



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 211 OF 2014

MWANGI WAWERU.....PLAINTIFF

-VERSUS-

ESTHER KAGURE.....DEFENDANT

RULING

A. INTRODUCTION

1. The material on record indicates that by a plaint dated 13th October, 2014 the Plaintiff sued the Defendant seeking her eviction from *Title No. Thegenge/Karia/803 (the suit property)* on the basis that he was the registered proprietor of the suit property having acquired the same through Succession Cause No. 24 of 1969 (*the succession cause*) before the Nyeri District Magistrate's Court at Ruring'u.
2. The Defendant defended the said suit whereby she claimed an interest in the suit property by asserting that it belonged to her late father Henry Waweru. She denied knowledge of the said succession cause. She also contended that she had wrongfully been sued since she was not the legal representative of her deceased father.
3. The record shows that upon full hearing of the suit the trial court (Hon. Waithaka J) found for the Plaintiff and entered judgment in his favour as prayed in the plaint. The Defendant was granted 90 days to vacate the suit property in default of which she was to be forcibly evicted. The judgment was dated and delivered on 19th December, 2018.

B. THE DEFENDANT'S APPLICATION

4. By a notice of motion dated 23rd March, 2019 based upon **Sections 1A, 1B & 63(e) of the Civil Procedure Act (Cap. 21), Order 42 rule 6 and Order 51 rules 1 & 3 of the Civil Procedure Rules, 2010 (the Rules)** and **all enabling provisions of the law** the Defendant sought an order for stay of execution of the judgment and decree dated 19th December, 2018 pending the hearing and determination of Nyeri Civil Appeal No. 46 of 2019 challenging the said decree.
5. The said application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the Defendant on 23rd March, 2019. It was contended that being aggrieved by the said judgment and decree the Defendant had filed an appeal against the same. It was further contended that the Defendant faced imminent eviction and that unless a stay was granted she was likely to suffer substantial loss since she had no alternative residence. The Defendant further contended that the pending appeal might be rendered nugatory unless the order sought was granted.

C. THE PLAINTIFF'S RESPONSE

6. The Plaintiff filed a replying affidavit sworn on 2nd April, 2019 in opposition to the said application. The Plaintiff denied that the suit property was the Defendant's permanent dwelling place and that she had alternative land which was allocated to their household. It was denied that the pending appeal shall be rendered nugatory should the stay sought be denied. The Plaintiff further faulted the Defendant for failing to seek stay without unreasonable delay and for waiting until expiry of the grace period before filing the instant application. The Plaintiff contended that there was no substance in the application and consequently he urged the court to dismiss it with costs.

D. SUBMISSIONS OF THE PARTIES

7. The material on record indicates that the application was argued orally before the Hon. Waithaka J on 4th April, 2019. The Defendant's advocate relied upon the grounds set out in the notice of motion and the contents of the supporting affidavit. The Defendant's advocate

relied on the 3 authorities listed in Defendant's list of authorities i.e **Mukuma v Abuoga [1988] KLR 645, Mugah v Kunga [1988] KLR 748** and **In Re the estate of the late Wambui Njeru (deceased) [2018] eKLR**. The Plaintiff on his part simply relied upon the contents of his replying affidavit and urged the court to disallow the application for stay.

F. THE ISSUES FOR DETERMINATION

8. The court has considered the Defendant's notice of motion dated 23rd March, 2019, the Plaintiff's replying affidavit in opposition thereto as well as the material on record. The court is of the opinion that the following issues arise for determination in the application:

(a) *Whether the Defendant has made out a case for stay of execution pending appeal.*

(b) *Who shall bear costs of the application.*

F. ANALYSIS AND DETERMINATION

(a) Whether the Defendant has made a case for stay of execution pending appeal

9. The court has considered the submissions and material on record on this issue. Whereas the Defendant contended that she had satisfied the requirements for the grant of stay pending appeal, the Plaintiff contended otherwise.

10. The Defendant's application is essentially grounded upon **Order 42 rule 6(2)** of the **Rules** which stipulates as follows:

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

11. In the case of **Halai & Another v Thornton & Turpin (1963) Ltd [1990] KLR 365**, the Court of Appeal held that the jurisdiction of the High court to grant a stay under **Order 42 rule 6** of the **Rules** was fettered by at least 4 conditions, namely:

(a) The applicant must establish sufficient cause.

(b) The applicant must demonstrate the risk of substantial loss unless stay is granted.

(c) The applicant must furnish security for due performance of the decree should the appeal eventually fail.

(d) The application must be made without unreasonable delay.

12. In the case of **Butt v Rent Restriction Tribunal [1979] eKLR** it was held that although the power of a court to grant a stay pending appeal is discretionary, it should be exercised in such manner as to prevent a successful appeal from being rendered nugatory. The court is required to take into account the particular circumstances of each case in either granting or refusing stay of execution.

13. An application for stay of execution of a decree usually raises two competing interests in the administration of justice. There is the right of the successful litigant to enjoy the fruits of his judgment on the one hand. On the other hand, there is the right of the unsuccessful litigant to pursue his right of appeal without the risk of the outcome being rendered merely academic and nugatory. The court has a duty to balance these competing but legitimate interests hence the need to adhere to the set down principles for granting a stay pending appeal.

14. The material on record indicates that the parties herein are children of the late Henry Waweru (*the deceased*) who had two wives. The Plaintiff belongs to the first house whereas the Defendant belongs to the second house. It is evident from the material on record that the deceased was the proprietor of *Title No. Thegenge/Karia/295* which was the subject of the succession cause. It is evident that it was directed by the succession court that parcel 295 should be subdivided equally between the two houses of the deceased hence the Plaintiff's house took the suit property upon sub-division whereas the Defendant's house took the other half.

15. It would further appear that the Defendant's brother challenged the order of the succession court before the *High Court in Nyeri HCCC No. 146 of 1987* whereby the High Court ordered a valuation of the deceased's house and coffee stems on the suit property for the purpose of compensating the second house with half of the value. There is evidence on record to show that the Plaintiff made the compensation.

16. The material on record further indicates that the Defendant entered the suit property to visit his sick brother and refused to leave even after his death. The Defendant was not always resident on the Plaintiff's property as she was staying with her husband at all material times until 1992 when she returned to her parent's home only to find that parcel 295 has been shared between the two houses. This feature clearly distinguishes the instant case from the cases of **Mukuma v Abuoga (supra)** and **Mugah v Kunga (supra)** where the Appellants had been in possession of the properties in dispute for decades in which they were ordinarily resident. The Defendant's case appears to be that of a visitor who overstayed her welcome at her brother's house.

17. The court has noted that even though the Plaintiff averred in his replying affidavit that the Defendant had alternative accommodation on the portion of land allocated to the 2nd house hence she would not be rendered homeless if evicted, the Defendant did not file a further or supplementary affidavit refuting that her household had its own portion of land and that it had residential houses thereon. In the premises, the court is not satisfied that the Defendant shall suffer substantial loss should the order of stay be declined.

18. The court is not satisfied that the demolition of the house on the suit property shall cause the Defendant any substantial loss since the house belonged to the deceased and it was shared equally between the two households. There is evidence on record to demonstrate that the Plaintiff paid half the value of the house to the second household. In any event, it is still possible to allay the Defendant's fears of demolition by making an appropriate order for preservation of the house pending the conclusion of the pending appeal.

19. The court has considered the material on record on whether or not the pending appeal shall be rendered nugatory in the absence of a stay order. It was not alleged or demonstrated that it shall be impossible to reinstate the Defendant into the suit property should her appeal ultimately succeed. Moreover, the court has noted that the Defendant did not file or prosecute any counterclaim against the Plaintiff over the suit property. So, even if her pending appeal were to succeed, the Plaintiff would still remain the registered owner of the suit property.

20. The Court of Appeal considered the meaning of the term *nugatory* in the case of **Stanley Kang'ethe Kinyanjui v Tony Keter & 5 Others [2013] eKLR** as follows:

“(ix) The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. Reliance Bank Ltd v Norlake Investments Ltd [2002] 1 EA 227 at page 232.

(x) Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is incredible; or if it is not reversible whether damages will reasonable compensate the aggrieved party.”

21. The court has considered the issue of delay in filing the instant application. The material on record indicates that judgment was delivered on 19th December, 2018 whereas the instant application was not filed until 25th March, 2019. There is no reasonable or satisfactory explanation for the delay in seeking stay. The material on record simply shows that the Defendant was granted a grace period of 90 days to voluntarily vacate the suit property. So, she adopted the strategy of first exhausting the grace period of 90 days before moving the court under certificate of urgency only to inform the court that he had nowhere else to move to hence she needed stay of execution. The court finds and holds that the delay of over 3 months in seeking say was unreasonable since no satisfactory explanation for the delay was rendered.

(b) Who shall bear the costs of the application

22. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap. 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd [1967] EA 287**. However, in the circumstances of this case the court is of the opinion that the appropriate order to make is that each party shall bear his own costs since the parties are siblings.

G. CONCLUSION AND DISPOSAL

23. The upshot of the foregoing is that the court finds no merit in the Defendant's application for stay pending appeal. Accordingly, the court makes the following orders for disposal thereof:

(a) The Defendant's notice of motion dated 23rd March, 2019 be and is hereby dismissed.

(b) The Plaintiff shall not demolish the deceased's house on the suit property until the pending appeal is determined.

(c) Each party shall bear own costs of the application.

RULING DATED AND SIGNED IN CHAMBERS AT NYERI AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 16TH DAY OF JUNE 2021.

In the presence of:

Plaintiff present in person

Ms Ndegwa for the Defendant

Court assistant – Wario

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Y. M. ANGIMA

