



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC NO. 104 OF 2017

ELIJAH SADALA MSAGHA.....PLAINTIFF

VERSUS

BENEDICT MWAKIO CHOMBO.....1ST DEFENDANT

SAFARICOM (K) LIMITED 2ND DEFENDANT

RULING

(Application for stay pending appeal; plaintiff having purchased a portion of land from the defendant but defendant not subdividing nor transferring the purchased portion to the plaintiff; 2nd defendant erecting a telecommunications base station on this portion sold to the plaintiff and paying rent on the same; plaintiff successfully suing to have the 1st defendant transfer the land to him and to have rental payments paid to him by the 2nd defendant; court also making an order that all rental payments received by the 1st defendant are held in trust for the plaintiff and thus plaintiff entitled to the same; 1st defendant filing a Notice of Appeal against the judgment and now seeking stay pending appeal; principles to be considered; security for the due performance of the decree; judgment being for both land and for monetary compensation; 1st defendant thus needs to deposit security for the money in order to be entitled to stay; order of stay granted subject to deposit of the money received by the 1st defendant/applicant)

1. The application before me is that dated 18 May 2020. It is an application filed by the 1st defendant and it seeks a stay of execution of the judgment herein pending appeal to the Court of Appeal.

2. To put matters into context, the plaintiff claimed to have purchased a portion of land from the applicant, from the larger land parcel No. MN/V/729. On this portion that was sold to the plaintiff, the 2nd defendant, a telecommunications company, erected a telecommunication base station under a lease arrangement. The formal lease was entered into with the applicant who has all along been the registered proprietor of the suit property. Payments for the lease were however being made to the plaintiff. Subsequently, the applicant demanded that payments for the lease now be made into his own account and that is what prompted the plaintiff to file this suit. In his plaint, the plaintiff sought orders of specific performance to compel the applicant to subdivide the suit land and transfer the portion sold to him; an order to compel the 2nd defendant to pay the rent directly to him ; mesne profits to cover the payments made to the applicant; and costs.

3. I heard the case and entered judgment for the plaintiff in a judgment delivered on 7 May 2020. I made the following orders :-

(i) That it is hereby declared that the 1st defendant holds in trust for the plaintiff a portion of land measuring 0.0293 Ha out of the land parcel MN/V/729 which portion is delineated and identified in the survey plan dated 21 November 2013.

(ii) That it is hereby declared that the 1st defendant entered into the subject lease with the 2nd defendant as trustee of the plaintiff who held no legal title to the demised land.

(iii) That it is hereby declared that all payments made by the 2nd defendant to the 1st defendant in respect of the lease over the land parcel MN/V/729 are held by the 1st defendant in trust for the plaintiff.

(iv) That the 1st defendant is hereby ordered to forthwith pay to the plaintiff all monies received in respect of the lease over the land parcel MN/V/729 and such monies will attract interest at court rates from the time they were paid until settlement in full.

(v) That the 2nd defendant is directed and ordered to henceforth pay all monies in respect of the subject lease directly to the plaintiff as he may direct.

(vi) That an order of specific performance is hereby issued directing the 1st defendant to register the proposed sub-division contained in the survey plan dated 21 November 2013, and proceed to formally subdivide the land parcel MN/V/729, in order to carve out a portion of 0.0293 Ha, and convey this portion to the plaintiff at his own cost.

(vii) That in default, of complying with order (vi) above, the Deputy Registrar of this court to proceed to effect the said order and any costs be shouldered by the 1st defendant.

(viii) That the 1st defendant will pay the plaintiff's costs of the suit and will pay the costs of the dismissed cross-claim to the 2nd defendant.

4. Aggrieved by the said judgment, the applicant filed a Notice of Appeal on 13 May 2020 and followed up the same with this application for stay pending appeal. The applicant believes that he has a meritorious appeal. He has averred that he is ready to abide by such terms and conditions as the court may impose upon him.

5. The plaintiff filed a replying affidavit to oppose the motion. He has pointed out that rental payments are usually made in November every year. He believes that there is no imminent threat of execution. He has further averred that the applicant has not demonstrated that he cannot recover the decretal sum if the same is paid to him. He has deposed that in the event that the court deems fit to grant stay, all future rental payments be held in a joint interest earning account. He has also asked that the applicant do deposit the sum of KShs. 1,197,121/= being the rental payments that he had received between the years 2017 and 2020 which the court held are held in trust for him.

6. At the hearing of the application, Mr. Jengo, learned counsel holding brief for Mrs. Kariuki for the plaintiff, submitted that the plaintiff would have no problem with stay being granted if security is provided. Ms. Ambetsa, learned counsel for the applicant, thought that there is no issue on security as the dispute is over the land. Mr. K'Ongere, learned counsel for the 2nd defendant, submitted that his client would abide by any orders made by the court.

7. This is an application for stay pending appeal and therefore the provisions of Order 42 Rule 6 (2) are operative. The said law provides as follows :-

(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.

8. From the above, three points may be fleshed out. First, the court needs to be satisfied that the application for stay has been made without unreasonable delay; secondly, the applicant needs to demonstrate that he will suffer substantial loss if the order for stay is not made; and finally, the applicant needs to furnish security for the due performance of the decree, in the event that he loses the appeal.

9. The decree herein has two faces to it. The first is for the land, that is, the applicant was ordered to subdivide and transfer a portion of the suit land to the plaintiff. The second face of the decree is a money decree. This money decree would cover the amounts of money received by the applicant, which the court held that he now holds in trust for the plaintiff, and also there is a decree for future rental payments to be made to the plaintiff. It is not correct, as submitted by Ms. Ambetsa, learned counsel, that the decree only relates to land; there is a money aspect to the decree.

10. I am prepared to grant stay, but the applicant must deposit in a joint interest earning account, all the money that he received as rental payments, and which monies the court decreed that he now holds in trust for the plaintiff. This joint interest earning account will be held in the names of counsel for the plaintiff and counsel for the applicant. The plaintiff has stated that this money amounts to KShs. 1,197,121/=. This figure has not been disputed by the applicant. If the applicant makes available this money within 60 days, for it to be deposited in the said joint interest earning account, then the decree herein can be stayed pending appeal. If he deposits this money, future rental payments will be made into this joint interest earning account.

11. However, if the applicant does not make available the sum of KShs. 1, 197,121/- within the said 60 days, then the plaintiff will be at liberty to execute for the whole decree (both for the land and for the money), and future payments will be made directly to the plaintiff by the 2nd defendant as the plaintiff may direct. On costs of this application, if the applicant deposits the money, the costs of this application will be costs in the appeal. If he does not deposit the money, this application will stand dismissed with costs to the plaintiff.

12. Orders accordingly.

DATED AND DELIVERED THIS 24TH DAY OF JULY 2020

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA