



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. E004 OF 2020

FATUMA BONAYAAPPELLANT

VERSUS

LEONARD KIARIE KINUTHIA RESPONDENT

RULING

1. Before me is a Notice Motion dated 21/10/2020 brought pursuant to Section 1A, 1B, 3 and 3A of the Civil Procedure Act, Order 42 Rule 6, Order 22 Rule 52 and Order 51 Rule 1 and 15 of the Civil Procedure Rules, as well as Article 50 and 53 of the Constitution of Kenya. The applicant is seeking the following orders;

1. Spent

2. An order of Injunction *to restrain the respondent from entering upon, occupying, alienating or dealing adversely with the land parcel known as L.R Kambi ya Juu 921, to the prejudice of the appellant pending the determination of this application.*

3. An order of Injunction do issue to restrain the respondent from entering upon, occupying, alienating or dealing adversely with the land parcel known as L.R Kambi ya Juu 921, *to the prejudice of the appellant pending the determination of the appeal against the ruling delivered on 29th September 2020.*

4. That pending the hearing and determination of the application, the court be pleased to issue an order to stay the execution of the judgment entered herein on 12th November 2019 *pending the hearing and determination of this application and this appeal*

5. That the court be pleased to make such orders as it deems meet and just

6. That the costs of this Application be provided for.

2. The Application is based on the grounds on the face of it and on the Supporting Affidavit dated 21/10/2020 and further affidavit dated 15/01/2021 of the Applicant. She avers that she has been sued in the trial court by the respondent who was seeking a declaration that he was the owner of the suit land. That being elderly, poor, sick, diabetic and having health complications, she was unable to defend the suit and judgment was entered in favor of the respondent. She filed an application to set aside the judgment which application was dismissed and the said ruling is the subject of this appeal.

3. The applicant contends that she has been in possession of the suit land since year 2005 and she has tenants and a caretaker living therein whom the respondent is now threatening and demanding they move out as he intends to demolish the houses and put up others. She will suffer substantial loss if the tenants are evicted and the residential house demolished and the appeal will be rendered nugatory. She avers that the application was filed without delay and it is in the interest of justice for the orders sought to be granted. She is ready to deposit the sum of Kshs.188,000, the same being the costs assessed before the trial court.

4. The application is opposed vide the Replying Affidavit of the respondent dated 01/12/2020. He avers that there is nothing to stay as the orders issued by the trial court were in the nature of a negative order and the injunctive orders sought cannot be issued as the applicant has invoked the wrong provisions of the law and no sufficient cause has been shown to warrant the issuance of the same. The applicant being elderly, poor or sickly is neither here or there. The applicant has also not demonstrated how she will suffer the alleged loss nor has she offered any security for the due performance of the decree.

5. Further, the respondent contends that the applicant is a vexatious litigant who keeps on filing one application after another and this application is only meant to delay the matter. The respondent therefore urges the court to dismiss the application with costs.

6. The application was canvassed by way of written submissions. In her submissions, the applicant reiterated her averments made in her affidavits. She relied on the cases of; **Butt V Rent Restriction Tribunal (1982) KLR, Consolidated Marine v Nampijja & Another, Civil App.No. 93 of 1989 (Nairobi), Aron C Sharma v Ashana Raikundalia t/a Raikundalia & Co Advocates & 2 others [2014 eKLR.**

7. Likewise, the respondent in his submissions reiterated the averments made in his replying affidavit. He added that the applicant has not demonstrated that she is in occupation of the suit land or proof that she is the registered owner thereof, and that her loss and damage suffered if any can be quantified and be compensated with an award of damages. The respondent relied on the case of **Mrao Ltd V First American Bank of Kenya Ltd & 2 others (2003)eKLR.**

8. I have carefully perused the application, the supporting affidavit and the submissions. This court has not been provided with the ruling being appealed against (the one of 29.9.2020), despite ordering the appellant to do so. Equally, the applicant did not avail a copy of the judgment of the trial court delivered on 12.11.2019. How then can this court discern why judgment was entered in the respondent's favor, i.e, was it done in default of appearance, defence, did the matter proceed for formal proof? The appellant avers that it was due to her poor health that she could not defend the suit. The question begging for an answer is; Was she aware of the suit and if so, why not instruct an advocate like in this instance?

9. To this end, I find that there is no sufficient material to guide the court on whether the applicant has a prima facie case or not as defined in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] eKLR.**

10. However, this court will still proceed to determine the question of stay of execution since it appears not to be in dispute that a judgment was delivered and efforts made by the applicant to set the same aside were futile. **Order 42 Rule 6(2) of the Civil Procedure Rules** states: -

“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 may ultimately be binding on him has been given by the applicant.”

11. In **Butt vs. Rent Restriction Tribunal [1979]**, the Court of Appeal gave guidance on what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that the power of the court to grant or refuse an application for a stay of execution is a discretionary one, and the discretion should be exercised in such a way as not to prevent an appeal. Secondly, 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 the appeal court reverse the judge's discretion. Thirdly, 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. Finally, the court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.

12. In the case of **Global Tours & Travel Limited –vs-Five Continents Travel Limited [2015] eKLR** it was held that:-

“... Whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interests of justice. Such discretion is unlimited save that by virtue of its character as a judicial discretion; it should be exercised rationally and not capriciously or whimsically. The sole question is whether, it is in the interests of justice to order a stay of proceedings, and if it is, on what terms it should be granted. In deciding whether to order a stay the court should essentially weigh the pros and cons of granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of the case, the prima facie merits of the intended appeal in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought timeously.”

13. The ruling being appealed against was delivered on 29/09/2020 and the applicant filed her memorandum of appeal on 9/10/2020, while this application was filed on 22/10/2020, hence there is no delay. The applicant has averred that she has tenants on the suit premises which stand to be demolished if an order of stay is not granted. The applicant is also ready to furnish security even though this is in respect of costs awarded in the trial court. It is still a sign of good faith. I do opine that it is in the interest of justice that the court allows the application with some conditions.

14. The final orders are as follows;

1. An order of stay of execution of the judgment dated 12/11/2019 in Isiolo CMCC 40 of 2014 is hereby granted on condition that the applicant shall deposit a sum of Ksh. 400,000 in court within a period of 30 days.

2. The orders of stay granted herein shall remain in force for a period of one year.

3. The costs herein shall abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 26TH DAY OF MAY, 2021 IN PRESENCE OF:

C/A: Kananu

Mrs. Kariuki for appellant/applicant

Gachuki for respondent

HON. LUCY. N. MBUGUA

ELC JUDGE