



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 226 OF 2019

NEW DESIGN CONSTRUCTION LIMITED PLAINTIFF

VERSUS

LYNE KERUBO MANDIEKA DEFENDANT

RULING

(Application for stay pending appeal; applicant having been sued to give vacant possession of a house; respondent obtaining an interlocutory mandatory injunction; applicant filing an appeal to the Court of Appeal and now seeking stay of execution of the ruling and stay of proceedings pending appeal; principles to be applied in an application for stay pending appeal to the Court of Appeal; substantial loss; applicant claiming that she will be rendered homeless and destitute if she is to vacate the disputed house; respondent demonstrating that the applicant has a net worth of KShs. 20 million; clear therefore that the applicant has capacity to seek alternative accommodation pending the hearing of the appeal; applicant not demonstrating that she will suffer any substantial loss; application dismissed)

1. The application before me is that dated 15 June 2020 filed by the defendant. There are two principal orders sought in that application. The first seeks a stay of the ruling delivered on 4 June 2020, and the second is for stay of proceedings, pending the hearing and determination of an intended appeal to the Court of Appeal.

2. To put matters into perspective, the plaintiff/respondent filed this suit on 19 December 2019, seeking orders inter alia to have the defendant/applicant evicted from a house that she occupies within the land parcels subdivision No. 222 (original No. 179/25) Section IV Mainland North CR No. 17917 and subdivision No. 223 (Original No. 179/26) Section IV Mainland North CR 17914 Mtwapa. Together with the plaint, the respondent filed an application dated 17 December 2019 seeking an interlocutory mandatory injunction to compel the applicant to vacate the house within the suit properties pending the hearing and determination of this case. The applicant filed a response to that application where she inter alia contended that her late husband (one Hakcil), died a shareholder of the plaintiff company, and as his widow, she is entitled to reside in the said house. The position of the respondent was that the late husband to the applicant had sold his shares in the company but the company had allowed him to reside on the suit property given their past relationship. The applicant asserted that her husband had never sold any shares in the respondent company, and alleged fraud and forgery, in the said transfer of shares and his resignation from the company. I heard that application and delivered ruling on 4 June 2020. It found that the respondent had made out a case for an interlocutory mandatory injunction and I gave the applicant 30 days to give vacant possession. My view was that even assuming that the applicant's husband was a shareholder of the company, that would not automatically have entitled him, and by extension the applicant, to residence in the disputed property, since a company is separate from its members.

3. Aggrieved, the applicant filed a Notice of Appeal and followed up the same with this application. In the application, the applicant has inter alia stated that she stands to suffer substantial loss if she is to give vacant possession of the disputed house. She has more or less also reiterated what she raised in the first application concerning her right to reside in the house which she considers matrimonial property. The plaintiff has responded to the application through a replying affidavit sworn by Mariam Abdikadir, a director. She has deposited inter alia that in the application for a grant over the estate of her late husband, the applicant has pronounced that she has a net worth of KShs. 20 million. She has thus asserted that no substantial loss will be occasioned to the applicant if she moves out of the house, for she can effortlessly find a roof over her head, pending the hearing of the appeal.

4. I have considered the application alongside the submissions made by counsel. Ms. Louisa Nafula, learned counsel for the respondent, appeared at the inter partes hearing of the application and made oral submissions. Mr. Okoko, learned counsel for the applicant, did not appear at the hearing, though he later filed written submissions, after I had already given a date for ruling. I observe that the same were filed without leave of the court and I have noted the protest by Ms. Nafula sent to me by email. Nevertheless I have considered the said submissions.

5. This being an application for stay pending appeal, I stand guided by the principles set out in 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.

6. It will be seen that three elements need to be met in order for one to sustain an application for stay pending appeal. Firstly, it needs to be demonstrated that the application has been filed without unreasonable delay; secondly, the applicant needs to satisfy the court that he/she stands to suffer substantial loss if the order for stay is not made; and finally, the applicant needs to offer security. Although counsel for the applicant submitted at length that the applicant has an arguable appeal, that is not a consideration before this court at this stage of the proceedings.

7. On the issue of delay, the application has not been made with unreasonable delay, for it was filed just about two weeks after the ruling. I need however to be satisfied that the applicant stands to suffer substantial loss. What the applicant does is to reside in the disputed house. Her position is that if she is to vacate, she will be rendered homeless and destitute. I am not convinced. As pointed out by the respondent, the applicant herself, avers that she has a net worth of KShs. 20 million. She therefore has the ability to find and afford alternative accommodation. With the kind of wealth that she has, she cannot allege that she will be rendered homeless and destitute, if she vacates the house in dispute. Given that position, the applicant has failed to demonstrate to this court that she stands to suffer any substantial loss if she vacates the suit property, while her appeal is being considered. There were submissions made by counsel for the applicant, that if stay is not granted, the house in issue may be lost, since some of the directors or shareholders of the plaintiff are foreigners. The issue here is not the preservation of the property, for it to be available to the applicant in case she succeeds, but whether or not the applicant has demonstrated that she ought to reside in it pending hearing and determination of the appeal. I am certainly not dealing with an application for injunction filed by the applicant. With my above finding, that no substantial loss has been demonstrated by the applicant, the prayer to stay the order that directed the applicant to give vacant possession pending hearing of the main suit fails.

8. There is the other prayer for stay of proceedings. There is no reason why these proceedings should be stayed. What the court decided was only an interlocutory application and made orders pending hearing of the suit. Those orders do not in any way prejudice any party from presenting their case during the hearing of the main suit. The prayer for stay of proceedings therefore also fails.

9. In all, this application has no merit and is hereby dismissed with costs.

10. I had made orders for status quo to be maintained pending delivery of this ruling. That order is vacated. The applicant must thus forthwith give vacant possession to the respondent. If she does not do so within the next 7 days, the respondent is at liberty to appoint a court bailiff to have her evicted. If such eviction is to be undertaken, the defendant/applicant will bear the full costs thereof and the respondent will be at liberty to quantify these costs and demand their payment even before the hearing of the suit.

11. Orders accordingly.

DATED AND DELIVERED THIS 14TH DAY OF JULY 2020

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA