



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
LAND AND ENVIRONMENTAL LAW DIVISION
CIVIL SUIT (ELC) NO.299 OF 2008

RAPHAEL KARIUKI NJOROGE.....PLAINTIFF/RESPONDENT
VERSUS
BERNARD MBUGUA KINYANJUI.....1ST DEFENDANT/APPLICANT
NAOMI GATHONI MBUGUA2ND DEFENDANT

RULING

1. By a chamber summons dated 22nd September, 2010, brought under Order XXI Rule 25 amongst others, the 1st defendant Bernard Mbugua Kinyanjui (hereinafter referred to as the applicant), seeks an order of stay of execution of the decree given on 23rd August, 2010, pending the hearing and determination of HCCC No.430 of 2010 between Bernard Mbugua Kinyanjui vs Raphael Kariuki Njoroge and two others. The order issued against the applicant on 23rd August, 2010, was an order requiring the applicant to vacate the suit premises LR No.Dagoretti/Kinoo/1069, within 30 days in default an eviction order to issue.
2. The applicant contends that unless the order for stay of execution is issued, he will be evicted from the suit premises. Such an action will cause the applicant irreparable loss as the suit property is his matrimonial home where he has resided with his family for over 30 years. The applicant further contends that his suit, HCCC (ELC) No.430 of 2010 which he has filed against the respondents in which he seeks a declaration that the transfer of the suit property to the respondent is unlawful will be compromised.
3. The application is opposed by Raphael Kariuki Njoroge, (hereinafter referred to as the respondent), who is the plaintiff. The respondent denies any knowledge of ELC.430 of 2010 contending that he has not been served with any documents in respect of that case. The respondent further maintains that the application is an abuse of the court process and is only intended to delay the fair conclusion of the current suit. The respondent denies that the suit property is the applicant's matrimonial home. It is further submitted that the applicant having already filed a notice of appeal against the order of 23rd August, 2010, any application for stay of execution ought to be made under Order XLI Rule 4. It is therefore argued that the application brought under Order XXI Rule 25 of the Civil Procedure Rules is incompetent.
4. I have given due consideration to this application. Order XXI Rule 25 states as follows:
“Where a suit is pending in any court against the holder of a decree of such court in the name of the person against whom the decree was passed, the court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided.”
5. In this case, the applicant seeks to stay a decree issued on 23rd August, 2010 on the basis of a suit which he filed on 16th September, 2010. The subject matter of the suit filed by the applicant is the suit property which is also the subject matter of the present suit. Both suits appear to arise from an agreement dated 30th April, 1990 entered into between the applicant and the respondent. Indeed, the applicant had filed a counterclaim in the present suit in which he sought judgment for the balance of the purchase price as well as general damages. I find that the suit filed by the applicant raises substantially the same issues as this suit. The new suit which was filed after the order of 23rd August, 2010, was issued, is clearly designed to enable the applicant avoid the execution of the order issued against him. I find that the application before me is an abuse of the court process. I concur with the submission made on behalf of the respondent that the applicant having appealed against the order of 23rd August, 2010, the

application for stay of execution ought to have been brought under Order XLI Rule 4 of the Civil Procedure Rules.

6. I find no merit in this application and do therefore dismiss it with costs.

Dated and delivered this 17th day of November, 2010

H. M. OKWENGU
JUDGE

In the presence of: -

Opini for the plaintiff/respondent

Advocate for the 1st defendant/applicant absent

B. Kosgei - Court clerk