



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NO. 224 OF 1987

MRS WANJIRU KAMAU.....1ST PLAINTIFF

KARUNGARI KAMAU KAIME.....2ND PLAINTIFF

VERSUS

JOSEPH BORO NGERA.....DEFENDANT

RULING

This is a Notice of Motion by the Plaintiffs made under **Order XLI Rule 4(1) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act** seeking the orders of this Court that the conditional stay of execution granted to the Defendant having lapsed, and further the Defendant having failed to fulfil the conditions given by the Court for the grant of the said stay orders, the said stay orders be vacated and the Defendant be ordered to vacate the suit land and not interfere with the Plaintiffs quiet possession of the same. The grounds in support of the application are that the Defendant has failed to deposit the sum of Kshs 500,000/= as security for costs as ordered by the Court on the 9th of July 2003. The Plaintiffs further stated that the Defendants continued stay on the suit land was criminal as it was in contravention of **Section 22 of the Land Control Act (Cap 302 Laws of Kenya)**. The Application is supported by the annexed affidavit of Wanjiru Kamau Kaime. The Application is opposed. The Defendant, Joseph Boro Ng'era has filed a replying affidavit in opposition to the application. In the said replying affidavit the Defendant has deponed that the Plaintiffs could not seek to enforce the judgment yet the same Plaintiffs had not satisfied the decree of the Court issued against them. The Defendant further deponed that if the Plaintiffs had paid him the amount ordered by the Court, he would have complied with the Court order and deposited the money in Court.

At the hearing of the Application, Mr Muhia, Learned Counsel for the Plaintiffs submitted that the Defendant had been granted a conditional stay of execution of the decree of this Court on condition that he was to deposit the sum of Kshs 500,000/= within twenty one days of the date of the said order. The Plaintiffs submitted that the Defendant had failed to comply with the said order and had further refused to vacate from the suit property as ordered by the Court. The Plaintiffs submitted that this Court should order the Defendant to vacate the suit land as decreed by the judgment of this Court.

Mr Mindo, Learned Counsel for the Defendant submitted that there was no decree which had been executed. Learned Counsel submitted that the decree of this Court had not been extracted and therefore the Plaintiffs could not apply to execute against the Defendant. The Defendant further submitted that the Plaintiffs had filed the application under the wrong provision of the law. It was the Defendants submissions that **Order XLI Rule 4(1) of the Civil Procedure Rules** was not applicable in this instance. The Defendant further submitted that the Plaintiffs ought to have made the application under **Order XXI Rule 86(1) of the Civil Procedure Rules**. It was the Defendants further submission that the Plaintiffs had not proved that the Defendant has failed to pay the sum of Kshs 500,000/= security as ordered by the Court.

In reply, Mr Muhia submitted that the Plaintiffs were seeking the vacation of the orders of this Court which stayed the execution of the decree of this Court pending the hearing of the Intended Appeal. The Plaintiffs argued that since the Defendant had not complied with the condition for the grant of the said stay of execution, the said conditional stay of execution granted should be vacated.

I have considered the rival submissions made by the Counsel for the Plaintiff and Counsel for the

Defendant. I have also read the pleadings filed in this case in respect of the application before this Court. Judgment was entered in favour of the Plaintiffs against the Defendant by Lady Justice Sarah C. Ondeyo on the 21st of January 2003. The said Court ordered the Defendant to vacate the suit property within ninety (90) days of the delivery of the said judgment. The Plaintiffs were ordered to refund the Defendant the sum of Kshs 1,011,537/40 which was the purchase price paid. Each party was ordered to bear its own costs. The Defendant was aggrieved by the said decision and duly lodged a Notice of Appeal indicating his intention to file an Appeal to the Court of Appeal against the said judgment. The Defendant also filed an application for stay of execution of the judgment and decree of the Court pending the hearing and determination of the said Appeal to be filed. The Application was argued and a ruling delivered on the 9th of July 2003 by Lady Justice Jessie Lesiit. At page 2 of the said ruling the Learned Judge stated as follows:

***“I find merit in this Application. I will allow the Application***

***for stay of execution on condition that the Applicant pays***

***Kshs 500,00/= to Court as security for costs within 21 days from the date of this ruling. The costs of the Application be in the Appeal.”***

The Defendant apparently did not deposit the said sum of Kshs. 500,000/= in Court within twenty one days as ordered by the Court. The Defendant has continued to enjoy the orders of stay granted by this Court yet he did not comply with the condition attached to the issuance of the said order of stay, that is, to deposit the sum of Kshs 500,000/= in Court as security for costs for the Intended Appeal. When the Defendant was served with the Plaintiff's application, he cheekily responded in his replying affidavit that he could not comply with the order issued by the Court because the Defendant had not paid him the sum decreed by the Court to enable him pay the same to the Court. This Court finds the said response by the Defendant to be disparaging to the Plaintiffs. The issue for determination by this Court in this Application is whether, in view of the fact that the Defendant had failed to comply with the conditions attached to the order of stay of execution granted, he should continue to enjoy the said orders of stay by residing on the suit land. This Court finds that the Defendant having failed to comply with the orders of this Court to deposit the sum of Kshs 500,000/= as condition to be granted stay of execution pending the hearing of the Intended Appeal. This Court has no option but to vacate the said orders of stay of execution granted. The said order of stay of execution granted on the 9th of July 2003 are hereby vacated.

The Plaintiffs are therefore at liberty to commence the execution process to give effect to the Judgment of the Court delivered on the 21st of January 2003. I noted that in both judgment and the ruling given when the Defendant applied for stay of execution the Court did not state what would happen in the event the Defendant defaulted in vacating the suit land as ordered. I will rectify the anomaly. As the Defendant has failed to vacate the suit land within the ninety (90) days that he was granted by this Court, I hereby order that the Defendant do vacate the suit land within seven (7) days after being served with the duly extracted decree of this Court together with a copy of this order, in default the Defendant be evicted from the suit land. The Plaintiffs shall have the costs of the Application. The Defendant, may apply to execute for the decretal amount awarded to him if he so wishes. The Plaintiffs shall have the costs of this Application.

**DATED at NAKURU this 9th day of November 2004.**

**L. KIMARU**

**AG. JUDGE**