



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO 323 OF 2014

MICHAEL JAMES KARANJAPLAINTIFF

VERSUS

BORO KABUTHIA 1 ST DEFENDANT

MARGARET WAMBUI 2 ND DEFENDANT

JOSEPH MATHERI CHEGE 3 RD DEFENDANT

GEOFFREY GATONYE KARANJA 4 TH DEFENDANT

GEOFFREY NJAGA GITHUA 5 TH DEFENDANT

KINYANJUI KAMONDIA 6 TH DEFENDANT

MOSES KARANJA 7 TH DEFENDANT

MBURU GITHUA 8 TH DEFENDANT

MBURU NGURUKO 9 TH DEFENDANT

NJENGA KAIBUTI 10 TH DEFENDANT

NJENGA KARIUKI 11 TH DEFENDANT

RULING

1. On 22/9/2017, Gitumbi J rendered a judgment in this suit. She found that the plaintiff was entitled to vacant possession of the suit property to the exclusion of the defendants. She accordingly entered judgment in favour of the plaintiff as prayed in the plaint.
2. On 19/4/2018, the defendants brought a notice of motion of even date seeking to set aside the said judgment. The application was considered by this court (Eboso J), and in a ruling dated 28/6/2018, this court dismissed the application, for lack of merit.
3. Subsequently, the defendants brought a notice of motion dated 13/11/2019 seeking an order of stay of execution pending the hearing and determination of an appeal lodged against this court's decision declining to set aside the judgment of Gitumbi J. The said application dated 13/11/2019 is the subject of this ruling.
4. The application was supported by an affidavit sworn on 13/11/2019 by Boro Kabuthia (1st defendant). He deposed that the defendants were aggrieved by the ruling rendered by this court on 28/6/2019 and had lodged an appeal at the Court of Appeal at Nairobi against the said ruling, to wit, **Nairobi Civil Appeal No 370 of 2019**. He added that the defendants were apprehensive that the respondents might execute the Judgment of Gitumbi J by evicting them and thereby render the appeal nugatory. He exhibited a signed memorandum of appeal dated 5/8/2019. The said memorandum of appeal did not bear the Court of Appeal's case number. He did not exhibit a copy of the filed and served notice of appeal.
5. The plaintiff opposed the application through a replying affidavit sworn on 21/11/2019 and a further affidavit sworn on 3/2/2020. He deposed that the defendants had earlier been given 30 days stay. He added that the intended appeal was a non-starter because the defendants had not tendered any evidence that would defeat the defendants' rights as the registered proprietor of the suit property. He added that the application was an afterthought. The plaintiff further deposed that the application had been overtaken by events because the defendants had

been evicted from the suit property on 15/1/2020. He further deposed that the defendants had not satisfied the requirements of Order 42 rule 6 (2) of the Civil Procedure Rules.

6. The application was orally canvassed in open court on 3/2/2020. Ms Jeruto, counsel for the defendants, submitted that the defendants lodged an appeal at the Court of Appeal and they were apprehensive that they would be evicted from the suit property before the appeal is heard and determined. She added that on 15/1/2020, the plaintiff sent auctioneers to execute the judgment and the auctioneers demolished some houses on the suit property. She urged the court to grant the order of stay.

7. In response, Mr Kenyatta, counsel for the plaintiff, submitted that the court had been invited to exercise discretionary jurisdiction under Order 42 rule 6(2) of the Civil Procedure Rules. He added that the defendants had not satisfied the criteria under Order 42 rule 6(2) of the Civil Procedure Rules. He contended that execution had already been carried out. Mr Kenyatta faulted the defendants for unreasonable delay, contending that the 30 days stay granted by this court on 28/6/2019 lapsed on 28/7/2019 and no application for stay was made until 14/11/2019, a period of 5 months later. He added that the applicants had not demonstrated that they were willing to provide any form of security in tandem with the requirements of Order 42 rule 6 (2). He urged the court to reject the application.

8. I have considered the application together with the rival affidavits and submissions. I have also considered the relevant legal framework and jurisprudential principles. The single issue falling for determination in this application is whether the defendants who are the applicants in this application have satisfied the criteria for grant of an order of stay of execution pending the hearing and determination of an appeal against the ruling of this court rendered on 28/6/2019.

9. The court has been invited to exercise its jurisdiction under Order 42 rule 6(2) of the Civil Procedure Rules. That jurisdiction is discretionary and is exercised in accordance with the requirements set out by the law. A party seeking an order of stay of execution under Order 42 rule 6(2) of the Civil Procedure Rules is required to demonstrate that he stands to suffer substantial loss unless the order of stay is made. Secondly, the application for an order of stay is supposed to be made without unreasonable delay. Thirdly, a party seeking an order of stay is required to demonstrate his readiness to provide an appropriate security for the due performance of such decree or order as may ultimately be binding on him.

10. In the application under consideration, the impugned ruling was rendered on 28/6/2019 in the presence of the parties' advocates. The defendants applied for a stay for 30 days. They also applied for leave to appeal. Both pleas were granted. The 30 days stay lapsed on or about 28/7/2019. No application for a further stay order was made until 14/11/2019, a period of more than three months. The plaintiff contends, and the defendants concede, that execution subsequently took place. The defendants however contend that not all the defendants were evicted from the suit property. The position of the plaintiff is that the defendants are in essence seeking a mandatory injunctive order returning them into the suit property.

11. The view I make of this application is that the defendants had the opportunity to approach the court for extension of the stay Order which the court had granted to them on 28/6/2019. They did not bother to seek an extension. They only came to court after the plaintiff took steps to execute the decree in this suit. There is admission by the defendants that execution took place and a number of them were evicted. It is therefore apparent that the defendants failed to satisfy the requirement to bring the application for stay without unreasonable delay. They brought the application after execution had taken place. In the circumstances, I do not think this court would be properly exercising its discretionary jurisdiction if it were to issue a stay order in a matter where execution has taken place.

12. Consequently, the notice of motion dated 13/11/2019 is dismissed for lack of merit. The defendants shall bear costs of the application.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 5TH DAY OF MAY 2020.

B M EBOSO

JUDGE

In the presence of:-

M/s B Auma for Defendants

Court Clerk - June Nafula