



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
CIVIL CASE NO. 313 OF 1998
ELIZABETH WAMBUI
KAMICHA.....PLAINTIFF

VERSUS

TERESA WAMBUI MUGI
THIKA MUNICIPAL
COUNCILDEFENDANT

RULING

The Municipal Council of Thika, the 2nd Defendant herein, took out the motion dated 24th November 2010 in which it applied for inter alia an order of stay of execution of the decree dated 17th September 2010 including the taxation of costs pending appeal. The motion is supported by the affidavit of Felix Gitaari Mbiuki. Elizabeth Wambui Kamicha, the plaintiff herein opposed the motion by filing the replying affidavit she swore on 3rd December 2010.

The 2nd Defendant has beseeched this court to grant it orders of stay so that the appeal is not rendered nugatory. It is said that the plaintiff is likely to execute the decree. It is said it was ready to deposit the decretal sum as security for the due performance of the decree. The plaintiff averred that she was in a position to refund the decretal should the appeal succeed. She urged this court not to grant the 2nd Defendant the order because it has disobeyed the court order directing it to release to the defendant the goods enumerated in the judgment. It is also alleged that the 2nd Defendant has refused to give her possession of the suit property despite having been ordered to do so.

I have considered the rival submissions of learned counsels from both sides plus the material placed before me. The plaintiff sued the defendant vide the plaint dated 23rd October 1998 and amended by an order of this court issued on 26th June 2010 in which she asked for inter alia an order of eviction, reinstatement of her name as the lawful allottee of house No. 1000 Kimathi Estate, Thika, an order of restitution of goods carted away by the 2nd Defendant and damages. In the end judgment was entered in

favour of the plaintiff as prayed in the amended plaint. The defendant was awarded Kshs. 200,000/- representing damages for unlawful eviction. In dealing with application for stay of execution pending appeal, the principles to be taken into account are well settled. An applicant must show the substantial loss he would suffer if the order is denied. Secondly, an applicant must show that the application for stay was expeditiously filed and thirdly, that the order for security for the due performance of the decree must be made. Let me begin by considering the second principle. Judgment was delivered on 17th September 2010. the motion herein was filed on 20th November 2010. It is apparent that there was a delay in filing the motion for stay. However the delay in my view is not inordinate hence I will excuse the same. The third principle is dependent on the outcome of the first two principles. I have already stated that the applicant must show the substantial loss it would suffer if the order is denied. It is said the plaintiff is likely to execute the decree in view of the fact that she has already applied for assessment of costs. It is said the appeal will be rendered useless. I have carefully considered the consequence of the execution of the decree. It will mean that the 1st Defendant will have been evicted from house No. 1000 Kimathi Estate, Thika and the plaintiff restored to occupation. In this regard the 1st defendant has not applied for an order for stay. I do not see the damage the 2nd Defendant would suffer because should the appeal succeed, the plaintiff will simply give up possession. The second effect of the execution of the decree is that the 2nd Defendant will have to rectify the register of its allottees by canceling the name of the 1st Defendant and replacing it with that of the plaintiff as the allottee of house No. 1000, Kimathi Estate, Thika. That exercise can be reversed and redone should the appeal succeed. The 2nd defendant has been ordered to return certain itemised goods to the plaintiff. It has not complied with that directive. It has not shown the substantial damage it would suffer if it complies with the aforesaid order. Lastly, the 2nd Defendant has been ordered to pay the plaintiff Kshs. 200,000/= as damages for unlawful eviction. The plaintiff has said that she is in a position to refund the money should the 2nd Defendant's appeal succeed. The 2nd Defendant has not alleged that the plaintiff will not be in a position to refund the money. Again, it is obvious that the 2nd Defendant has not shown the substantial loss it would suffer if the order of stay is denied. The overall picture I get in this application is that the 2nd Defendant is not going to be prejudiced in any way if the order for stay is denied. I have already stated that the principle for the provisions of security is dependent on the success of the application for stay. In this case I have come to the conclusion that the application should be dismissed hence the requirement for security is not necessary.

In the end the motion dated 25th November 2010 is dismissed with costs to the plaintiff.

Dated and delivered this 25th day of February 2011.

J.K. SERGON

JUDGE

In open court in the presence of Mr. Ng'ang'a for the plaintiff, N/A Gathoga & Miss Nyambura for the Defendant.

J.K. SERGON

JUDGE