



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MAKUENI

ELC CASE NO. 19 OF 2017

**BERNARD MUSYOKA KINYANZWII.....PLAINTIFF**

**VERSUS**

**ALICE WANZA NZIOKA**

**(Being the legal representative of AARON KYULU NZIOKA).....DEFENDANT**

**RULING**

1. Two applications are for determination. The first is dated 1<sup>st</sup> August 2019 and filed on 6<sup>th</sup> August, 2019. It was filed by the Defendant under Order 22 Rule 25 of the Civil Procedure Rules and all other enabling provisions of the Law.

2. The Defendant seeks the following Orders: -

**i. That this Honourable Court be pleased to order a stay execution of the judgment/Ruling delivered on 28<sup>th</sup> May 2019 in respect of this case and any other orders therein pending the hearing and determination of the Intended Appeal herein.**

**ii. That any other or further orders this court may deem fit to grant.**

**iii. That the costs of this application be in the cause.**

3. The application is supported by the affidavit of Alice Wanza Nzyoka sworn on the same day.

The basis of the application is that a summary judgment and other orders were entered against the Defendant on 28<sup>th</sup> May, 2019. That being dissatisfied, the Defendant opted to file an appeal against the said judgment. That on 28<sup>th</sup> June, 2019 a Notice of Appeal was filed at the Court of Appeal and the said Notice was served upon the Plaintiff's firm of Advocates, B.M. Mung'ata & Co. Advocates. That the Defendant is within time limits as she awaits admission of the said appeal for hearing. That the Defendant would suffer great injustice if the orders sought are not granted because she would be evicted from her homestead while the intended appeal would be rendered nugatory.

4. The application is opposed by Bernard Musyoka Kinyanzwii vide the Replying affidavit sworn on 18<sup>th</sup> November, 2020. It is deponed therein that to date, the Defendant has never filed a record of Appeal despite having sixty (60) days from the date of filing of the Notice of Appeal. That the Defendant/Applicant has not demonstrated that she meets the legal threshold for a grant of the orders sought. That the that application is frivolous, an abuse of the court process and prays that the same be dismissed with costs for want of merit.

5. Further to the above application, the Plaintiff filed an application dated 15<sup>th</sup> November, 2019 under certificate of urgency of even date. It is brought under Order 41 Rules 1, 2 & 4 of the Civil Procedure Rules and Sections 3A and 63(a) of the Civil Procedure Act. He seeks the following Orders therein: -

**i. Spent.**

**ii. That an eviction order do issue against the Respondent and the same to be enforced by a licensed auctioneer or Court bailiff.**

**iii. That the OCS Makueni Police Station or any other OCS under whose jurisdiction the land is do give security.**

**iv. That costs of this application be paid by the Respondent.**

6. The application is supported by the affidavit of Bernard Musyoka Kinyanzwii sworn on 15<sup>th</sup> November, 2019. He deponed therein that a judgment was entered by this Court in his favour on 28<sup>th</sup> May, 2019 but the Defendant/Respondent is yet to comply by vacating his land. That while in the aforesaid occupation of the suit land, the Defendant has planted crops in addition to making bricks which activities were causing wanton loss and destruction to the Plaintiff's land. That the Plaintiff has been denied access, occupation, quiet use and enjoyment of the suit land. That unless the Defendant is evicted by an order of this Court, the Plaintiff will suffer irreparably.

7. The Defendant/Respondent has opposed the said application through her affidavit sworn on 20<sup>th</sup> November, 2020. She deponed therein that the Plaintiff's application is premature because she had filed an application earlier in time viz the Notice of Motion dated 1<sup>st</sup> August, 2019. That she has already filed and served a Notice of Appeal challenging the judgment of this Court thus if the Plaintiff's application were to be allowed, her appeal would be rendered nugatory and she would also suffer irreparable loss. That land matters are very emotive and sensitive and therefore it would be prudent to allow her to extinguish her appeal channels prior to issuing eviction orders. That she has been living in the suit property since she was born in the year 1970 and it is also where her parents lived. That she is also a single mother living at the suit property with her three children. That the remains of both her parents are interred in the suit property since 2001 and 2013 respectively.

8. Both parties duly filed their respective submissions as per the directions issued on 23<sup>rd</sup> November, 2020. On the Defendant's application for stay of execution of the decree, it is common ground from the parties' submissions that the prerequisite conditions for a grant of the orders sought herein are well spelt out under Order 42 Rule 6 (2) of the Civil Procedure Rules (2010). These are: -

**i. That substantial loss may result to the Applicant unless the order is made;**

**ii. That the application has been made without unreasonable delay;**

**iii. That security has been given by the Applicant for the due performance of the decree as may ultimately be binding on her.**

9. On substantial loss, the Defendant/Applicants' contention is that she has been living in the suit property since 1970 when she was born. That being an elderly single mother of three children, she would be rendered homeless if the Plaintiff's application for eviction orders was allowed. The Applicant cited several authorities in support of her application but only annexed one to the submissions namely: -

**Beatrice Ndunguri Mwai & another -Vs- Sicily Wawira Titus & another [2020] Eklr.**

10. On his part, the Plaintiff/Respondent submitted that the Applicant has not demonstrated any substantial loss that she stands to suffer. The mere allegations that the Applicant will suffer a great injustice and that her intended Appeal would be rendered nugatory are not sufficient to grant the orders sought. No evidence has been annexed to the Applicants' supporting affidavit and as such there is no basis to find any substantial loss.

11. On the aspect of delay, it is noted that judgment herein was delivered on 28<sup>th</sup> May, 2019. The Applicant then filed a Notice of Appeal on 24<sup>th</sup> June 2019 and the application herein was filed on 6<sup>th</sup> August, 2019. That is a span of about ten weeks.

12. On security, the Plaintiff/Respondent has noted no willingness by the Applicant to provide the same for the due performance of the decree. As such, it is submitted that the application lacks merit and ought to be dismissed with costs. The Plaintiff/Respondent relied on two authorities: -

**Jaber Mohsen Ali & another -Vs- Priscillah Boit & Another [2014] eKLR; and Kiplagat Kotut -Vs- Rose Jebor Kipngok [2015] eKLR.**

13. After evaluating the parties' submissions in respect of the Defendant's application for stay, it is noted that the requirements of Order 42 Rule 6 (2) of the Civil Procedure Rules 2010 must be satisfied. This Court's discretion to grant an order for stay of execution pending an appeal is guided by the Court of Appeal decision in **Butt -Vs- Rent Restriction Tribunal [1982] KLR 417** where it was held as follows: -

**“1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.**

**2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.**

**3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.**

**4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.**

**5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of**

execution to lapse.”

14. In my view, the length of time from the date of judgment to filing the formal application herein was ten weeks. I find no justification to the Respondent’s assertion that there was unreasonable delay in the making of the application.

15. On substantial loss, I find that the Applicant has not demonstrated in clear terms the nature of substantial loss she is likely to suffer should execution of the decree herein proceed. In fact, the Applicant has merely repeated that she stands to suffer substantial loss without discharging the evidentiary burden attached thereto. I am minded to agree with Platt Ag. J.A. (as he was then) when he held as follows in **Kenya Shell Ltd -Vs- Kibiru [1986] KLR 416: -**

**“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.”**

16. Lastly, the Applicant has not expressed her willingness to abide by such order for security as this Court will order in her application. I can only agree with the Respondent’s submission that the application is being made in bad faith with an intention to hamper valid execution of judgment.

17. Given the above findings, it is my view that there is no sufficient cause to inhibit the Plaintiff/Respondent’s right to enjoy the fruits of his judgment. The application dated 1<sup>st</sup> August, 2019 is hereby dismissed with costs to the Respondent.

18. I am now left with the decision on whether the Plaintiff/Applicant has demonstrated merit in his application dated 15<sup>th</sup> November, 2019. It is not in dispute that in this court’s judgment, I found the Plaintiff to be the joint registered owner of the suit property known as LR. No. Makueni/Iuani/1020 together with his mother one Kasamu Kinyanzui Ngotho. Under Section 24(a) of the Land Registration Act, 2012 all rights and privileges appurtenant to the registration of a person as the proprietor of land shall vest in that person absolutely. I also found the Defendant to be a trespasser in the suit property.

19. Nonetheless, since an eviction order was not sought in the plaint therein, the Plaintiff has now sought to enforce the judgment by seeking the orders herein. Whereas, I agree that it is in the interest of justice that the Defendant should vacate the suit premises, I find it necessary to point out that this application may have been premised on the wrong provisions of the law. Order 41 Rule 1 of the Civil Procedure Rules, 2010 deals with the appointment of receiver over the suit property. I find that provision of the law being extraneous to these proceedings and more likely to bring confusion based on all the duties and nuances attached to such appointments. Order 22 Rule 29 of the Civil Procedure Rules is the much appropriate as this application has been made pursuant to the execution of a decree for immovable property.

20. Order 22 Rule 29(1) provides as follows;

**Where a decree is for the delivery of any immovable property, possession thereof shall be delivered to the party to whom it has been adjudged, or to such person as he may appoint to receive delivery on his behalf, and, if necessary, by removing any person bound by the decree who refuses to vacate the property.**

21. I am in agreement with the sentiments of Munyao J. in the authority that has been cited by learned counsel for the Plaintiff/Applicant i.e., **Josphat Kuria Gathoni -Vs- James Maina Njoroge & 3 others [2019] eKLR** wherein the Court held as follows;

**“Whichever way I look at it; I do not see how the plaintiff can fail in this suit. He is the title holder and the defendants have not demonstrated any right over the suit land... the defendants have no right to be on the land without the permission of the Plaintiff. The plaintiff is otherwise entitled to the orders of eviction and permanent injunction as prayed against the defendants. I will give the defendants 30 days to vacate the land and if they do not do so, the plaintiff is at liberty to apply for eviction.”**

22. On the basis of the foregoing, I shall grant prayers 2 and 3 of the application dated 15<sup>th</sup> November, 2019 with temporary reprieve of thirty (30) days hereof for the Defendant/Respondent to voluntarily exit from the suit property. Costs shall be in the cause.

**SIGNED, DATED AND DELIVERED AT MAKUENI VIA EMAIL THIS 19<sup>TH</sup> DAY OF APRIL, 2021**

.....

**HON. MBOGO C.G.**

**JUDGE**

**Court Assistant: Mr. Kwemboi**