

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 713 of 2007

JANICE JAHITO KANYI.....APPELLANT

VERSUS

NICK KARIUKI.....RESPONDENT

R U L I N G

By a notice of motion dated 27th November, 2007, the applicant Janice Jahito Kanyi, seeks an order of stay of execution of the judgment and decree, delivered on 20th July, 2007 by the SRM, Milimani in CMCC No.3168 of 2007. In the affidavit filed in support of the application, the applicant swears that he was coerced and forced into signing an agreement admitting owing the respondent the sum of Kshs.800,000/=. Subsequently, the respondent filed CMCC No.3168 of 2007 seeking judgment for the amount admitted. The appellant filed a defence denying the respondent's claim. The respondent then applied for summary judgment relying on the agreement allegedly signed by the applicant. The applicant objected to the application but the trial magistrate ruled in favour of the respondent. The applicant maintains that his defence raised triable issues as the trial magistrate was wrong in relying on the alleged agreement and admissions contrary to Section 25(a) of the Evidence Act. The applicant is now apprehensive that unless orders for stay of execution are granted, the respondent who has already initiated execution proceedings will have him committed to civil jail, and she will not only suffer irreparable loss, but her appeal will also be rendered nugatory.

Mr. Nyangito who appeared for the applicant maintained that the respondent will not be prejudiced if the orders sought are granted. He therefore urged the court to exercise its discretion in the applicant's favour.

In a replying affidavit sworn on 10th January, 2008, the respondent denied that he caused the applicant to be arrested by the police or that the applicant signed any agreement under duress. He maintained that the applicant voluntarily admitted the debt and her application was frivolous and only intended to delay the execution of the judgment entered against her. Mr. Njuguna who appeared for the respondent submitted that the application before court was fatally defective, as it was brought by advocates who were not on record. He further submitted that the applicant had not demonstrated that she would suffer substantial loss if the orders sought are not granted. Regarding the security which had been deposited by the applicant as condition for a temporary injunction issued by the court on 26th November, 2007, counsel for the respondent maintained that there was no valuation of the property offered as security to confirm that the security was adequate.

I have carefully considered this application. I do note that the applicant has already been served with a notice under Order XXI Rule 18 of the Civil Procedure Rules to show cause why execution should not issue against her. There is therefore a real danger that unless the order of stay of execution is granted, the applicant may be committed to civil jail. That would obviously cause her substantial loss. Moreover, the decree is for a sum of Kshs.896,329/90. The respondent has not revealed his means or source of income. The applicant's apprehension that if execution proceeds and the decretal sum is paid to the respondent, it may be difficult to recover the money from the respondent, is therefore not unfounded. Such an eventuality would render the applicant's appeal nugatory.

The applicant has already provided security by way of deposits of title deeds. Contrary to the submissions of the respondent's counsel the evaluation of the property was submitted showing that it is worth well over 15 million. For the above reasons, I grant the application and issue an order for stay of execution on the following conditions: -

- (i) The original title deeds in respect of property known as LR Dagoreti/Riruta/5.69 will remain in court until the appeal is finalized.
- (ii) The respondent is at liberty to register an appropriate inhibition against the aforementioned title with the Lands Office.
- (iii) The applicant shall file and serve a record of appeal within 90 days from the date hereof and take all necessary action to facilitate the speedy disposal of the appeal.
- (iv) In the event that the appeal is not disposed off within 12 months from the date hereof, the order for stay of execution shall lapse unless otherwise ordered by this court.
- (v) Costs of the application shall be in the appeal.

Orders accordingly.

Dated and delivered this 16th day of December, 2008

H. M. OKWENGU

JUDGE

In the presence of: -

Gatuguta H/B for Nyagito for the appellant/applicant

Advocate for the respondent absent