



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 1241 of 2003

HARRISON K. NGANGA PLAINTIFF

VERSUS

THE HON. ATTORNEY GENERAL..... DEFENDANT

RULING

The Plaintiff/Respondent has a judgment in his favour delivered on 13th October, 2004. A perusal of the Court record reveals that the said judgment was read and delivered by Aluoch J. on 13th October 2006 in the presence of the Plaintiff, Counsel for the Attorney General who is the first defendant but in the absence of Counsel for the second defendant. There is no indication on the Court record as to whether notice of the delivery of the said judgment was ever sent. Neither is there a note by the delivery judge that a notice of delivery be sent to the Counsel of the 2nd defendant.

Further perusal of the decree reveals that the decree was drawn and issued by the Deputy Registrar of this Court on 18th day of October 2006. The decree indicates that the Plaintiff had claimed for:-

- (1) Transfer in vacant possession of the suit property.
- (2) Rectification of the Register and registration of the Plaintiff as the registered absolute proprietor.
- (3) Mesne profits from the time of unlawful transfer to the time of transfer in vacant possession to the plaintiff.
- (4) Costs of this suit
- (5) Interest on 3 and 4 above at Court rates.

The reliefs shown to have been decreed are three:-

- (1) That the Land Registrar Kiambu do transfer the land LIMURU/BIBIRION/424 into the name of Plaintiff, Harrison Kamau Nganga as the absolute owner and register the same into his name.
- (2) That the Land Registrar do cancel the registration of the name of Francis Waweru Andrew Giathi forthwith and issue the Plaintiff with a new title document i.e. land certificate to this land.
- (3) That the defendants do pay the plaintiff the cost of this suit to be taxed and certified by the taxing officer of this Honourable Court.

Notice to show cause was drawn, dated on 20th day of February, 2007 and filed on the same 20th February, 2007. The Notice to Show Cause came up on the 27th June 2007. The second defendant/applicant is noted to have appeared and opposed the Notice to Show Cause on the grounds that:-

- (i) They had never been served with the decree.
- (ii) There is no eviction order in the judgment.
- (iii) The Plaintiff as decree holder had not taxed the costs.
- (iv) The Notice to Show Cause was premature.
- (v) They were trying to get proceedings to appeal to the Court of Appeal.

It is noted that the Plaintiffs response was that he had already been issued with a new title deed. He was of the view that the 2nd defendant should vacate the land and then proceed to appeal and that he could not tax the costs because the case was still on going.

On the strength of those arguments the Deputy Registrar made orders to the effect that:

- (a) The Plaintiff to serve the 2nd defendant with the decree of this court within 7 days.
- (b) The Plaintiff to have his costs taxed if not agreed upon.
- (c) The Notice to Show Cause to be dealt with thereafter.

On 25th July 2007 issued eviction orders against the second defendant Francis Waweru Andrew Giathi, to be enforced by the court bailiff assisted by the Officer In charge Tigoni Police Station.

This prompted the 2nd defendant/applicant to come to this court by way of Chamber Summons under order 39 rules, 2 and 3 of the Civil Procedure Rules, Section 3 and 3A of the Civil Procedure Act and all other enabling provisions of the law. The application is dated 11th day of October, 2007 and filed on 16.10.2007 prayer 1 is spent. The substantive prayer is prayer 2 which seeks that a stay of execution of the decree dated 13th 2006 be granted pending the out come of the intended appeal and that costs be provided for. The application was amended through an oral application to read order 41 rule 4 instead of Order 39 rules 2 of the Civil Procedure Rules.

The grounds are found in the body of the application, supporting affidavit, and submissions in Court, and annexures. The major ones are that:-

- (1) That the judgment was delivered *ex parte* on 13th October 2006 and discovered delivery of the same on 9th day of November, 2006 when they requested to peruse the file. They obtained a copy of the judgment on 13th November 2006 and upon perusal of the same is when the applicant discovered that the learned trial judge never considered his position as a purchaser for value without notice in consequence of which he became aggrieved hence the desire to appeal to the Court of Appeal.
- (2) Instructions were duly given and Counsel applied for and obtained leave to file notice of appeal in the Court of appeal vide CA APP.. NO.Nai 299 of 2006 for leave to appeal out of time which was granted vide GMMI to the further affidavit.
- (3) The said notice was duly filed and served on the Plaintiff/applicant in good time as shown by a copy of the same dated 7th day of June 2007 and filed on 13th June 2007 as shown by GMM2 to the further affidavit.

- (4) They were not aware of the issuance of the decree as the same was never send to their Counsel for approval which decree the Plaintiff respondent is threatening to execute.
- (5) That him applicant second defendant has applied for a certified copy of proceedings together with the judgment but the same has not been supplied to them.
- (6) That the intended appeal has very high chances of success and if stay is not granted the same will be rendered nugatory.
- (7) That although the Plaintiff is trying to execute the decree, he has not taxed his costs, the execution is therefore premature in the absence of an order of court allowing him to dispense with costs.
- (8) That him, 2nd defendant has been in possession of the said suit property since 1986 when he purchased the same and allowing execution to proceed without allowing him to be heard on his appeal will render their intended appeal nugatory.

The Plaintiff/Respondent has opposed the application on the grounds of opposition filed on 24.10.07 and oral sub mission in Court, the major ones are:-

- (1) Leave to appeal was granted on 6.6.07 with an order that he be served within 7 days. He was served on the 8th day.
- (2) The applicant was ordered to pay costs of 3,000.00 within 30 days from the date of the said orders which was not done.
- (3) The appeal was to be filed within 60 days but has not done so and he has only brought the application for stay to frustrate his efforts to execute the decree.
- (4) That when time for filing of the appeal expired he sold the land to another 3rd party and the applicant evicted on 16.10.07 and that is why he ran to Court with the application under review.
- (5) That the eviction was lawful and proper as the same was sanctioned by the Court. On the basis of the foregoing the Plaintiff decree holder urged the Court not to allow the application.

In response Counsel for the applicant reiterated the earlier submissions and added that he was not aware that eviction had been effected. The Court was urged to ignore that assertion as the Respondent has not exhibited the agreement for sale and extract of title to show that the land has been sold.

- (2) That the Respondent should have come to his offices to collect the money.
- (3) The appeal has not been filed because they have not been given proceedings.
- (4) Allegations of sale of the subject mater and eviction is just an after thought as there is no proof.

On the Courts assessment of the facts herein, it is clear from the record as outlined above that the 2nd defendant is indeed desirous of appealing to the Court of Appeal. He sought leave to appeal which is already in place. Notice to appeal has been filed and served. Although the respondent complains that he was served out of time, order 49 rules (7) and 8 of the Civil Procedure Rules provides a cure. They excludes the counting of the first day but includes the last day when so computed it means that the first day was not to be counted pushing the last day for service to fall on to the 8th day which would as per computation be the 7th day. On this basis the Court finds that service of the Notice to appeal out to time was regular and within time.

Issue was raised about failure to pay costs awarded on the application for leave to appeal out of time. The Court has perused the ruling annexed to the further affidavit annexure GMM1 and find that indeed

the order was that costs be paid within 30 days from the said date. However there was a default clause to the effect that if not paid execution to issue.

As for jurisdiction to grant the order, this court finds that there is jurisdiction to grant the same under Order 41 rule 4(1) of the Civil Procedure Rules. There are pre-requisites for granting the same.

- (i)** That the Court approached for the grant of the same should either be the court appealed from or the court appealed to. Herein the grieving decree was issued by this Court. The applicant has therefore come to the court appealed from in the first instance. The Court is therefore properly seized of the matter.
- (ii)** The candidature for such a relief is in the first instance based on sufficient cause being shown and in the second instance as the court may deem fit.

The ingredients, that comprise sufficient cause in order to enable a litigant earn the courts discretion in granting him/her an order of stay are set out in the Order 41 rule 2 and these are:-

- (a)** The application must have been presented promptly without undue delay.
- (b)** The applicant must show substantial loss if the order is not granted.
- (c)** There should be provisions for security for the due performance of the decree.

Applying these to the facts herein, the court finds that the record shows that indeed judgment was delivered in absentia of the 2nd defendant as no notice of delivery of the same as having been sent to the 2nd defendant is traced on the record. Neither is there any evidence to show that notice was sent to them after delivery of the same. It is however apparent that as soon as they learned of the same and on realizing that time for filing the appeal had run out on them, moved to the Court, of Appeal to seek leave which was granted promptly. What is now left is for them to demonstrate that they are making progress in trying to speed up the appeal. Indeed the plaintiff has complained that the appeal should have been filed within 60 days from the date leave to appeal out of time was granted. The Court agrees that in normal circumstances an appeal to the Court of Appeal is usually filed within 60 days as this Court has judicial notice of this fact. The court also has judicial notice of the fact that this is only usually possible where proceedings are released within time. Herein the applicant 2nd defendant complains that he has not received proceedings to enable him process the filing of the appeal. It should be noted that the said 2nd applicant has exhibited all other relevant documents to support his desire to appeal but this Court has failed to trace a letter asking for proceedings either on the record or amongst its annexures. In the absence of such evidence there is nothing to show that him the second defendant is moving to process both the filing and disposal of the appeal speedily.

As for proof that substantial loss will be suffered, this is usually a proper candidate for monetary decrees. The issue herein is land. In any case it has not been sufficiently demonstrated by the 2nd defendant/applicant that he will suffer such irreparable or substantial loss. What has been stressed is that the appeal will be rendered nugatory. This is a genuine apprehension on their part as the plaintiff respondent has revealed in his representation to Court that he has in fact sold the land to a 3rd party and the second defendant has been evicted and the proceedings being engaged herein are just an academic exercise. In this court's view the revealed situation is a proper candidate for stay pending appeal subject to other consideration being satisfied.

As for security for the due performance of the decree should the appeal fail none has been offered by the second defendant/applicant notwithstanding the court has its discretion to grant conditional stay as it deems fit where circumstances so demand.

One other fact or that this Court should not lose sight of is that eviction orders have already been issued by the Deputy Registrar of this Court. Indeed it is on record that the first time Notice to Show Cause came up, an order was made that it be deferred until taxation is done or leave of Court granted before

execution is proceeded with. There is no order for taxation on the record. It is however to be noted that the Deputy Registrar who deferred Notice to Show Cause until taxation is done is the same one who has issued eviction orders. Presence of eviction orders on record automatically creates a roadblock in the path of the granting of stay orders however irregularly they may have been issued. Since they are on the record they cannot be ignored.

For the reasons given above, in conclusion the court makes the following orders:-

- (1)** The applicant/2nd defendant is partially within the ambit of the ingredients of granting stay pending appeal because they filed the application promptly.
 - (ii).** They have expressed a genuine apprehension that the appeal might be rendered nugatory, in view of the revelation by the Plaintiff that the property has been sold and eviction orders have been issued and effected.
 - (iii).** Failure to offer security for due performance of the decree should the appeal fail notwithstanding, as the Court has power to impose conditional stay should circumstances permit. And secondly notwithstanding the failure to show existence of substantial loss likely to be suffered.
- (2).** No 1 above notwithstanding the applicant/2nd defendant has been denied the entitlement to stay pending appeal on two fronts:-
- (i)** He has not displayed a letter either on the court's record or in his annexures to show that he has in fact applied for proceedings. In the absence of such a letter there is nothing to demonstrate that the applicant though desirous of appealing is making serious progress to speed up both the filing and disposal of the appeal.
 - (ii)** There are eviction orders on record. However irregularity made as claimed by the applicant, the court cannot ignore them because what is sought to be stayed has already been effected by those eviction orders issued by the Deputy Registrar. It therefore follows that the applicant has to move and have those orders of eviction done away with before the issue of stay can be entertained.
- (3).** For the reasons in No.2 above the application dated 11.10.07 and filed on 16.10.07 has been refused.
- (4).** As for costs since it is on record that execution was deferred pending taxation, which taxation has not been effected and yet eviction orders have been granted, which eviction orders are given to attack, and which eviction orders are contributory factor to the denial of the stay it is not safe to award costs to the Respondent. Hence the order that each party do meet its own costs of this application.

DATED, READ AND DELIVERED ON THIS 22ND DAY OF FEBRUARY 2008.

R.N. NAMBUYE