



**Oundo v Ondiek (Environment and Land Case Civil Suit
E013 of 2023) [2024] KEELC 3546 (KLR) (2 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 3546 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND CASE CIVIL SUIT E013 OF 2023**

SO OKONG'O, J

MAY 2, 2024

BETWEEN

ENOS OLANDO OUNDO PLAINTIFF

AND

MAURICE OMONDI ONDIEK DEFENDANT

RULING

1. The facts giving rise to this suit are set out in detail in the ruling delivered by this court on 8th February 2024. In summary, the Plaintiff brought this suit against the Defendant on 29th September 2023. The Plaintiff averred that he was the owner of all that parcel of land known as Kisumu/Konya/6496 (hereinafter referred to only as “the suit property”. The Plaintiff averred that the suit property was initially owned by the Defendant who charged the same to Equity Bank of Kenya Limited (hereinafter referred to only as “Equity”) to secure a loan. The Plaintiff averred that he purchased the suit property at a public auction on 1st April 2021 at Kshs. 3,000,000/- after the Defendant defaulted on his loan repayment obligations to Equity which put up the property for sale by public auction in the exercise of its statutory power of sale. The Plaintiff averred that the suit property was registered in his name on 3rd June 2022 after paying the purchase price in full.
2. The Plaintiff averred that even after the suit property was transferred to his name, the Defendant refused to vacate the suit property and hand over possession to the Plaintiff. The Plaintiff averred that the Defendant had remained in possession of the suit property and was also collecting rent from tenants occupying part of the premises. The Plaintiff averred that the said acts by the Defendant amounted to trespass.
3. The Plaintiff sought judgment against the Defendant for; a declaration that the Defendant's acts of interference with the suit property were illegal and void, a permanent injunction restraining the Defendant from obstructing, residing on, managing and /or interfering with the suit property, an order for vacant possession of the suit property, damages for trespass and costs of the suit.



4. Together with the plaint, the Plaintiff filed a Notice of Motion application dated 30th September 2023 seeking a temporary injunction restraining the Defendant from obstructing, residing on, managing and/or dealing or interfering in any way whatsoever with the suit property pending the hearing and determination of the suit. In his affidavit in support of the application, the Plaintiff averred among others that on several occasions, he called upon the Defendant to vacate the suit property but he had refused to do so. The Plaintiff averred that he stood to suffer grave loss and prejudice if the orders sought were not granted since the suit property was exposed to wastage and damage.
5. The Plaintiff's injunction application was opposed by the Defendant through a replying affidavit sworn on 4th October 2023. The Defendant admitted that he took a loan from Equity secured by the suit property a substantial portion of which he claimed to have paid. The Defendant averred that he ran into financial problems that led to his default in keeping up with the loan repayment schedule. The Defendant averred that he pleaded with Equity to reduce the interest that had accrued on the loan so that he could pay a sum of Kshs. 3,000,000/- but Equity insisted that he had to deposit with them a sum of Kshs. 6,000,000/-. The Defendant averred that the suit property was put up for sale without notice to him while he was still negotiating with Equity on the loan repayment terms.
6. The Defendant averred that he did not know of the sale of the suit property until this suit was filed and he was served with the pleadings and a court order. The Defendant averred that the value of the suit property including developments thereon was Kshs. 10,000,000/- and that the same was sold to the Plaintiff at a throwaway price of Kshs. 3,000,000/-. The Defendant averred that the sale of the suit property to the Plaintiff was irregular as due process was not followed. The Defendant averred that the title held by the Plaintiff was in the circumstances invalid. The Defendant averred that he was capable of redeeming the suit property if he was given time by Equity. The Defendant urged the court to dismiss the Plaintiff's application.
7. In a ruling delivered on 8th February 2024, the court allowed the Plaintiff's application and restrained the Defendant from obstructing, residing in, managing and/or dealing or interfering in any way whatsoever with the suit property pending the hearing and determination of this suit. The court also awarded the Plaintiff the costs of the application. In the ruling, the court stated as follows in part:

I am also persuaded that the Plaintiff stands to suffer irreparable injury unless the orders sought are granted. The Defendant has not repaid a loan of Kshs. 4,080,000/- excluding interest which he obtained from Equity in 2013. There is no evidence that the Defendant would be able to make good any damage or waste committed on the suit property. The Defendant has not denied that he is collecting rent from premises on the suit property. I am not convinced that the Defendant would be able to refund such rent should he lose the case at the trial. There is therefore a risk that the loss likely to be incurred by the Plaintiff if the orders sought are not granted cannot be compensated in damages. The Plaintiff having established a prima facie case against the Defendant and that he stands to suffer irreparable harm, it is not necessary to consider the balance of convenience. I wish to say that even if I were to consider the balance of convenience, the same would tilt in favour of allowing the application. The Plaintiff is the registered owner of the suit property having purchased the same at Kshs. 3,000,000/-. There is no justification for the Defendant's continued occupation and interference with the property."
8. What is now before me is the Defendant's Notice of Motion application dated 23rd February 2024 in which the Defendant has sought a stay of the orders that were given by the court on 8th February 2024 pending the hearing and determination of the appeal that the Defendant intends to file in the Court of Appeal against the same. The application that was supported by the affidavit of the Defendant sworn



on 23rd February 2023 was brought on the grounds that the Defendant was dissatisfied with the said ruling of the court and had lodged an appeal against the same in the Court of Appeal. The Defendant averred that he had an arguable appeal with high chances of success. The Defendant averred that he stood to suffer substantial loss unless the stay sought was granted and that the application was brought without unreasonable delay.

9. The application was opposed by the Plaintiff through a replying affidavit sworn on 11th March 2024. The Plaintiff averred that the application was frivolous, misconceived and amounted to an abuse of the process of the court. The Plaintiff contended that the application was filed in bad faith as a delaying tactic to deny the Plaintiff the fruits of successful litigation. The Plaintiff averred that the Defendant had not satisfied the threshold for granting the orders of stay sought. The Plaintiff urged the court to dismiss the application with costs to the Plaintiff.

10. I have considered the Defendant's application together with the affidavit filed in support thereof. I have also considered the Plaintiff's affidavit filed in reply to the application. Finally, I have considered the oral submissions by the advocates for the parties and the authorities cited in support thereof. The Defendant's application was brought principally under Order 42 Rule 6 of the Civil Procedure Rules. Order 42 Rule 6(1) and (2) of the Civil Procedure Rules provides that:

6.

(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under sub-rule (1) unless-

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as ultimately be binding on him has been given by the applicant.”

11. In Kenya Shell Limited v. Karuga (1982 – 1988) I KAR 1018 the court stated that:

It is usually a good rule to see if order XLI rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money.”

12. I am persuaded that the Defendant's application was brought without unreasonable delay. I am also satisfied that the Defendant is likely to suffer substantial loss if the stay sought is not granted. It is not disputed that the Defendant is in occupation of the suit property. It is also not disputed that in the ruling in respect of which a stay has been sought, the Defendant was for all intents and purposes



ordered to vacate the suit property. The effect of that order is that unless the stay sought is granted, the Defendant risks being evicted from the suit property while his appeal to the Court of Appeal is pending. On the issue of security, the Defendant stated that he is willing to abide by any order on security that the court may make as a condition for granting the stay sought. In their submissions, the Defendant proposed a security in the sum of Kshs. 100,000/- while the Plaintiff proposed a security of Kshs. 3,000,000/- if the stay was granted.

13. The Plaintiff purchased the suit property at Kshs. 3,000,000/- on 1st April 2021. Three years down the line, the Plaintiff has not been able to take possession of the same. The Defendant is in possession of the property and is deriving benefit therefrom. The suit property has residential premises which are rented out. It is the Defendant who has been collecting rent for all those years and will continue to collect rent pending the hearing of the appeal to the Court of Appeal. In his replying affidavit to the Plaintiff's application that gave rise to the ruling the subject of the intended appeal, the Defendant had stated that he was willing to pay Equity Kshs. 3,000,000/- to redeem the suit property. Since this is the same amount that was paid by the Plaintiff as the purchase price for the suit property, it is only fair that the Defendant deposits an amount similar or nearer to that as security.

Conclusion

14. The upshot of the foregoing is that the Defendant's Notice of Motion application dated 23rd February 2024 has merit. The application is allowed in terms of prayer 3 thereof. The Defendant shall deposit in an interest-earning bank account in the joint names of the advocates on record for the parties a sum of Kshs. 2,500,000/- as security within 14 days from the date hereof in default of which the stay granted herein shall stand discharged without any further reference to the court. The costs of the application shall be in the cause.

DELIVERED AND DATED AT KISUMU ON THIS 2ND DAY OF MAY 2024

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Aboge for the Plaintiff

Mr. Nyanga for the Defendant

Ms. J. Omondi-Court Assistant

