



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC SUIT NO. 555 OF 2011**

**MARY NYAMBURA MACHARIA.....PLAINTIFF**

**VERSUS**

**COUNTY GOVERNMENT OF NAIROBI.....DEFENDANT**

**RULING**

On 3<sup>rd</sup> August 2021, judgment was entered herein for the plaintiff against the defendant on the following terms;

1. That a permanent injunction is issued restraining the defendant from trespassing on, constructing on, transferring, disposing of, alienating, demolishing, wasting, or in any manner interfering with the land parcel known as Plot No. 110 Komarock Infills-Huruma Self Help (hereinafter referred to as “the suit property”).
2. That it is declared that the plaintiff is the beneficial owner of the suit property.
3. That the defendant shall pay to the plaintiff special damages of Kshs. 870,000/- which were proved at the hearing.
4. That the defendant shall pay to the plaintiff the global sum of Kshs. 6,040,000/- being general damages for illegal demolition of the plaintiff’s buildings and violation of the plaintiff’s constitutional right to a fair hearing and resulting mental anguish.
5. That the defendant shall bear the costs of the suit.

The defendant was aggrieved by the said judgment and filed a notice of its intention to appeal against the same to the Court of Appeal. The defendant also wrote to the Deputy Registrar of the court requesting to be supplied with certified copies of the proceedings for the purposes of the intended appeal. What is now before me is the defendant’s Notice of Motion application dated 16<sup>th</sup> September 2021 seeking stay of execution of the said judgment pending the hearing and determination of the intended appeal against the same to the Court of Appeal. The application has been brought on the grounds set out on the face thereof and on the affidavit of Erick Odhiambo Abwao sworn on 16<sup>th</sup> September 2021. The defendant has averred that it is aggrieved by the said judgment and intends to appeal against the same to the Court of Appeal. The defendant has averred that the plaintiff was wrongfully awarded hefty damages and that there is imminent danger of the plaintiff executing the decree for the recovery of the said amount thereby rendering the intended appeal nugatory. The defendant has averred that if the decree of the court is executed, the defendant would suffer substantial and irreparable loss. The defendant has averred that its intended appeal has high chances of success and that the plaintiff will not suffer any prejudice if the application is allowed. In its affidavit in support of the application, the defendant has averred that it is ready to abide by any condition that may be imposed by the court for granting the order sought.

The application is opposed by the plaintiff through a replying affidavit sworn on 1<sup>st</sup> November 2021. The plaintiff has averred that she has waited for the determination of her claim for 10 years and that the defendant’s intention is to prolong that period. The plaintiff has averred that the application is an abuse of the process of the court and that the same is intended to deny the plaintiff the fruits of the judgment made in her favour. The plaintiff has averred that the intended appeal is not arguable and that if the court is inclined to exercise its discretion in favour of granting the order sought, the defendant should be ordered to deposit the entire decretal amount in an interest earning bank account in the joint names of the advocates on record for the parties. The plaintiff has contended that the application has not met the threshold for granting an order for stay of execution.

The application was heard on 9<sup>th</sup> November 2021 when the parties relied on their affidavits in support of and in opposition to the application. I have considered the application together with the affidavit filed in support thereof. I have also considered the replying affidavit filed by the plaintiff in opposition to the application. The application for stay was brought under Order 42 Rule 6 of the Civil Procedure Rules. Order 42 Rule 6(2) of the Civil Procedure Rules provides that:

**“(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.”**

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 corner stone 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.”**

I am persuaded that the defendant is likely to suffer substantial loss if the stay sought is not granted. In the judgment delivered by this court on 3<sup>rd</sup> August 2021 which is sought to be stayed, the defendant was awarded in excess of Kshs. 6,900,000/- as damages. If the cost of the suit that was also awarded to the plaintiff is added, the plaintiff would seek to recover in excess of Kshs. 7,000,000/- from the defendant. This is a substantial amount. In the event that the amount is paid to the plaintiff and the defendant succeeds in its appeal in the Court of Appeal, the defendant may have difficulty in recovering the amount from the plaintiff. It is not disputed that loss of Kshs. 7,000,000/- would be a substantial loss for the defendant. For that reason, I am inclined to grant the stay sought. The defendant has indicated that it is ready and willing to abide by any condition that may be imposed by the court for granting the stay sought. I am of the view that the condition that has been proposed by the plaintiff is reasonable.

In conclusion, I find merit in the defendant’s application dated 16<sup>th</sup> September 2021. The same is allowed on the following terms;

1. The execution of the judgment dated 2<sup>nd</sup> July 2021 delivered on 3<sup>rd</sup> August 2021 and the decree issued on 9<sup>th</sup> September 2021 is stayed for a period of 12 months from the date hereof or until the hearing and determination of the intended appeal to the Court of Appeal whichever comes earlier.
2. The defendant shall deposit in an interest earning bank account in Nairobi in the joint names of the advocates on record for the parties a sum of Kshs. 7,000,000/- as security within 30 days from the date hereof in default of which the stay granted herein shall stand discharged automatically without any further reference to the court.
3. Each party shall bear its own costs of the application.

**DELIVERED AND DATED AT NAIROBI THIS 3RD DAY OF FEBRUARY 2022**

**S. OKONG’O**

**JUDGE**

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

Mr. Arum for the Plaintiff

Mr. Nyakoye h/b for Ms. Mogusu for the Defendant

Ms. C.Nyokabi-Court Assistant