



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CIVIL SUIT NO. 4 OF 2017

FLORENCE WANJALA.....PLAINTIFF/RESPONDENT

VERSES

RONALD W. JUMBE.....1ST DEFENDANT /APPLICANT

DORCAS ANN ASIONYI.....2ND DEFENDANT/APPLICANT

RULING

1. The Applicants Notice of Motion dated **26th May, 2020** brought under Order 42 rule 6 of the Civil Procedure Rules seeks a stay of this court's judgement and decree dated **5th May, 2020** pending an appeal to the Court of Appeal. The application is supported by the sworn separate affidavits of the Applicants as well as the supplementary affidavit of one Maurice Lusweti Chumbe.
2. The gist of the application is clear and straight forward namely that they are not satisfied with the above decision and they have preferred an appeal to the Court of Appeal. They therefore pray that the 2nd Applicant should not be evicted from the land and the house as she stands to suffer serious loss and damage and that the intended appeal shall be rendered nugatory.
3. They have offered to abide by any conditions of this court while the appeal is pending. To this end the said Maurice Lusweti Chumbe has offered his land number **Bungoma /Tongaren/2143** to act as a security on behalf of the Applicants. He has attached the valuation report of the above security which indicates its value at Kshs 3million.
4. The Respondent on the other hand filed grounds of opposition dated **4th June, 2020** in which she argued that the Applicants have not satisfied the grounds laid down under Order 42 rule 6 above namely, that they have not shown what loss they shall suffer should stay of execution is not granted and that they have not offered any meaningful security to secure the performance of the decree.
5. The parties as ordered have filed their respective written submissions which the court has perused as well as the cited authorities. The applicants in particular have submitted that the appeal is arguable and that they should be granted a chance by having the status quo maintained. The 2nd Applicant who is directly affected by the order has submitted that she has invested much in the property and thus she should be allowed to seek a second opinion at the said Appellate Court. For that reason, she offered the property by the said Maurice Lusweti Chumbe as a security.
6. The Respondent on her part has submitted that the above security is not valid as it is not owned by the Applicants and thus enforcing it shall be very difficult. She said that her bill of cost she has submitted to the Applicants is to a tune of Kshs. 500,000 and there is nothing to demonstrate that they shall be able to settle.
7. The Court of Appeal in the case of **KENYA SHELL LTD VERSES KIBIRU & ANOTHER (1986) KLR 410** on the question of substantial loss stated as follows;

“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money”.
8. Taking cue from the above decision which is binding on this court, will the appeal be rendered nugatory if the stay is not granted? Will the 2nd Applicant for that matter suffer any substantial loss? This court may not have the capacity to know if the appeal has any chances of success as it has already rendered its mind. The Applicants must however be given a chance to convince that court.

9. It is appreciated even from the evidence on record that the Applicants have cohabited together while the Respondent has been in Britain undertaking her work and studies. When she came back to the country she found the 2nd Applicants in occupation of her house. This caused her among other issues to file the case.

10. It is equally true that the respondent and the 1st Applicant have another home in Kitale town and therefore the suit property may not be the only one.

11. Taking the above consideration this court is inclined to allow the application. The immediate loss the Respondent shall suffer shall be her inability to occupy the home and the usage of the land. There must be adequate security however to cushion the Respondent. This court agrees with the respondent that the security offered by Maurice Lusweti Chumbe is not tenable as he is not a party to these proceedings and therefore it would be very difficult to enforce the same. At any rate being a parcel of land there are many other land protocols outside this court's jurisdiction to be followed before it is sold and or transferred to a third party.

12. The parties have on the other hand admitted that the Respondent has submitted a bill of costs totalling Kshs. 500,000. This in my view will be a sufficient security to be offered by the Applicants as it is easily enforceable. At any rate should the appeal succeed then the amount shall be returned to the Applicant. Whatever time the appeal may take this money shall continue to attract the necessary interest.

13. Consequently, the application is therefore allowed as follows';

a. The 2nd Respondent shall deposit the sum of Kshs. 500,000 in a joint interest earning account of both Counsels for the Applicants and the Respondent within the next 60 days from the date herein.

b. In default execution shall issue forthwith.

c. Costs of this application to the Respondent.

Dated, signed and delivered at Kitale in open court this 16th day of July, 2020.

H. K. CHEMITEI

JUDGE

16/7/2020