



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NAIROBI

ELC SUIT NO. 2054 OF 2007

KENYA ANTI-CORRUPTION COMMISSION.....PLAINTIFF

VERSUS

PAUL MOSES NGETHA..... DEFENDANT

SAM N. GACHAGO (CHAIRMAN)

GEORGE MULI MWALABU (SECRETARY)

ALEXANDER JOHN OGUTU (TREASURER) Suing on behalf of

WOODLEY RESIDENTS WELFARE SOCIETY.....INTERESTED PARTY

RULING

The plaintiff brought this suit against the defendant on 31st October, 2006 by way of a plaint dated 6th October, 2006. The suit was filed in the High Court and assigned High Court Civil Case No. 1143 of 2006. It was subsequently transferred to the former Environment and Land Division of the High Court in 2007 and assigned its current case number. In its plaint, the plaintiff sought judgment against the defendant for;

- a) A declaration that the lease made on 22nd April, 1999 between the City Council of Nairobi and the defendant in respect of L.R No. 209/13539/154 is invalid, null and void for all intents and purposes for fraud and being ultra-vires, and thus conferred no interest, right or title on the defendant;
- b) A declaration that the registration of the lease instrument dated 22nd April, 1999 against L.R No. 209/13539 Grant No. 76717 as entry No. 4 under presentation Book No. 1028 of 25th May, 1999 was wrongful and illegal;
- c) An order directing the Registrar to cancel and expunge from the register entry No. 4 on the Grant made under presentation Book No. 1028 of 25th May, 1999 so as to restore the land comprised in L.R No. 209/13539/154, I.R No. 80454 to the grantee;
- d) An order directing the Registrar to cancel the original lease instrument and certificate of lease issued upon registration of subdivision known as L.R No. 209/13539/154, I.R No.80454;
- e) An injunction restraining the defendant by himself, his servants or agents or otherwise howsoever from dealing with the properties known as L.R No. 209/13539, Grant No. I.R 76717 and L.R No. 209/13539/154, I.R No. 80454 otherwise than by delivery or transfer to the council;
- f) Vacant possession;
- g) General damages;
- h) Costs of the suit;
- i) Interest on (vii) and (viii) above at court rates.

The defendant filed a statement of defence on 21st December, 2006 in which he denied the plaintiff's claim in its entirety. On 27th February, 2020, the court entered judgment for the plaintiff against the defendant on the following terms;

- a) A declaration that the lease made on the 22nd April, 1999 between the City Council of Nairobi and the defendant in respect of L.R No. 209/13539/154 is invalid, null and void for all intents and purposes for fraud and being ultra-vires, and thus conferred no interest, right or title on the defendant.
- b) A declaration that the registration of the lease instrument dated 22nd April, 1999 against L.R No. 209/13539 Grant No. 76717 as entry No. 4 under presentation Book No. 1028 of 25th May, 1999 was wrongful and illegal;
- c) An order directing the Registrar to cancel and expunge from the register entry No. 4 on the Grant made under presentation Book No. 1028 of 25th May, 1999 so as to restore the land comprised in L.R No. 209/13539/154, I.R No. 80454 to the grantee;
- d) An order directing the Registrar to cancel the original lease instrument and certificate of lease issued upon registration of subdivision known as L.R No. 209/13539/154, I.R No.80454;

What is now before me is the defendant's application dated 6th March, 2020 seeking; a stay of execution of the said judgment delivered on 27th February, 2020 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 the defendant sworn on 6th March, 2020. The defendant has averred that he is dissatisfied with the judgment of this court and intends to appeal against the same to the Court of Appeal. The defendant has averred that he has filed a Notice of Appeal and has also requested for certified copies of the judgment and typed proceedings. The defendant has averred that he has an arguable appeal which will be rendered nugatory unless the stay sought is granted. The defendant has averred that unless the stay sought is granted, his title in respect of all that property known as L.R No. 209/13539/154, I.R No.80454(hereinafter referred to as "the suit property") is likely to be cancelled an action that will expose him to eviction from the suit property on which he has lived since 1974. The defendant has averred that he has come to court without delay.

The application is opposed by the plaintiff through a replying affidavit sworn by Bonface Waweru on 17th November, 2020. In the affidavit, the plaintiff has averred that the allegation that the defendant is likely to be evicted from the suit property unless the stay sought is granted is baseless since the court declined to grant the plaintiff an order for possession. The plaintiff has averred further that the defendant has not demonstrated that there is any intention on the part of the Nairobi City County to terminate his tenancy on the suit property. The plaintiff has averred further that the long stay by the defendant on the suit property is not a factor that the court should take into account while considering whether or not to grant the stay more so when the court has made a finding that the process through which the defendant acquired the suit property was marred by illegalities.

The plaintiff has averred further that the defendant has not demonstrated that he will suffer substantial loss if the orders sought are not granted and that he has not indicated that he is ready and willing to furnish security for the due performance of the decree sought to be stayed. The plaintiff has averred that the suit property belongs to the public and that the continued occupation by the defendant of the suit property has denied the public rent that would have been paid to the Nairobi City County for a period of 28 years. The plaintiff has averred that in the event that the court is inclined to grant the stay sought, the defendant should be ordered to furnish security equivalent to the value of the suit property. The plaintiff has averred that the court should also take into consideration the fact that there is a real threat of the defendant transferring the suit property to a third party in order to defeat justice.

The defendant filed a supplementary affidavit sworn on 30th November, 2020 in which the defendant has reiterated the contents of his affidavit filed together with the application. The defendant has averred that although the court declined to grant an order for vacant possession, he is now occupying the suit property as a tenant of the Nairobi City County which may terminate his tenancy at any time. The defendant has averred that he has demonstrated that he will suffer substantial loss if the stay order sought is not granted. On the issue of security, the defendant has averred that he is willing to furnish a reasonable security as the court may direct.

The application was argued by way of written submissions. The defendant filed his submissions on 8th January, 2021 while the plaintiff filed its submissions on 9th February, 2021. I have considered the application together with the affidavits filed in support thereof. I have also considered the replying affidavit filed by the plaintiff in opposition to the application. Finally, I have considered the submissions of counsels from both sides and the authorities cited in support thereof. The defendant's application 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 cornerstone of both jurisdictions for granting stay.”

I am 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 registered as the owner of the suit property and that he is in occupation of the same. In the judgment execution of which is sought to be stayed, the court declared that the defendant acquired the suit property illegally and ordered his title to the property to be cancelled. The court

ordered further that the defendant's status on the suit property henceforth would be that of a tenant of the Nairobi City County which is at liberty to terminate that tenancy for good cause. What this means is that unless the stay sought is granted, the defendant's title to the suit property shall be cancelled and the defendant's occupation of the suit property may also be brought to an end at any time his status on the property being that of a mere tenant. After the plaintiff's title is cancelled and the property restored to the Nairobi City County, the county may dispose of the property to a third party a move that may put the property beyond the reach of the defendant. The defendant has a right of appeal against the judgment of this court. That right must be protected so that it does not become illusory.

I am also satisfied that the application was brought without unreasonable delay. The application was filed on 6th March, 2020 a few days after the judgment. On the issue of security, the court will order an appropriate security to be furnished by the defendant as a condition for the stay.

In conclusion, it is my finding that the defendant's application dated 6th March, 2020 has merit. The application is allowed on the following terms;

1. Pending the hearing and determination of the intended appeal by the defendant to the Court of Appeal, the orders granted by this court in its judgment of 27th February, 2020 directing the Registrar to cancel and expunge from the register entry No. 4 on the Grant made under presentation Book No. 1028 of 25th May, 1999 so as to restore the land comprised in L.R No. 209/13539/154, I.R No. 80454 to the grantee is stayed.
2. Pending the hearing and determination of the intended appeal by the defendant to the Court of Appeal, the orders granted by this court in its judgment of 27th February, 2020 directing the Registrar to cancel the original lease instrument and certificate of lease issued upon registration of sub-division known as L.R No. 209/13539/154, I.R No.80454 is stayed.
3. Pending the hearing and determination of the intended appeal by the defendant to the Court of Appeal, there shall be an inhibition inhibiting the registration of any other or further dealings with L.R No. 209/13539/154, I.R No.80454.
4. The defendant shall deposit in an interest earning bank account in the joint names of the advocates for the defendant and the advocates for the plaintiff a sum of Kshs. 500,000/= as security within ninety (90) days from the date hereof in default of which the stay and an order of inhibition granted herein shall lapse automatically without any further reference to the court.
5. Each party shall bear its own costs of the application.

DELIVERED AND DATED AT NAIROBI THIS 1ST DAY OF NOVEMBER 2021

S. OKONG'O

JUDGE

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

Ms. Wambugu h/b for Ms. Shamalla for the Plaintiff

Mrs. Rotich for the Defendant

Mr. Odero for the Interested Party

Ms. C. Nyokabi - Court Assistant