



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI

ELC NO. 1302 OF 2016

BBAM.....PLAINTIFF

=VERSUS=

MB.....DEFENDANT

RULING

1. This is a Ruling in respect of a Notice of Motion dated 28th October 2019 in which the Defendant/Applicant seeks stay of execution of the Judgement delivered on 24th October 2019 pending hearing and determination of an appeal filed against the said judgement. The Applicant contends that if stay of execution is not granted, she will suffer substantial loss. She contends that already, the Plaintiff/ Respondent has sent a final draft decree to her Advocates for approval and that if stay of execution is not granted, the Respondent will proceed to execute the same which will render the appeal nugatory.
2. The Applicant further contends that the suit property is the only known asset held by the Respondent and that if execution was to proceed, it will be difficult for her to get her share of the suit property in case her appeal succeeds after the suit property has been sold.
3. The Applicant's application was opposed by the Respondent through a replying affidavit sworn on 2nd July 2020. The Respondent contends that the Applicant has not demonstrated that she will suffer substantial loss should stay of execution not be granted. He further contends that the Applicant having not contributed any amount towards the purchase price there is no basis upon which she can suffer loss if stay is not granted. The Respondent also argues that the Applicant has not offered any security and in the event that she succeeds in the appeal which she has filed, there will only be need for reversal of the entry in the register by reinstating the name of the Applicant as a joint owner of the suit property.
4. I have carefully gone through the Applicant's application as well as the opposition thereto by the Respondent. I have also considered the submissions filed by the parties herein. The only issue for determination is whether the Applicant has met the threshold for grant of stay of execution pending appeal.
5. The Applicant's application was brought pursuant to order 42 Rule 6(1) of the Civil Procedure Rules which gives conditions for grant of stay pending appeal. The conditions are that the application must be brought without unreasonable delay; the Applicant has to demonstrate that she will suffer substantial loss if stay is not granted and that there has to be such security for the due performance of the decree.
6. In the instant case, judgement which is being appealed against was delivered on 24th October 2019. The application for stay was filed on 31st October 2019. There was therefore no delay in filing the same. The issue which falls for determination is whether the Applicant has demonstrated that she will suffer substantial loss if stay is not granted. In determining this issue, it is imperative that a brief background of the case be given. The Applicant and the Respondent had separated from their respective spouses. When the two met in London, they developed a liking for each other which resulted in intimate affair. The Respondent later moved to Kenya where the Applicant who is a British citizen would occasionally visit him. The Respondent purchased the suit property entirely using his own resources. He put the name of the Applicant as a joint owner.
7. The Applicant later moved out of Kenya on grounds that the Respondent was seeing other women behind her back. The Applicant went and re-married in Britain where she stays. The Respondent brought a suit against the Applicant seeking to have her name removed from the title on the ground that she was a mere trustee. The Applicant counter-claimed for half share in the property on grounds that she had become a co-owner on the basis of presumption of marriage by co-habitation.
8. The Plaintiff's case succeeded whereas the Defendant's counter-claim was dismissed. It is against this background that the Applicant is seeking stay of execution. It is from this background that I will determine whether the Applicant has demonstrated that she will suffer loss. The counter-claim which the Applicant had filed was filed in a wrong court without jurisdiction. In the Judgement, I clearly said that there had been no pronouncement of presumption of marriage by co-habitation for it to be a basis of the Applicant's claim to the suit property. I

could not proceed to adjudicate on this issue as I did not have jurisdiction to do so.

9. Demonstration of substantial loss is the cornerstone for grant of stay. It is clear, given the background of this suit that the Applicant has not demonstrated that she will suffer any substantial loss. A person cannot say that she will suffer substantial loss without demonstrating that substantial loss. Substantial loss has to be considered from the basis upon which the Applicant alleging it would arise. In the instant case, the Applicant's contention of marital status had not been determined. She filed her counter-claim in a wrong court. This being the case, I do not see how she has demonstrated that she will suffer substantial loss. The issue of security for costs would have been considered if there was demonstration of substantial loss. I therefore find no merit in this application which is dismissed with costs to the Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 21ST DAY OF JANUARY 2021.

E.O.OBAGA

JUDGE

In the Virtual presence of:-

M/s Kembo for M/s Onyango for Defendant/Applicant

M/s Kulohoma for Mr Bwire for Plaintiff/Respondent

Court Assistant: Hilda

E.O.OBAGA

JUDGE