



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 15 OF 2012

ESTHER KITUYI.....PLAINTIFF

=VERSUS=

EASY PROPERTIES LIMITED.....1ST DEFENDANT

KATHERINE N KISILA.....2ND DEFENDANT

RULING

1. This is a ruling in respect of a Notice of Motion dated 17th May 2019 in which the 1st Defendant/Applicant seeks the following orders: -

1) Spent

2) Spent

3) That this Honourable court be pleased to grant a stay of execution of the Judgement entered on the 21st day of march 2019 and any taxation matters pending the hearing and determination of the intended appeal.

4) That costs of this application be provided for.

2. The Applicant contends that it has preferred an appeal to the Court of Appeal against the Judgement which was delivered on 21st March 2019 by filing a Notice of Appeal; that the intended appeal has high chances of success and that if stay of execution is not granted, the appeal will be rendered nugatory.

3. The Plaintiff/Respondent opposed the Applicant's application based on grounds of opposition filed on 7th October 2019. The Respondent contends that the application is misconceived, frivolous, bad in law and is an abuse of the process of the court. The Respondent further contends that the Applicant has not met the threshold under Order 42 Rule (2) (3) and (4) of the Civil Procedure Rules.

4. The parties were directed to file written submissions. The Applicant filed its submissions on 11th March 2020. The Respondent did not file any submissions and if any were filed, then they are not in the file. I have gone through the application as well as the grounds of opposition. I have also considered the submissions by the Applicant.

5. The only issue for determination is whether the Applicant has met the threshold set out under Order 42 of the Civil Procedure Rules 2010. The Applicant is expected to demonstrate that the application has been brought without undue delay that the Applicant will suffer substantial loss and that security for the due performance of the decree as may ultimately be binding upon the Applicant has been given.

6. In the instant case, the impugned judgement, was delivered on 21st March 2019. The present application was filed on 20th May 2019. This is a period of two months from the date the judgement was delivered. This delay of two months has not been explained given the circumstances of this case.

7. The Respondent had intended to purchase an apartment which the Applicant was selling. The Respondent paid the entire purchase price amounting to Kshs.7,697,000/= . When the Respondent went to pick the keys to the house which she had purchased, she was informed that the house had been purchased by the 2nd Defendant in this case. It is after this that the Respondent filed a suit against the Applicant and the 2nd Defendant who had purchased the house claiming specific performance and in the alternative refund of the purchase price.

8. After conclusion of the hearing, the court found that the most efficacious remedy is refund. The court ordered the Applicant to refund the purchase price together with interest at court rates from 7th March 2011. The Applicant contends that the Appeal will be rendered nugatory if stay of execution is not granted.

9. The Applicant has not demonstrated what substantial loss it will suffer if stay is not granted. It is in very rare instances when an appeal from a money decree will be rendered nugatory. It is not enough for one to allege that substantial loss will ensue if execution is not stayed. The Applicant did not deny that it received the Respondent's money which was towards purchase of the house. The Applicant's contention was that its employee had received the entire purchase price but that the employee never receipted for the whole amount and that the said employee was facing criminal charges in Makadara Chief Magistrates Court.

10. Whereas a court should ensure that there is no impediment to an appellant wishing to file an appeal, the court equally must ensure that the successful party enjoys the fruits of her judgement. The issue of inability of the Respondent to repay the decretal sum does not arise. The Respondent is simply asking a refund of the purchase price which the Applicant has been holding on to for over a decade.

11. To grant a stay in the circumstances of this case will clearly be preventing a successful party from enjoying the fruits of her judgement when the Applicant who is holding her money pursues an appeal. The issue of security can only be addressed where it is demonstrated that the Applicant will suffer substantial loss or if the appeal will be rendered nugatory. No substantial loss has been demonstrated and demonstration of substantial loss is the cornerstone of any grant of stay pending appeal. I therefore find no merit in this application which is dismissed with costs to the Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 17TH DAY OF JUNE 2021.

E.O.OBAGA

JUDGE

In the Virtual Presence of :-

M/s Koske for Plaintiff/Respondent

M/s Michira for Mr Nyakwana for Applicant

Court Assistant: Okumu

E.O.OBAGA

JUDGE