



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. CASE NO. 253 OF 2009

REGINA MWIKALI KITAVIPLAINTIFF

VERSUS

ONGATA WORKS LIMITEDDEFENDANT

RULING

1. On 29/5/2009, the plaintiff took out an originating summons dated 29/5/2009 seeking a determination of the following three questions: (i) Whether the plaintiff was entitled to be registered as proprietor of Land Reference No 209/10904 Embakasi by way of adverse possession; (ii) Whether the plaintiff was entitled to an order that a certificate of title be issued in her name as proprietor of the suit property; and (iii) Whether the plaintiff was entitled to the costs of this suit. On 10/4/2015, Gitumbi J rendered a judgment in which she made the following disposal order:

“In light of the foregoing, I hereby dismiss this suit. Each party shall bear their own costs”.

2. More than three years later, on 21/9/2018, the plaintiff brought a notice of motion dated 21/9/2018 seeking an order of stay of execution of the said judgment. She also sought an order of stay of an undisclosed notice to show cause. The said application is the subject of this ruling.

3. The application was supported by an affidavit sworn by the plaintiff on 21/9/2018. The plaintiff averred that she was dissatisfied with the Judgment. She deposed that she intended to file an appeal out of time and had prepared a draft memorandum of appeal which raises triable issues with a probability of success.

4. The defendant opposed the application through a replying affidavit sworn by the director of the defendant company, Mary Wangui Wambugu, on 9/10/2018. She deposed that when judgment was rendered on 10/4/2015, they instructed their advocates to engage the services of an auctioneer to evict the plaintiff. She deposed that the plaintiff had not filed an appeal or a notice of appeal at the Court of Appeal. She further deposed that there was inordinate delay in filing this application.

5. The application was canvassed by way of written submissions. The plaintiff filed her submissions on 1/9/2019 through the firm of Wakiaga Semekia & Company Advocates. She framed three issues to be determined by this court: (i) whether the plaintiff had an arguable appeal; (ii) whether the notice to show cause was served; and (iii) whether the court had inherent powers to issue an order of stay.

6. Counsel submitted that for an appeal to succeed, an applicant must prove that the intended appeal is arguable; and that if an order of stay or injunction is not granted and the appeal succeeds, the appeal would be rendered nugatory. Reliance was placed on the case of **Housing Finance Company of Kenya v Sharok Kher Mohamed Ali Hirji [2015] eKLR** and **Nairobi Civil Application No 157 of 2006**, **Ishmael Kagunyi Thande v Housing Finance Kenya Ltd(unreported)**. Counsel further submitted that the suit property was registered in the plaintiff's name and therefore, the appeal would succeed. He argued that the plaintiff was issued with an allotment letter and title in 1990 and had been in occupation of the suit property since then. It was contended that the defendant was fraudulently issued with a title for the same property on 1/1/1994. Counsel for the plaintiff argued that the court had the discretion to allow an applicant to file an appeal out of time provided that the reason for delay has been explained and is reasonable. Reliance was placed on **Nairobi Civil Application No 356 of 1996**, **Muchugi Kiragu v James Muchugi Kiragu & Another**.

7. The defendant filed its submissions through the firm of Muriungi & Company Advocates. The defendant identified the following two issues for determination by this court: (i) whether the applicant was entitled to an order of stay of execution; (ii) whether a stay order can be issued in the absence of the appeal or steps towards one for the last 4 years.

8. Counsel submitted that stay of execution pending appeal is governed by Order 42 rule 6 of the Civil Procedure Rules. He submitted that the court has a discretion to grant stay if the application is brought without undue delay; the court is satisfied that substantial loss may result to the applicant if stay of execution is not granted; security has been provided; an appeal has already been filed at the Court of Appeal; and notice to appeal has been given. Counsel submitted that the plaintiff had not met the above conditions because the present application was

brought 4 years after judgment had been delivered. He further submitted that the plaintiff had not demonstrated to this court the loss she would suffer if the judgment is not stayed or if she is evicted from the suit property. It was submitted that substantial loss should be proved for a stay to be granted. Reliance was placed on the following authorities: **James Wangalwa & another v Agnes Naliaka Cheseto [2012] eKLR; Nairobi HCCC No 422 of 2006, Antoine Ndiaye v African Virtual University and Kenya Shell Ltd v Kibiru [1986] KLR 410.**

9. It was further submitted that the plaintiff had not offered to deposit any security in court. Counsel further argued that the plaintiff did not file or serve a notice of appeal to the defendant. It was further submitted that the notice of appeal lodged at the Court of Appeal was not dated or signed as per the rules of the Court of Appeal. It was argued that the plaintiff's application was misconceived and an abuse of the court process and should therefore, be dismissed.

10. I have considered the application together with the parties' rival affidavits and submissions. I have also considered the relevant legal framework and jurisprudence. The single question falling for determination in this application is whether the applicant has satisfied the criteria upon which this court exercises jurisdiction to grant an order of stay of execution pending the hearing and determination of an appeal. That criteria is set out 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.

11. Firstly, the judgment rendered by Gitumbi J did not contain any positive orders capable of stay or capable of execution. The Learned Judge simply dismissed the plaintiff's suit and ordered that each party shall bear their own costs. In essence, there is nothing to stay and there is nothing to execute.

12. Secondly, the impugned judgment was rendered on 10/4/2015. The present application was brought on 21/9/2018, more than three years later. The delay has not been explained. There is no evidence of any notice of appeal which was filed and served by the applicant within the prescribed time. There is similarly no evidence of any leave granted to the applicant to lodge an appeal out of time. In essence, there is no evidence of any pending appeal to form the basis upon which this court would grant a stay order almost five years post the date of the impugned judgment.

13. Similarly, the applicant has not endeavoured to satisfy the other requirements of Order 42 rule 6(2) of the Civil Procedure Rules.

14. In light of the foregoing, my finding on the single question in this application is that the applicant has failed to satisfy the criteria upon which this court exercises jurisdiction to grant an order of stay of execution pending the hearing and determination of an appeal. Consequently, the notice of motion dated 21/9/2018 is dismissed. The applicant shall bear costs of the application.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 20TH DAY OF FEBRUARY 2020.

B M EBOSO

JUDGE

In the presence of:-

Mr Wakiaga for the plaintiff

Mr Muraya holding brief for Mr Mwenda for the defendant

June Nafula - Court Clerk