



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 189 of 2003**

1. Land and Environmental Law Division

2. Civil Practice and Procedure:

I: Application for stay of extension

a) Finalized case – Land ownership of consent (Ojwang J)

6 May 2004)

b) Plaintiff/respondents default in terms of consent due to
there former advocates negligence

c) Application notice of motion 4 July 2005 seeking eviction of the plaintiff in default of consent
allowed Aluoch J

d) (1 November 2006)

e) Plaintiff change advocates file application 16 January 2007 seeking extension of time to comply with
consent

f) Application allowed by Ang'awa J (25 May 2007). Ruling by court that the explanation by plaintiff
is accepted, that the former advocate was negligent causing the default.

g) Extension of time given to pay the balance of money due

3. Application by defendant applicant 6 June 2007

a) For stay of execution pending appeal

Reasons

a) Defendant dissatisfied with ruling

b) Previous advocate not misled

c) No compensation was given by court to the 1st defendant for delay in payment

d) Defendant paid land rate and rates

e) That the judge sat on appeal of a fellow judge

f) Orders were issued not sought in the application.

4. In reply

a) Exception that there may be under dealing on matter

b) The plaintiff was allotted the suit plot by government. There was a double allocation to defendant. This was error. The church in order not to be engaged in protracted battle over the property conceded 1st defendant to accept payment of Ksh. 3.5 m.

c) The plaintiffs paid 1.8 million. Balance was to be paid of Ksh.1.7 m.

d) Negotiation began again. The defendants demanded Ksh.500,000,000/- for damages for delay in payment of Ksh.1.7 m.

c) Interest of 27 months actually amounted to Ksh.500,000/- and not Ksh. 5 million.

e) Defendant trying to re negotiate

g) Defendant claims collision with court as cheque signed same day and paid but was rejected by defendant.

5. Finding

a) It is the plaintiff who is to pay defendant

b) Defendant rejected 1.7 m as such sum be deposited to court.

c) Court not sitting on appeal of another judge as Order

17 r 10 Civil Procedure Rules applies.

6. Held: Stay of execution dismissed.

7. Case law - Nil

8. Advocate

M.D. Enonda for Enonda Makoloo Makori & Co. Advocates for the defendant/applicant - present

M. Juma for Wanyoike & Co. Advocates for the plaintiff/respondent- present

ARCHBISHOP RAPHAEL STEPHEN NDINGI MWAN A' NZEKI...1ST PLAINTIFF

PALEN D'SOUZA.....2ND PLAINTIFF

LAWRENCE NJOROGE, THE REGISTERED TRUSTEES OF THE

ARCHDIOCESE OF NAIROBI.....3RD PLAINTIFF

VERSUS

NELSON MUGUKU.....1ST DEFENDANT

COMMISSIOENR FOR LANDS.....2ND DEFENDANT

RULING

I: Background to the application dated 6 June 2007 for stay of execution.

1. The application of 6 June 2007 seeks orders inter-alia:-

“That there be ordered a stay of execution herein of the said orders issued on 22nd June 2007 pending the hearing and determination of an appeal filed by the first defendant in the court of appeal.”

2. The main suit, as stated in my Ruling No.1, concerned land ownership. The suit was finalized by way of a consent before Ojwang J (6 May 2004). Due to the negligence of the plaintiffs former advocate, the terms of the consent was defaulted. The defendant applied by way of a notice of motion (4 July 2005) seeking the eviction of the plaintiffs in default of the consent. This was granted by Aluoch J (1 November 2006). The plaintiffs changed advocates and filed application of 16 January 2007 seeking the extension of time to comply with the consent. This application was heard by myself on 25 May 2007. This court accepted the explanation given by the plaintiff that their former advocates was negligent causing them not to fully comply with the consent. This court gave the extension of time to the plaintiffs to comply with consents

3. Not being satisfied with the ruling of this court, the defendant appealed to the court of appeal through his notice. By the application of 6 June 2007 the defendant prayed there be stay of execution pending appeal.

II Application 6 June 2007 for stay of execution

4. The defendant stated that the former advocate was never misled. She knew what she was doing. The plaintiffs, the defendant argued delayed in paying him the balance of the money. This court should therefore had ordered paid further sums to him by way of compensation but failed to do so. The land was the defendants and he had been paying the land rate and rents. The fact the court allowed the defendant to complete the transaction meant that the orders given amounted to this court sitting on another judge’s appeal. Further the orders issued were never prayed for.

III: In reply by plaintiff

5. This matter, the plaintiffs stated is exceptional as there may have been some under dealing. It was the plaintiff who was allotted the suit plot by the government. There was double allocation later to the defendant. This was an error. The plaintiffs in order not to be engaged in protracted litigation over the property conceded to the 1st defendant to accept to pay him Ksh.3.5 million. The plaintiff him Ksh.1.8 million and the balance to be paid was Ksh.1.7 million.

6. The defendant on demanding the payment of Ksh.1.7 million balance stated he wanted to be paid Ksh.500,000,000/- over and above the original amount to take up for the delay of payment of the sum due. The plaintiff on seeking accountancy experts calculated that for 27 months the actual interest would amount to Ksh.500,000/- and not Ksh.5 million. What this amounted to is a re negotiation of the original sum of Ksh.3.5 million agreed.

7. The defendant further depone that there was something amiss as the sum of Ksh.1.7 million which was paid by cheque on the same day or before of the courts ruling. This did not appear in order accordingly to the defendant. The plaintiff argued that there was nothing amiss. They always had the funds to pay the defendant. If it was not for the plaintiffs former advocate negligence this sum would have been paid immediately.

IV: Finding

8. I have been asked to issue a stay of execution of my order. The defendant in the grounds of the applications stated that he was apprehensive that the plaintiffs would transfer the property to a third party. That the plaintiff does not have the capacity to pay Ksh.1.7 million to him nor sufficient funds to compensate him if the plaintiff would lose the appeal.

9. At the same time the defendant stated the plaintiff had in fact paid him Ksh.1.7 million and returned the said sum of money and stated "it was prepared before the ruling was issued" and thus the defendant states there may have been something a miss.

10. This suit having been compromised, it is important to understand the issues behind it. The plaintiff, the trustee of the Catholic Church was allocated the suit premises/land and were in possession of the same. They were slow in obtaining their title deed but were in possession of letter of allotment. The defendant had never been in possession of the premises. He obtained letters of allotment, then title to the suit premises. It is this leverage he had to negotiate a sum of Ksh.3.5 million as compensation. According to the submission before court he now wants Ksh. 5 million to be paid instead to compensate him. The plaintiff wanted to pay Ksh.500,000/- only,.

11. This court not knowing the above facts merely ruled that the plaintiff who were already in possession for years on the said suit land should be given an opportunity to complete their payments. Not known to this court according to the defendant the plaintiff paid him immediately with a cheque signed before the ruling of the court was written.

The defendants displayed a bankers cheque dated 9 May 2007 whilst this ruling of this court was issued on 22 May 2007. The plaintiff explained this as an attempt to negotiate this matter. The negotiations fell through because the defendant wanted Ksh. 5 million and not 1.7 million.

12. The issues herein is whether the plaintiff have sufficient funds to compensate the defendant, if he wins his appeal in the court of appeal. I find that the plaintiff was paying money to the defendant which they did. He has a right to reject this money pending his appeal but should have had the sum deposited in a joint account of both advocates and in an interest earning account. The other matter he may wish to stay execution but not mentioned extensively or at all, is the issue of transferring the property to the plaintiffs name or another 3rd party.

13. The defendant wants compensation, the issue is how much? I did not obtain the application from defendant that he sought more compensation for the delay in payment. I found and still no reasons for this.

14. I wish to just deal with the aspect that this court was sitting in appeal of another court. I am quite aware that Aluoch J made orders in favour of the defendant. She has since been moved to another Division and for good cause and explanation under order 17 r 10 Civil Procedure Rules whereas the Hon. Judge is not in the station, has been transferred or died, this court is permitted to proceed with the suit. What I was hearing was a review and or variation of an order made. I reject this argument and rule that I was not sitting on appeal on Aluoch J's orders (order 17 r 10 Civil Procedure Rules applies).

15. As to the application before court I would make the following orders:-

- i) That the sum of Ksh.1.7 million be deposited in court by the plaintiff pending the finalization of the appeal to the court of appeal.
- ii) I reject the prayers for stay of execution and rule that plaintiff is at liberty to proceed with the execution as the issue is basically how much compensation should the defendant be paid.
- iii) The application for stay of execution be and is hereby dismissed with costs to the plaintiffs/respondents.

Dated this 10th day of July 2007 at Nairobi.

M.A. ANG'AWA

JUDGE

M.D. Enonda for Enonda Makoloo Makori & Co. Advocates for the plaintiff/respondent **M. Juma for Wanyoike & Co. Advocates for the defendant/applicant**