



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

MILIMANI LAW COURTS

HCCC NO. 575 OF 2006

ISIAH NYABUTI ONCHONGA.....PLAINTIFF/APPLICANT

VERSUS

HOUSING FINANCE COMPANY OF

KENYA LIMITED.....1ST DEFENDANT/RESPONDENT

ISAAC GODFREY ARERI.....2ND DEFENDANT/RESPONDENT

RULING

1. If the Judgment of this Court delivered on 17th January 2020 is not stayed then Plaintiff herein will face an imminent eviction from the property known as LR No. 209/8343/94 situate in Nairobi.
2. The Plaintiff says that he has occupied the house for over 27 years and so an eviction will cause him substantial harm and has through a Notice of Motion dated 14th February 2020 sought stay of execution of that decision pending the hearing and determination of the Appeal herefrom.
3. The application is brought under the provisions of Order 42 Rule 6 which provides:-

“Stay in case of appeal.

6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have **been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.**

(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.

(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

4. I think loss of possession of a house which the Plaintiff has occupied continuously for the last 27 years is not an insubstantial loss and the first limb for grant of a stay order has been satisfied.

5. What remains is the security to be furnished by the Plaintiff for the due performance of the decree that may ultimately bind him. On this, the 2nd Defendant has a valuation Report dated 10th March 2020 in which the valuer returns an opinion that expected monthly rent income from the property in Kshs.75,000/=. This has not been controverted by the Plaintiff.

6. The 2nd Defendant seeks that the Plaintiff do deposit the sum of Kshs.12,000,000/= as a condition grant for stay. This is arrived at as being the rental income from 29/11/2006 to 31/03/2020. The former being the date that the 2nd Defendant had contended was when he was entitled to take possession of the property.

7. The Plaintiff perceives that as a harsh condition.

8. I can easily resolve the matter. In the Judgment sought to be stayed, this Court found that the Plaintiff had not established his claim for mesne profit and there can be no reason to work the rental income backwards. However, the Court ordered for vacant possession of the house in favour of the 2nd Defendant within 30 days of 17th January 2020. So, by virtue of the judgment, the 2nd Defendant was entitled to vacant possession on 17th February 2020. Obviously, the 2nd Defendant is deprived of occupation or income that could have been derived from rent from that day (i.e 17th February 2020).

9. So as to balance the interests of the Plaintiff with that of the 2nd Defendant , I allow the application but on condition that:-

1. Rent at Kshs.75,000/= per month from 17th February 2020 to the date of this decision shall be deposited by the Plaintiff in an interest earning account to be opened in the joint names of the advocates of the Plaintiff and the 2nd Defendant. The deposit to be made within 45 (forty five) days hereof.

2. The Plaintiff to deposit the sum of Kshs.75,000/= each month with effect from 15th April 2021 into an interest earning account to be opened in the joint names of the advocates of Plaintiff and the 2nd Defendant until the Appeal herefrom is heard and determined. Such deposit to be made on or before the 15th day of each succeeding month.

3. In default of condition (1) or (2) above, the stay order granted shall stand discharged.

4. Each party to bear its costs.

DATED, SIGNED AND DELIVERED IN COURT AT NAIROBI THIS 15TH DAY OF MARCH 2021

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17TH April 2020, this Ruling has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

Chacha holding brief fir Anyoka for the Applicant.

Ms Abuya for the 1st Respondent.

Omwenga for the 2nd Respondent.