



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC SUIT NO. 313 OF 2018**

**(FORMERLY HCCC NO. 2808 OF 1990)**

**1. SARAH NJUHI MWENDA.....1<sup>ST</sup> PLAINTIFF**

**2. EMMANUEL WANDERI MACHARIA.....2<sup>ND</sup> PLAINTIFF**

**(Suing as legal representative of JOHN MACHARIA MWENDA)**

**=VERSUS=**

**LUKA NJARARUHI.....1<sup>ST</sup> DEFENDANT**

**JOSEPH MUTURI KURUTU.....2<sup>ND</sup> DEFENDANT**

**MARY WANJIRU MUNGAI.....3<sup>RD</sup> DEFENDANT**

**PHILISIA NJERI MUNGAI.....4<sup>TH</sup> DEFENDANT**

**(Sued as legal representatives of ANDREW MUNGAI NJUI)**

**ISHMAEL MUTURI GITAU.....5<sup>TH</sup> DEFENDANT**

**VERONICAH WAMBUI GITAU.....6<sup>TH</sup> DEFENDANT**

**PETER MUIRURI GITAU.....7<sup>TH</sup> DEFENDANT**

**(Sued as legal representatives of DICKSON GITAU MUTE)**

**RULING**

The dispute between the parties herein relates to a parcel of land known as to L.R No. 4953/4/71 situated at Thika (hereinafter referred to as the “suit property”). The plaintiffs brought this suit against the defendants claiming that they had purchased the suit property from the defendants at a consideration of Kshs. 595,000/- through agreement of sale dated 10<sup>th</sup> February, 1983. The plaintiffs claimed that although they had paid the full purchase price to the defendants, the defendants had refused to transfer the suit property to them. The plaintiffs sought an order for specific performance of the said agreement of sale together with the costs of the suit.

The defendants filed a defence and counterclaim against the plaintiffs. The defendants admitted the agreement of sale dated 10<sup>th</sup> February, 1983 but contended that the same was rescinded by the defendants after the plaintiffs failed to complete the same within the prescribed completion date. In their counter-claim, the defendants averred that despite their failure to complete the said agreement of sale, the plaintiffs had remained in unlawful possession of the suit property and were collecting monthly rent of Kshs. 4,500/- from the tenants on the property. The defendants sought judgment against the plaintiffs for; rescission of the agreement of sale dated 10<sup>th</sup> February, 1983, liquidated damages in the sum of Kshs. 59,000/-, mesne profits at the rate of Kshs. 4,500/- from 11<sup>th</sup> May, 1983 until vacant possession was delivered to the defendants and vacant possession of the suit property.

The suit was heard by Mutungi J. who in a judgment delivered on 30<sup>th</sup> October, 2019 made a finding that the agreement of sale between the plaintiffs and the defendants dated 10<sup>th</sup> February, 1983 was lawfully rescinded by the defendants due to the plaintiffs’ failure to complete the same. Mutungi J. dismissed the plaintiffs’ suit and entered judgment for the defendants in their counter-claim as follows;

1. Kshs. 59,000/- as liquidated damages together with interest from the date of judgment.
2. Kshs. 200,000/- as general damages for loss of user together with interest from the date of judgment.
3. Vacant possession of the suit property to be delivered within 60 days from the date of the judgment and in default an order of eviction to issue.
4. The costs of the suit and the counter-claim.

What is now before the court is the plaintiffs' application dated 16<sup>th</sup> December, 2019 seeking a stay of execution of the said judgement by Mutungi J. pending the hearing and determination of the intended appeal to the Court of Appeal. The application was brought on the grounds set out on the face thereof and on the affidavit of the 1<sup>st</sup> plaintiff sworn on 16<sup>th</sup> December, 2019. The plaintiffs contended that they were never served with a notice for the delivery of the said judgment on 30<sup>th</sup> October, 2019 and that they only came to know of the judgment when the defendants served them with a copy of the decree extracted therefrom. The plaintiffs averred that they were aggrieved with the judgment and intended to appeal against the same to the Court of Appeal. The plaintiffs averred that they had already filed a notice of appeal and that the intended appeal would be rendered nugatory if the order of stay sought was not granted. The plaintiffs averred that the court had granted them 60 days within which to vacate the suit property which was to expire on 21<sup>st</sup> January, 2020 after which they risked being evicted from the suit property. The plaintiffs averred that if the defendants proceed to execute the said judgment, they would be rendered homeless since the suit property was their family home. The plaintiffs averred that they were willing to abide by any directions that may be given by the court and that the application was brought timeously.

The application was opposed by the defendants through a replying affidavit sworn by the 2<sup>nd</sup> defendant filed in court on 27<sup>th</sup> January, 2020. The defendants averred that the dispute between the parties had been going on for several years and that ultimately, judgment was made in the defendants' favour. The defendants averred that although the plaintiffs had a right to appeal against the said judgment, the court had to balance the interest of all the parties to the dispute so that none of the parties was prejudiced. The defendants averred that the plaintiffs had not satisfied the monetary aspect of the judgment and that it was not true that the plaintiffs were residing on the suit property. The defendants averred that the suit property comprises of a commercial building which the plaintiffs had rented out to two (2) tenants. The defendants averred that the orders sought if granted would deprive them of their right to property. The defendants averred further that the application was not brought timeously.

The application was argued on 27<sup>th</sup> January, 2020 when Mr Wakwaya appeared for the plaintiffs while Mr Kamau appeared for the defendants. In his submission in support of the application, Mr. Wakwaya reiterated the grounds set out on the face of the application and on the supporting affidavit of the 1<sup>st</sup> plaintiff. Mr Wakwaya submitted that the plaintiffs were in possession of the suit property and were deriving income therefrom. Mr. Wakwaya submitted that the plaintiffs would suffer substantial loss and their constitutional right to property would be infringed if stay was not granted. On the issue of security, Mr Wakwaya submitted that in land matters the issue of security does not arise. He submitted that the plaintiffs were willing to comply with any directions that may be given by the court on the issue. He urged the court to allow the application.

In his submission in reply, Mr Kamau reiterated that the suit property comprises of a commercial building and that the plaintiffs were not residing thereon. On the issue of security, Mr Kamau submitted that the court had awarded the defendants damages against the plaintiffs in respect of which security should be given. Mr Kamau submitted further that the suit had taken long to determine and that all along the plaintiffs had been deriving income from the property. Mr. Kamau submitted that the defendants would suffer prejudice if the stay sought was granted. He urged the court to dismiss the plaintiffs' application which he contended was filed after unreasonable delay.

#### Determination.

I have considered the plaintiffs' application together with the affidavit filed in support thereof. I have also considered the affidavit filed by the defendants in opposition to the application. I have similarly considered the submissions that were made before me by the respective advocates for the parties. The plaintiffs' application was brought under Order 42 Rule 6 of the Civil Procedure Rules. Order 42 Rule 6(2) of the Civil Procedure Rules provides that:

**“(2) No order for stay of execution shall be made under sub-rule (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 ultimately be binding on him has been given by the applicant.”**

In Kenya Shell Limited v Karuga (1982 – 1988) I KAR 1018 the court stated that:

**“It is usually a good rule to see if order 41 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 cornerstone of both jurisdictions for granting stay.”**

There is no dispute that the plaintiffs are in occupation of the suit property and that they have occupied the property for the entire period of over 25 years that this dispute has been pending in court. In the judgment of the court sought to be stayed, the court found that the agreement of sale between the plaintiffs and the defendants was lawfully rescinded and that the plaintiffs were occupying the suit property unlawfully.

The court ordered the plaintiffs to vacate the suit property and to pay the defendants damages for loss of use. If the stay sought is not granted, the plaintiffs will be evicted from the suit property and the defendants will take possession thereof. Once they are in possession, the defendants would be free to deal with the suit property as they wish. Nothing will stop the defendants from selling, charging or leasing the property to third parties. In the event that the defendants take possession of the suit property and disposes of the same while the intended appeal is pending, the appeal if successful would be rendered nugatory. I am satisfied that the plaintiffs are likely to suffer substantial loss if the stay sought is not granted as concerns the order for vacant possession.

Apart from vacant possession, the defendants also were awarded Kshs. 59,000/- as liquidated damages and Kshs. 200,000/- as general damages for loss of use of the suit property. In their affidavit in support of the application, the plaintiffs did not intimate that they will have any difficulty in settling these monetary awards or that the defendants would be unable to pay back the same in the event that the intended appeal is successful. In the circumstances, I can see no valid reason why the execution of the monetary part of the judgment in favour of the defendants should be stayed.

On the issue of security, the evidence before the court shows that the agreement of sale between the parties was rescinded by the defendants through a letter dated 2<sup>nd</sup> January, 1990. The court has found that the rescission was lawful since the plaintiffs had failed to pay the balance of the purchase price even after the completion date was extended. The evidence before the court also shows that the plaintiffs remained in occupation of the suit property after the rescission of the said agreement of sale and have over the years been deriving income from the same. The defendants have not used the suit property for over 25 years. The intended appeal by the plaintiffs would take some time to determine during which period the plaintiffs would continue to derive income from the suit property. I am of the view that it is necessary for an order for security to be made against the plaintiffs to secure the defendants against damages they are likely to incur from the loss of use of the suit property if the plaintiffs' appeal fails.

In conclusion, I hereby make the following orders;

1. Execution of part of the judgment dated 4<sup>th</sup> October, 2019 delivered on 30<sup>th</sup> October, 2019 directing the plaintiffs to vacate all that parcel of land known as L.R No. 4953/4/71 Thika is stayed pending the hearing and determination of the plaintiffs' intended appeal to the Court of Appeal.
2. The plaintiffs shall deposit in court as a condition for the stay order, a sum of Kshs. 1,500,000/- within 60 days from the date hereof in default of which the stay shall lapse automatically without any further reference to the court.
3. The application is refused as concerns the monetary part of the judgment.
4. Each party shall bear its own costs of the application.

**Delivered and Dated at Nairobi this 23<sup>rd</sup> day of July 2020**

**S. OKONG'O**

**JUDGE**

**Ruling delivered through Microsoft Teams Video Conferencing Platform in the presence of:**

Mr. Wakwaya for the Plaintiffs

Mr. Kamau for the Defendants

Ms. C. Nyokabi-Court Assistant