



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 1989 OF 1998

ORIOLE HOLDINGS LTD.....PLAINTIFF

VERSUS

LOISA N. MWAURAA.....DEFENDANT

RULING

This is the defendants application under Order XLI Rule 4 CP Rules and S. 3 A CP Act for an Order that the execution of the judgment delivered on 11.7.2001 be stayed pending the lodging and hearing of the defendants intended appeal.

Defendant filed a Notice of Appeal on 15.7.2001. Plaintiffs is a limited liability company. It filed this suit for vacant possession of L.R. 1159/12 Karen occupied by the defendant. Defendant claimed that she was occupying the house as a wife of one Charles Levitan and that the house was a matrimonial home. The property in dispute originally belonged to Charles Levitan who transferred it to his son Anthony Levitan on 25.8.89. Anthony Levitan in turn transferred the property to plaintiff on 30.3.90. Charles Levitan died on 11.1.97. In Probate and Administration Cause NO. 159 of 1997 involving the estate of Charles Levitan defendant filed an application for provision for a dependant under s. 26 of the law of Succession Act. On the basis that she was the widow of Charles Levitan. Visram J on 23.3.2001 ruled among other things, that, defendant was not a widow of Charles Levitan and that she was not entitled to provision from the suit property or other Assets.

As the defendants right of Ownership or occupation of the suit property was determined in the succession cause, this court on 11.7.2001 allowed the plaintiffs claim and ordered defendant to give vacant possession of the suit property to plaintiff within 30 days. Defendant prays for a stay of execution of that order pending Appeal. She intends to appeal against the decision in this court and against the decision in Probate and Administration Cause NO. 159.

By Order XLI Rule 4(1), this court may for sufficient cause stay the execution of the decision pending Appeal. By order XLI Rule 4(2) the order for stay of execution should not be made unless

- (a) Court is satisfied that substantial loss may result to the applicant unless the order of stay is made and that the application has been made without unreasonable delay.
- (b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant

This application should be determined within the ambit of Order XLI Rule 1 and 2 CP Rules.

Dr. Kamau Kuria, learned Counsel for the applicant, has summarized the grounds of the intended Appeal and has addressed the court on the merits of those grounds including the supporting law.

He intends to convince the Court of Appeal, inter alia, that:

- (i) The Court offended the principle of equality of sexes and was gender insensitive in arriving at its decision
- (ii) That Charles Levitan acted fraudulently when he transferred the suit property to his son Anthony Levitan.
- (iii) That plaintiff company, in law holds the suit property in trust for Charles Levitan and for the defendant
- (iv) That denial of adjournment to defendant to engage a lawyer deprived her of a chance to put her case fully before the court.

Mr. Mcourt, learned Counsel for the plaintiff, contended, inter alia, that this court is being asked to grant a stay in respect of a judgment given by another court – that is by the Probate Court. But applicants counsel argued that the holding of Visram J on the status of the defendant had a direct bearing in this case, in that, in essence defendant was non – suited

. If the intended appeal against the judgment of this court is prima facie frivolous, then there would be no sufficient cause for granting an order of stay of execution. As the defendants counsel concedes, the only viable defence to plaintiffs claim is in paragraph 7 of the Defence that the suit property is a matrimonial home on which defendant settled together with her husband and lived there on without any interruption. The court had to decide the suit within the ambit of the pleadings and on the issues which arose from the pleadings.

There was no counterclaim. Defendant did not pray for the cancellation of the registration of the plaintiff as the proprietor of the suit property As there was no counterclaim, she did not seek a declaration that she is entitled to the share of the suit property. She did not plead that transfer to Anthony Levitan and subsequently to plaintiff was fraudulent. She did not set out particulars of fraud in the defence. More importantly, the probate court had at the time of hearing of the suit already ruled that defendant was not a widow of Charles Levitan and that she was not entitled to provisions from the suit property. The defendants defence in this suit could not stand. It is not really the decision of this court which deprived her of her rights to suit property. It is the decision in the succession cause which deprived her of her rights to the suit property. This suit is independent from the succession cause. The application for stay of execution has to be decided on the basis of this suit. It is in this suit that applicant has to satisfy the court that there is a sufficient cause for staying the execution of the decree. From the foregoing I am not satisfied that the intended appeal from the decision of this court is prima facie meritorious.

The practice of courts of law is not to deprive successful litigants of their fruits of litigation. The court has however a duty to see that the defendant's appeal if successful will not be rendered nugatory.

In the present case, if the order of stay of execution is not granted, the Appeal, in my view, will not be rendered nugatory. The intended Appeal can be rendered nugatory only if the suit property is transferred or alienated during the pendency of the Appeal. The applicant has not stated that plaintiff is likely to transfer the property. There is no evidence on which I can find so. If the applicants vacates the suit premises and her appeal ultimately succeeds, she will only have suffered temporary inconvenience.

Applicants counsel says that applicants should be allowed to occupy the suit premises without any conditions such as depositing the market rent.

Plaintiff's counsel submits that plaintiff would be left in a limbo if the order of stay is granted as it will not be a party to the Appeal in the succession cause and therefore will not do anything in the appeal. As it

is the decision in the succession cause which deprived defendants of any rights to the suit property, it is probable that defendant will not prosecute the appeal against the decision in this suit until the Appeal against the decision in the succession cause is determined.

The unpredictable and indefinite delay likely to occur will cause plaintiff great financial loss. Defendant has not offered security for that financial loss

. For the foregoing reasons, it is unjust to deny plaintiff the fruits of its litigation in the special circumstances of this case. Consequently, I dismiss the application with costs,.

E. M. Githinji

Judge

20.11.2001

Miss Ndegwa holding brief for Dr. Kamau Kuria present

Mr. Mcourt for Respondent present

Mr. Mcourt

I apply for typed copy of the Ruling

Order: Ruling to be typed and copy supplied as prayed.

E. M. Githinji

Judge