



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC CASE NO. 42 OF 2013**

**MARGARET NDUNGE KIOKO .....PLAINTIFF**

**-VERSUS-**

**MANASE ANANDA CALLEB ..... DEFENDANT**

**RULING**

***(Application by the plaintiff seeking stay of execution pending appeal; plaintiff/applicant having sued the defendant for title to land; plaintiff's suit dismissed; application supported by an affidavit of the applicant sworn abroad but not indicating who the notary was; affidavit defective; conditions for stay of execution; substantial loss; no demonstration of what substantial loss the applicant stands to suffer; application dismissed.)***

1. The application before me is that dated 28 October 2020 and filed on 30 October 2020 by the plaintiff. The plaintiff seeks orders of stay of execution of the judgment of this court that was delivered on 16 September 2020, pending the hearing and determination of an intended appeal to the Court of Appeal.

2. To put matters into context, the suit was instituted by way of a plaint filed on 7 March 2013. It was the case of the plaintiff/applicant that she is the bonafide owner of all that parcel of land identified as plot Number CR 98701 Subdivision number 3665 (Original Number 607) Section III Mainland North, situated in Mtwapa (the suit land). The plaint is quite convoluted, but from what I can gather, the applicant claimed to have purchased the suit land from some third parties. In the suit, she asked for orders of permanent injunction against the defendant/respondent and an order directed at the Registrar of Titles to cancel the title deed issued to the respondent and replace it with the name of the applicant. The respondent filed defence and pleaded that he had no knowledge of the claims of the applicant. He maintained to have lawfully acquired the land.

3. The case was heard by my predecessor, Omollo J, and she dismissed the applicant's case. In the judgment, the following were the conclusions of the court: -

- i. The plaintiff has not demonstrated that she identified the plot she was buying before paying for it.*
- ii. The plaintiff has failed to create a nexus between the plot she bought and the suit plot.*
- iii. The plaintiff failed to prove that the defendant acquired the suit title through fraud.*
- iv. The plaintiff's suit is fatally defective for non-joinder of parties.*

*Consequently, the plaintiff has failed to prove her case on the standards required in law. The same is dismissed with costs to the defendant."*

4. Aggrieved with the judgment the applicant filed a notice of appeal and subsequently this application seeking stay of execution of the judgment pending appeal. She claims that the judgment amounts to denying her ownership interest in the suit land, which is her only property. She avers that she will suffer substantial loss unless the orders sought are issued, and also that the application was filed without unreasonable delay, since the judgment was delivered on 16 September 2020. She contends to have purchased the land in the year 1991 and having invested Kshs. 300,000/= in it in the year 1991.

5. The respondent opposed the application vide a replying affidavit and grounds of opposition. In his replying affidavit, he deposed that the judgment did not confer any proprietary interest on the plaintiff to the suit land. He urged that dismissal of the applicant's suit is a negative order not capable of being stayed by this court. He added that the applicant has not shown any sufficient cause why the stay of execution should be granted, or how she may suffer any substantial loss. He pointed out that there is no evidence that the applicant invested Kshs. 300,000/= in the suit land as alleged. He also raised the issue of deposit of security for the due performance of the decree.

6. In his grounds of opposition, the respondent claimed that the applicant's supporting affidavit was not dated and attested by a commissioner of oaths thus was null and void and should be struck out. He further claimed that this court has no jurisdiction to grant stay of execution orders after dismissal of the plaintiff's case as he had no counter claim. He reiterated that the dismissal of the applicant's suit was a negative order incapable of being stayed.

7. The matter came up for *inter-partes* hearing on 8 June 2021. Learned counsel for the applicant, Mrs. Umara, submitted that the application has been brought to court timeously. She submitted that the applicant has invested heavily on the suit land and she will suffer loss if orders are not granted.

8. Mr. Mutubia, learned counsel for the respondent, submitted that there is nothing to be stayed, as you cannot stay a dismissal, and the plaintiff can only proceed to prosecute the appeal. He submitted that the plaintiff has claimed that she has heavily invested in the suit land yet the suit land is a vacant plot fenced by the defendant who is in possession. Counsel submitted that only a positive order can be stayed. He put his reliance on the case of *Catherine Njeri Maranga vs. Sarah Chege (2017) eKLR*.

9. In her rebuttal, Mrs. Umara submitted that the application has also been brought under Section 3A of the Civil Procedure Act, and further, that the court has discretion to grant the orders.

10. I have considered the matter. I need first to address the preliminary issue raised by the respondent in his grounds of opposition. He raised the issue that the applicant's supporting affidavit was defective for not being dated or attested by a commissioner of oaths. I have looked at the affidavit. The deponent states that she resides in Germany. The affidavit is stated to be sworn in Germany (though written German). Interestingly, there is a commissioning stamp of F. Ouma Advocate. It is not clear if F.Ouma Advocate commissioned the affidavit in Germany or in Kenya. What was commissioned is a photocopy, not an original. I have not seen any stamp or signature of the document having been notarized. I find it difficult to accept it as a competent affidavit. Without the application being supported by a competent affidavit, it must fall flat on its face.

11. Even if I were to go to the merits of the application, I would still dismiss it. Stay of executions pending appeal to the Court of Appeal are governed by Order 42 Rule 6 (2) which is drawn as follows :-

*(2) No order for stay of execution shall be made under subrule (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.*

12. An applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned. First the application should be made without undue delay; secondly, the applicant should show that substantial loss may result unless the order is made; and lastly the applicant must furnish security for the due performance of such decree or order.

13. Even if I am to accept the affidavit herein, I really do not know what it is that the applicant wants stayed. As pointed out by the respondent, all that the court did was to dismiss her suit. I do not know what sort of execution the applicant fears that the respondent will undertake that she now wants stayed. I am aware that the respondent has argued that you cannot stay a negative order or a dismissal of suit. Well, I wouldn't want to enter into that debate, at least within the proceedings herein, but what I will say is that the applicant has not informed this court what it is that she wants stayed, so that the respondent does not proceed to execute it, while her appeal is pending.

14. Moreover, I have not seen any demonstration of substantial loss that the applicant stands to suffer. In fact, the applicant has not stated what this "substantial loss" is going to be if stay is not granted, forgetting for a moment that we are not even clear what it is that the applicant wants "stayed." It is not for this court to speculate for an applicant what loss such applicant stands to suffer. The onus is on the applicant to state what loss he/she stands to suffer and show how that loss is substantial. The applicant stated that she invested Kshs. 300,000/= on the property in the year 1991. What she did in that property with this sum is not mentioned at all. If it is the position that what she did in the property is what she wants preserved, then what the applicant needed to do was state clearly what this is, and then seek the preservation of it. As matters stand we have no idea what the applicant is talking about.

15. The upshot of the above is that I am not persuaded that this application is merited and it is hereby dismissed with costs.

16. Orders accordingly.

**DATED AND DELIVERED THIS 29TH DAY OF SEPTEMBER 2021**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

AT MOMBASA