



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 388 OF 2010

PAULINE MUTEI MAKUMU..... 1ST PLAINTIFF

KILUNGU JUSTUS MULI2ND PLAINTIFF

VERSUS

URSULA KRESZENNTIA1ST DEFENDANT

MONIKA HERKENRATH 2ND DEFENDANT

PETER JURGEN HERKENRATH 3RD DEFENDANT

OSCAR JUMA4TH DEFENDANT

RULING

(Application for stay pending appeal; judgment entered against the applicant for the sum of KShs. 53 million; plaintiffs also awarded land in the name of the applicant; principles to be considered in an application for stay pending appeal; security for the due performance of the decree; security necessary for one to be entitled to a stay pending appeal; court making order for security to be made available within 30 days and in default the plaintiffs will be at liberty to execute the decree)

1. The application before me is that dated 29 November 2019 filed by the 3rd defendant. The application seeks a stay of execution of the judgment herein pending the hearing and determination of an intended appeal to the Court of Appeal. The application is opposed by the successful plaintiffs.

2. To put matters into context, the plaintiffs contended to have purchased the land parcel identified as Subdivision No. 2444 (Original No. 1938/1) Section 1 Mainland North from the 1st and 2nd defendants through an agreement entered into in the year 2003. On the land was constructed a guest house and other structures through which the plaintiffs appear to have been operating a lodging and restaurant business. The same land was subsequently sold to the 3rd defendant and a transfer effected in the year 2012. The 3rd defendant moved into the land and demolished the guest house and the other structures. In the suit, the plaintiffs sought orders of specific performance of their 2003 agreement and damages. The case was heard by Omollo J, who was the then Presiding Environment and Land Court at Mombasa. She was subsequently transferred to Busia Court. The judgment shows that it was written in Busia on 23 September 2019 and delivered by Yano J, in Mombasa, on 7 October 2019. In her judgment, Omollo J, found for the plaintiffs and entered judgment in their favour for the suit land and for compensation in the sum of KShs. 53 million for the demolished structures, jointly and severally against the 1st, 2nd and 3rd defendants. On 9 October 2019, the 3rd defendant filed a Notice of Appeal and subsequently filed this application on 29 November 2019. I have already mentioned that it is an application for stay pending appeal. The 3rd defendant/applicant wants to have the plaintiffs restrained from interfering with the suit land or executing the judgment pending appeal. The applicant has averred that unless restrained, the plaintiffs will take possession of the land and cause it to be registered in their names and also execute for the sum of KShs. 53 million.

3. The plaintiffs have opposed the application through a replying affidavit sworn by the 1st plaintiff. She has justified the judgment and has stated that the applicant needs to furnish security by depositing the sum of KShs. 53 million. The applicant filed a further affidavit contending to be a bona fide purchaser for value and faulting the judgment. He has stated that the current status quo should be maintained pending the appeal.

4. I invited counsel to file written submissions, and both Mr. Gikandi for the applicant, and Mr. Muniyithya for the plaintiffs, did file their submissions. These submissions were highlighted by Mr. Gikandi and Mrs. Umara holding brief for Mr. Muniyithya. I have taken into account these submissions.

5. The operative provision of the law is Order 42 Rule 6 (2) which 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.

It will be seen from the above that the applicant needs to demonstrate that he has filed his application without unreasonable delay; demonstrate that he stands to suffer substantial loss if the stay is not granted; and finally there needs to be an offer of security for the due performance of the decree.

6. Before I delve into the above, there was submission by counsel for the plaintiffs that this court cannot grant an injunction pending appeal. On that I do not agree. A stay pending appeal can have various aspects to it and that may include an injunction pending appeal. This court can, within an application for stay pending appeal, give an injunction, depending on whether or not that order is deemed appropriate in the circumstances. What is important is to see to it that an appeal is not rendered nugatory, subject of course, to the applicant satisfying the requirements laid down in Order 42 Rule 6 (2).

7. I will thus make an assessment of whether the applicant has met the test laid down in Order 42 Rule 6 (2). On the aspect of delay, the application was filed on 29 November 2019, after judgment was delivered on 7 October 2019. This is just over 50 days after the judgment. The applicant had benefited from a 14 day stay that was given after delivery of the judgment, which stay was given pending the filing of a formal application for stay pending appeal. The court generally frowns on any delay that is not explained. On my part, I would have thought that the applicant needed to file his application within the 14 days period, given after the oral application after judgment was delivered, or very shortly thereafter. There was a delay of over 30 days after the lapse of the initial period of 14 days. This delay, regrettably, has not been explained. I think it can be argued to be unreasonable, but I opt not to dwell too much on this.

8. What I cannot however avoid is the aspect of security. The law does require the deposit of security for the due performance of the decree. In this instance, there is no offer of security. In his oral submissions, Mr. Gikandi, learned counsel for the applicant, was in fact emphatic, that his client is not prepared to offer any security. He submitted that the disputed property is going nowhere and that an order of non-interference with the property would suffice. He submitted that it was not possible for his client to raise the sum of KShs. 53 million, though in the same breadth, he submitted that if his client loses the appeal, he will pay the money. I wonder how, if the applicant is unable to raise security for the KShs. 53 million, he will later become capable of satisfying the decree, in case he loses the appeal. He has not said that he hopes, in future, to have the money that he does not now have.

9. In our case, there is judgment for the plaintiffs for both the land and the sum of KShs. 53 million. There needs to be security for the performance of this decree if it has to be stayed pending appeal. The applicant cannot say that the land is adequate security because it is now not his land for him to offer it as security. It has already been adjudged that the land ought to belong to the plaintiffs. The applicant cannot offer as security land that does not now belong to him. Neither is it enough for the applicant to say that he will pay the money aspect of the decree after the appeal. He needs to demonstrate that if he loses the appeal, he is able to pay the money.

10. I am prepared to grant a stay of execution pending appeal, if the applicant through his counsel, will confirm the availability of the sum of KShs. 53 million to counsel for the plaintiffs, within 30 days from the date hereof, in which case, such money to be deposited in a joint interest earning account in the joint names of counsel for the applicant and counsel for the plaintiffs. If this money is so deposited, there will be no registration of any disposition in the register of the suit property until the appeal is heard. However, if the money is not made available and not deposited as directed above, the applicant will have to pursue his appeal without the benefit of an order of stay of execution, and the plaintiffs will be at liberty to fully execute the decree herein. If the applicant abides by the order of deposit of security as ordered above, the costs of this application will be costs in the intended appeal. However, if no security is so deposited, the applicant will bear the costs of this application.

11. Orders accordingly.

DATED AND DELIVERED THIS 16 DAY OF JULY 2020.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA