



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 506 OF 2008

PAUL KARUGA NJUGUNA.....PLAINTIFF

- VERSUS -

HOUSING FINANCE COMPANY OF KENYA LIMITED.....1ST DEFENDANT

PENINAH NJERI HASSAN.....2ND DEFENDANT

RULING

1. The application before the court is for stay of execution pending the hearing and determination of the appeal arising from the judgement of the court.
2. The plaintiff had, in his claim sought a declaration that the sale of the suit property by the 1st defendant to the 2nd defendant was null and void.
3. He had asked the court to cancel the registration of the 2nd defendant as the proprietor of the suit property, so that the said property could revert to the plaintiff.
4. The 2nd defendant had purchased the suit property at a public auction which was conducted by an auctioneer appointed by the 1st defendant, who was exercising its statutory powers of sale.
5. Meanwhile, the 2nd defendant had lodged a counter-claim, seeking the eviction of the plaintiff from the suit property.
6. After a full trial, the court dismissed the plaintiff's claims against the defendants. The court also declared that the auction sale was conducted lawfully and regularly, thus giving to the 2nd defendant a legitimate title.
7. Consequently, the 2nd defendant was authorized to obtain possession of the suit property from the plaintiff.
8. In the light of those pronouncements, the plaintiff has now brought an application for stay of execution, pending the hearing and determination of his pending appeal.
9. He stated that he is aware of the requirement that it is his obligation to satisfy the court that unless the order is granted, he would suffer substantial loss.

10. In order to demonstrate the nature of the loss he would suffer, the plaintiff pointed out that since 1985 he had lived within the suit property. The suit property was the plaintiff's family home, where he resided together with his family.

11. Therefore, if the plaintiff and his family were forced out of the suit property, he says that he would suffer substantial emotional and psychological loss.

12. Secondly, if the 2nd defendant were to sell the suit property, the appeal would be rendered nugatory; so feared the plaintiff.

13. And the plaintiff's said fear was based upon what he terms as the course of action which is often taken by purchasers of property, which then became the subject matter of litigation. Such purchasers are said to usually sell-off the property, so as to rid themselves of further litigation. They would then sell the suit property and use the proceeds to invest elsewhere.

14. In answer to the application, both defendants submitted that the plaintiff had failed to meet the conditions required to warrant the grant of a stay of execution.

15. In **BUTT Vs RENT RESTRICTION TRIBUNAL [1982] KLR 417**, Madan J A (*as he then was*) underscored the following 2 principles;

1) The appellant has an undoubted right of appeal; and

2) If there is no other overwhelming hindrance, a stay ought to be granted so that the appeal, if successful, may not be nugatory.

16. In the case of **SELESTICA LIMITED Vs GOLD ROCK DEVELOPMENT LIMITED, CIVIL APPEAL No. 48 of 2015**, Aburili J. had the following to say;

“...the purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal, if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant, who should not be deprived of the fruits of his judgement. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs”.

17. In this case, the applicant is fearful about being evicted from the suit property, where he and his family have lived in since 1985.

18. Eviction would occur if the applicant did not vacate the premises voluntarily.

19. If it became necessary for the Decree to be executed, by the eviction of the plaintiff, the said process would be one which had been legally sanctioned through the judgement. Therefore, unless the court gave an order staying execution, there would be a real possibility that the 2nd defendant would, in due course, undertake the lawful process of obtaining the vacant possession of the suit property.

20. In this case, the title of the suit property is already registered in the name of the 2nd defendant. Therefore, if the said 2nd defendant also gets the actual possession of the property, there would be no reason why he could not deal with the property in such manner as he deems most appropriate.

21. It is for that reason that the plaintiff expressed the fear that the 2nd defendant could well choose to sell-off the suit property. I find that that is a possibility.

22. But, I also find that the 2nd defendant did not need to wait until he obtained actual possession of the suit property before he could sell it. He could sell it even when the plaintiff was still in possession.

23. Of course, it is more probable than not that when a potential purchaser is able to buy a property which is not occupied by a person who was challenging the title of the person selling the property, he was likely to offer better prices.

24. Nonetheless, the applicant did talk about that kind of loss. The loss he was concerned about was Emotional and psychological.

25. In the case of **MUKUMA Vs ABUOGA [1988] KLR 645**, the Court of Appeal said;

“...the issue of substantial loss is the cornerstone of both jurisdictions (i.e High Court and Court of Appeal). Substantial Loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory”.

26. Would the eviction of the plaintiff render the appeal herein nugatory?

27. In the case of **JAMES WANGALWA & ANOTHER Vs AGNES NALIKA CHESETO, Misc APPLICATION No. 42 of 2011**, Gikonyo J. talked about the need for the applicant to;

“...establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant, as the successful party in the appeal”.

28. The very essential core of the application herein is the dwelling house which is currently occupied by the applicant.

29. The title to the house is no longer in the applicant's name, so that is not an issue before me. It may, perhaps be an issue at the Court of Appeal.

30. If the applicant lost the possession of the house, that would complete the disengagement between him and the subject matter of the suit.

31. In my considered view, based on the unique factors prevailing in this case, I find that justice demands that the status quo prevailing be maintained until the pending appeal was determined. If that be done, the suit premises would not have been placed beyond the reach of the plaintiff.

32. Therefore, I am minded to stay execution of the Decree. But the order for stay of execution shall be conditional upon the plaintiff depositing rent into a joint account held between his advocates and the advocates for the 2nd defendant.

33. When rents are being paid, as a pre-condition for the continued stay of the plaintiff in the suit property, neither the plaintiff nor the 2nd defendant would be prejudiced.

34. The quantum of the rents to be paid by the plaintiff is Kshs. 50,000/-; and the payments shall be effective from January 2017.

35. In determining the quantum of the rent, I have derived guidance from the Valuation Report which Lloyd Masika prepared on 30th March 2006. That Report was prepared at the instance of the 2nd defendant, and it stated that the suit premises could attract a sustainable rent of Kshs. 20,000/-.

36. The rents shall be paid by the 5th day of each month, in arrears.

37. And as for the rents for January and February 2017, I order that the plaintiff will remit the same by 30th April 2017.

38. In the event of default on any rental payment, execution may issue.

39. Finally, I order that the costs of the application dated 6th September 2016 shall be in the cause in the appeal which is pending at the Court of Appeal. If the appeal is successful, the plaintiff will also become entitled to the costs of the application. But if the appeal fails, the plaintiff will pay to the defendants, the costs of this application.

DATED, SIGNED and DELIVERED at NAIROBI this 16th day of February 2017.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Miss Othieno for the Plaintiff

Miss Ndumia for the 1st Defendant

Miss Mugo for the 2nd Defendant

Collins Odhiambo – Court clerk.