



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Miscellaneous 401 of 2009

MARY WAMBUI CHEGE.....PLAINTIFF
VERSUS

PETER NGIGI KARANJA.....DEFENDANT

RULING

Coram: Mwera, J

Mbichire for applicant

Mrs Mwendo for Respondent

The notice of motion dated 20.7.09 by the applicant, Mary Wangui Chege, was brought under Order 41 rule 4 Civil Procedure Rules and Section 3A Civil Procedure Act for the main order:

- 1) That there be a stay of execution of the decree from the lower court's judgement (Kajiado) issued on 30.4.2008.

The grounds in the motion stated that the applicant was desiring to appeal the lower court judgement and so that unless a stay sought is issued she stood to suffer irreparable loss and damage. The provision of law cited speaks of suffering substantial loss. The loss was said to be in the form of eviction from the subject plot where she had lived for over 50 years. The applicant swore a supporting affidavit on which Mr Mbichire relied to argue the application. Mrs Mutendo appeared in opposition.

Mr Mbichire told the court that the judgement in the lower court having been delivered on 30.4.08 the applicant applied for typed and certified proceedings in this case on 7.5.08 and the same were furnished on 6.4.09. Then this application was brought on 20.7.09. Prompted that an application for a stay of execution does not require typed proceedings, which seemingly caused an unreasonable delay in bringing the application, counsel said that in the meantime they had filed an application dated 29.5.09 for leave to appeal out of time. That application was allowed by consent at the hearing of the present motion, but still it was not taken that that satisfactorily explained the delay in bringing this application.

Counsel argued that the applicant would suffer substantial loss in the event she was evicted from the subject land as per the lower court decision, a place she had lived for 50 years. It was not stated in the supporting affidavit, but

Mr Mbichire submitted from the Bar that the applicant had built a house on the plot which would be demolished in case the stay order was refused. Asked to offer security for due performance to guide the court, in the event it granted the stay, Mr Mbichire said that he had no instructions on this.

Mrs Mwendu's position was that the unreasonable delay before filing this application had not been satisfactorily explained and substantial loss to be suffered if the stay order was not given, had not been demonstrated. And that the suit land was valued at approximately Sh. 700,000/= and if this court is minded to grant the stay sought all that sum should be deposited.

Having the above in mind, this court is least satisfied that this application was brought without unreasonable delay. The dates from the judgment/decree to the filing of the application have been set out. The applicant only stated that the delay was caused when typed proceedings were sought but it took so long to supply. But such proceedings are not necessary in applying for stay of execution.

As to substantial loss likely to be suffered the court heard that the applicant had lived on the suit plot for 50 years. That could be so. But if the lower court found that the owner of the plot is the respondent, so what? And the applicant did not make an offer of security for due performance, even if it is the court which should actually make an order on this.

Orders as to security for due performance is a condition when a court orders that a stay under Order 41 rule 4 Civil Procedure Rules do issue. The applicant can hardly be said to deserve it here. But the subject being land, an emotive matter in this country, and in this specific case, the court directs that she deposits in the 2 advocates', joint income – earning account within 45 days Sh. 450,000/= and with that she has a stay and may proceed to appeal.

Except as above ordered this application will stand dismissed. Costs here to the respondent.

Orders delivered on 8/2/10.

J. W. MWERA

JUDGE