



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC APPEAL NO. 10 OF 2018

ROSALINE NJERI NDUNGU.....APPELLANT

VERSUS

ROBERT JAMES GITHUNGO MAINA.....1ST RESPONDENT

KEZIAH WAIRIMU ZACHARIA.....2ND RESPONDENT

RULING

What is before Court for determination is the Appellant's application dated the 25th March, 2019 brought pursuant to section 1A, 1B and 3A of the Civil Procedure Act; Order 22 Rule 22; Order 42 Rule 6 and Order 51 of the Civil Procedure Rules. The Appellant seeks a stay of execution of the judgment issued on 28th November, 2018 and decree dated the 11th December, 2018 in the Kajiado CMCC No. 300 of 2013 Robert James Githungo Maina V Keziah Wairimu Zacharia & Another, pending the outcome of the Appeal.

The Application is premised on the summarized grounds that the Appellant was dissatisfied with the Judgment issued in Kajiado CMCC No. 300 of 2013 delivered in favour of the 1st Respondent and preferred an appeal herein. The lower Court held that Ngong/ Ngong/ 57597 belonged to the 1st Respondent while Ngong/ Ngong/ 57598 belonged to the Appellant and Appellant directed to surrender title for Ngong/ Ngong/ 57597 to the 1st Respondent so as to take possession. The 1st Respondent on 21st March, 2019 proclaimed the Appellant's household goods and should the 1st Respondent proceed to execute the lower court Decree, the Appeal will be rendered nugatory yet it has high chances of success. The Appellant is ready and willing to furnish security for the due performance to the satisfaction of the lower Court's Decree.

The application is supported by the affidavit of the Appellant ROSALINE NJERI NDUNGU where she reiterates her claim above and explains that the 1st Respondent had commenced a suit against the 2nd Respondent and herself in the lower court in which she filed a Defence where she denied the averments in the Plaint as she had purchased land parcel number Ngong/ Ngong/ 57597 from the 2nd Respondent and paid the full purchase price. She contends that the 1st Respondent's case is that he purchased land from one JOHN SAITOTI SHUGURU (deceased) and later the 2nd Respondent claimed to have sold the same parcel of land whose title is not disclosed to him without any agreement. She states that the 2nd Respondent claims to have sold Ngong/ Ngong/ 57597 to the 1st Defendant and received money long after she sold the said land to her and received the full payment after which she effected a transfer through the Advocates she had engaged. She is apprehensive that the 1st Respondent will proceed with the execution of the lower court Decree.

The 1st Respondent opposed the Application and filed Grounds of Opposition dated the 21st May, 2019 where he stated that there is absolutely no justifiable ground for stay; Appeal filed is hopeless and has no chances of success; all ingredients necessary for stay have not been met and there is no proof of irreparable damages.

The Appellant and 1st Respondent filed their respective submissions.

Analysis and Determination

Upon consideration of the Notice of Motion Application dated 25th March, 2016 including the supporting affidavit, Grounds of Opposition and submissions, the only issue for determination is whether there should be an order of stay of execution of the Judgment of the lower court pending the outcome of the Appeal.

The Appellant in her submissions stated that she is deserving of orders of stay pending the hearing and determination of the Appeal. She relied on the cases of **Kotut V Rose Jebor Kipngok (2015) eKLR**; **Antoine Ndiaye V African Virtual University (2015) eKLR**; **Feisal Mahsen Saggaf & 3 Others V Green Gas Company Limited & Another (2015) eKLR** to buttress her arguments. She submitted that there

was no unreasonable delay in filing this Application and relied on the case of **Housing Finance Company of Kenya V Sharok Kher Mohammed Ali Hirji & Another Civil Application No. 74 of 2015** to support this argument. Further, that she is willing at the discretion of court to provide security for the due performance of such decree or order that may be ultimately binding upon her. She submitted that her Appeal has sufficient cause and the same would be rendered nugatory if the orders sought are not granted. These arguments were supported by the case of **Butt V Rent Restriction Tribunal (1982) KLR 417 and Micro Enterprises Support Programme Trust Registered Trustees V Mayford Savings & Credit Cooperative Society Limited & 5 Others Civil Case No. 81 of 2008**.

The 1st Respondent in his submission stated that the Applicant will not suffer any substantial loss and relied on the case of **Kenya Shell Limited V Kibiru (1986) KLR 410**. Further, the Applicant has not provided evidence to prove that the Appeal will succeed. He further submitted that the Applicant has not provided security and relied on the case of **Socfinac Company Limited V Nelphat Kimotho Muturi (2013) eKLR**.

Order 42 Rule 6(2) provides that: ' **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.**'

In the case of **Butt v Rent Restriction Tribunal [1982] KLR 417** the Court of Appeal provided direction on how a Court should proceed to exercise its discretion in instances where a party seeks a stay of execution and stated thus:'

- “1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.**
- 2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.**
- 3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.**
- 4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.**
- 5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”**

The 1st Respondent insists the Appeal is not arguable and has no chances of success. From a keen perusal of the Memorandum of Appeal, I find that the Appeal raises triable issues since the Appellant is the registered proprietor of the suit land. Further, the 1st Respondent has already proclaimed the Appellant’s household goods. In the 1st Respondent’s submissions, he has not indicated whether he would be in a position to re transfer the suit land back to the Appellant if the same is transferred to him. From the Applicant’s averments, I find that she has established that she stands to suffer substantial loss if the intended execution is not stayed. Further, that if the 1st Respondent proceeds to execute the judgement and the Applicant’s appeal succeeds, then not only will the Applicant suffer substantial loss but the appeal will also be rendered nugatory. Since the subject matter is land, I hold that the deposit of security of costs is not necessary so long as the said suit land is preserved. I find that the application was filed without unreasonable delay and in associating myself with the decision I have cited above, I find the applicant is entitled to orders of stay of execution pending appeal.

It is against the foregoing that I find the application dated 25th March, 2019 merited and will allow it. Further, I proceed to make the following orders pending the hearing and determination of the Appeal:

- a. An order be and is hereby issued staying execution of the judgment delivered on 28th November, 2018 and decree dated the 11th December, 2018 in the Kajiado CMCC No. 300 of 2013 Robert James Githungo Maina V Keziah Wairimu Zacharia & Another;
- b. the Applicant be and is restrained from engaging in any acts of interfering with the suit land including transferring, charging, wasting, leasing, alienating or putting up any new structures thereon;
- c. The costs will be in the cause;

DATED AND DELIVERED AT KAJIADO ON 3RD FEBRUARY, 2020.

CHRISTINE OCHIENG

JUDGE