appellate court has jurisdiction on an application being made to, respectively, set aside an order of the trial court granting the stay or make an order for stay of execution pending appeal.

7) While the trial court is not sitting on appeal from itself (or other court of concurrent jurisdiction) and therefore may not properly determine, as an appellate court does, whether the intended appeal has prospects of success or that there is an arguable appeal, the Applicant must, in my view, demonstrate that in addition to establish substantial loss, security for the due performance and diligent application for the stay, there are serious questions to be put before the Court of Appeal for determination. Where no reasonable grounds of appeal are demonstrated, the trial court in considering an application for stay pending appeal may properly find there is no sufficient cause as is necessary for the grant of the stay under Order 42 rule 6 (1) of the Civil Procedure Rules. Indeed the constitutional principle under Article 159 that justice shall not be delayed coupled with the principle of litigation that a successful litigant ought not be kept out of the fruits of judgment unduly calls for a demonstration, on the part of an Applicant for stay of execution, of bonafide serious issues, or arguable appeal, to be considered by the appellate court.

8) In the present application, while the court may order an injunction to restrain the disposal of the suit property as a security against the Applicant for the due performance of the decree against him, and while conventional judicial wisdom is that loss of land is substantial loss, which is irreparable by damages, I am

unable to find that the Applicant has any arguable appeal or serious questions to put before the Court of Appeal as no draft Memorandum of Appeal has been attached to the application for stay of execution. The Applicant's real case appears to be a challenge on the consent order of 8th December 2008 and the further sale agreement of the same date, the rescission of which is sought by the Applicant's suit HCCC 203 of 2009. I consider that the Applicant's intended appeal has no prospects of success as there are no serious questions to be put before the Court of Appeal because it is trite law that a consent order can only be set aside on the same grounds as would justify the setting aside of a contract and the subsequent suit HCCC 203 of 2009 is barred by the principles of res judicata by virtue of the consent order of 8th December 2008 in HCCC 90 of 2008 before the same parties suing in the same capacity.

9) Accordingly, for the reasons set out above, I dismiss the application for stay of execution pending appeal dated 15th July 2011 with costs to the Respondents.

10) However, in deference to the Court of Appeal's jurisdiction to consider an application for stay of execution under Order 42 rule 6 (1) of the Civil Procedures upon the refusal by this court, I grant the Applicant a stay of execution for 14 days only to enable him file an application for stay of execution therefore in the Court of Appeal, if so advised by his counsel, pursuant to the said provisions. In the meantime, as security therefore, the Applicant is restrained by injunction from disposing or in any other way dealing with the suit property LR No. 2471/VI/M.N. Mombasa.

11) For the avoidance of doubt, the order for stay granted herein will lapse on the expiry of 14 days from the date of this ruling if the Applicant does not obtain a stay order from the Court of Appeal within that period.

EDWARD M. MURIITHI
JUDGE

Dated and delivered this 28th day of September 2012.

F. TUIYOTT
JUDGE

In the presence of:

Ms Muyaa for the Applicant

No appearance for the Respondents

Miss Moriasi - Court Clerk