



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. CASE NO. 476 OF 2010

DAVID KARAU KARANJA.....PLAINTIFF

VERSUS

JAMES MACHARIA MBERA.....1ST DEFENDANT

VIOLET WAIRIMU MBERA.....2ND DEFENDANT

RULING

1. On 21/6/2018, this court rendered a judgment in this matter in which it granted the plaintiff the following orders:

a) The caveat lodged against Land Reference Number 27/80/3 by the 2nd defendant is hereby vacated.

b) An order of specific performance compelling the 1st defendant to complete the transfer of the 0.2156 hectare piece of land hived out of Land Reference Number 27/80/3 and designated as Land Reference Number 27/301 in terms of the agreement dated 14/6/2010 is hereby issued.

c) The plaintiff shall within Ninety (90) days from today deposit in court the sum of Kshs 7,500,000 to be released to the 1st defendant upon registration of transfer in favour of the plaintiff. In default, the above orders shall stand vacated and the plaintiff's suit shall stand dismissed with no order as to costs.

d) Subject to compliance with order (c) above, the plaintiff shall have costs of this suit.

2. Subsequently, the two defendants in this suit brought two separate applications dated 26/5/2019 and 29/5/2019, respectively, each seeking an order of stay of execution pending the hearing and determination of an appeal lodged in the Court of Appeal. The two applications were filed on the same day. The two applications are the subject of this ruling.

3. The 1st defendant contended that they lodged a notice of appeal in June 2018 and he stood to suffer irreparable loss and damages if a stay was not granted. The 2nd defendant similarly contended that they filed a notice of appeal and enforcement of the judgment herein would render the appeal nugatory. She added that she attached sentimental value to the suit property and loss of the suit property would cause her great grief and suffering.

4. The plaintiff opposed the applications through two replying affidavits. He deposed that the defendants had not complied with the requirements of Rule 82(1) of the Court of Appeal Rules which required the defendants to file a memorandum and record of appeal within 60 days and give security for costs within the same period of time. He added that the defendants had not explained why they brought the application after the lapse of 11 months and after he had deposited Kshs 7,500,000 in court. He added that the defendant had not demonstrated any likely substantial loss. He faulted the defendants for not taking steps to prosecute the appeal or comply with the orders of the court. His position was that the applications lacked merit. He urged the court to dismiss the two applications.

5. The applications were canvassed through written submissions. The 1st defendant filed his submissions through the firm of Ng'ang'a Ngigi advocates on 29/8/2019. It was argued that the 1st defendant had met the conditions for grant of stay under Order 42 Rule 6 (2). It was further submitted that whether or not to grant a stay is a discretion of the court. It was argued that this matter involves the sensitive issue of land and therefore, the court should allow a stay in order to prevent irreparable loss and damage. Reliance was placed on the case of **Attorney General v Emerson and Others 24 QBD (1889) 56 at p 59**.

6. The 2nd defendant filed her submissions through the firm of J.K Mwangi & Associates on 29/8/2019. Counsel submitted that although the letter requesting for typed proceedings was not served on the plaintiff, the court should not rely on this technicality and deny the defendants stay. It was argued that in exercising the discretion on whether a stay of execution should be granted, the court should follow the procedure laid down in the case of **Butt v Rent Restriction Tribunal [1982]KLR 417**. It was further argued that it was not necessary to deposit security in court because the subject matter is immovable.

7. In response, counsel for the plaintiff submitted that the defendants had not demonstrated that they will suffer substantial loss if the stay is not allowed. He argued that the defendants' proclamation that the suit property is of sentimental value to them is not an adequate demonstration of substantial loss. He argued that he stood to suffer loss and prejudice because he had already complied with the judgment of the court by depositing Kshs 7,500,000 in court. Reliance was placed on **Eliud Njoroge Gachiri v Stephen Kamau Nganga [2018] eKLR; Machira TA Machira & Co Advocates v East African Standard (N0 2) (2002) KLR 63; and Absalom Dora v Turbo Transporters 2013 eKLR** where the courts held that substantial loss should not just be proclaimed; that one must prove specific details and particulars of substantial loss. It was further argued that the delay of 11 months had not been explained. Lastly, it was submitted that the defendants had not shown willingness to offer any security in court should the appeal fail.

8. I have considered the two applications together with the rival affidavits and submissions. The single question falling for determination in the two applications is whether the defendants/applicants have satisfied the criteria for grant of stay.

9. The jurisdiction to grant stay is governed by the legal framework in Order 42 rule 6 (2) of the Civil Procedure Rules which provides as follows:

(6) (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.

10. The applications under consideration were brought 11 months after the court rendered a judgment in the above terms. One of the disposal orders in the judgment required the plaintiff to deposit in court Kshs 7,500,000 within 90 days. In default, the suit would stand dismissed with costs to the defendants. Had the applicants brought the two applications without undue delay, there would have been no need for the plaintiff to deposit in court Kshs 7,500,000. No explanation for the inordinate delay has been tendered to the court. In the circumstances, I do not think the defendants have satisfied the first limb of Order 42 rule 6 (2) of the Civil Procedure Rules.

11. The defendants have similarly not made any attempt to satisfy the court on the second limb. The plaintiff has had possession of the suit property since he entered into the material sale agreement. He paid the 1st defendant part of the purchase price. He has deposited the balance in court in compliance with the judgment of the court.

12. In the circumstances, I will not grant the defendants a stay order in terms of the prayers sought in the two applications. I will instead allow the conveyance of the suit property into the name of the plaintiff but preserve the suit property in the sense that no further dealings will be registered against the title and no permanent developments will take place on the suit property for a period of 12 months. The defendants are expected to prosecute their appeal within the period of 12 months.

13. Consequently, the 1st defendant's notice of motion dated 26/5/2019 and the 2nd defendant's notice of motion dated 29/5/2019 are both disposed in the following terms:

a) Execution in terms of prayers (a) and (b) of the judgment in this suit shall proceed.

b) Apart from registering the suit property in the name of the plaintiff, there shall be no further dealings in the Title for a period of 12 months from today.

c) The plaintiffs shall not undertake any permanent developments on the suit property for a period of 12 months from today.

d) The defendants shall bear costs of this application

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 29TH DAY OF JANUARY 2020.

B M EBOSO

JUDGE

In the presence of:-

Mr Kamau for the 2nd defendant and holding brief for

Mr. Ngige for the 1st defendant

Court clerk: June Nafula