



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL APPEAL NO.375 OF 2013
VISION HOUSING COOPERATIVE LTD.....APPELLANT
VERSUS
WAIRIMU KINYANJUI.....1ST RESPONDENT
MARY WAMBUKU KAMAU (As Trustees of Ngei Kugeri.....2ND RESPONDENT

R U L I N G

Before the court is a Notice of Motion dated 2nd April 2014, brought under Order 51 Rule 1, Order 42 rule 6(1) and (2) of the Civil Procedure Rules 2010 and section 3 of the Civil Procedure Act Laws of Kenya seeking:-

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2. That the honourable court be pleased to issue an order of stay of execution of the decree in Thika CMC NO.982 of 2008 pending hearing and determination of this application inter parties.

2. That the honourable court be pleased to issue an order of stay of execution of the decree in Thika CMC NO.982 of 2008 pending hearing and determination of High Court Civil Appeal No. 375 of 2013.

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The court observes that no certified copy of the lower court decree or judgment has been annexed to this application as mandatorily required by order..... of the Civil Procedure Rules. The purpose for requiring such certified decree or judgment to be annexed to such and other applications is to inform the court the nature of the lower court ruling or judgment in relation to which the application currently before the court is made, so that the court will be in a position to make a relevant and/or meritorious ruling to the application before it. The practice of the court has been to refuse to act in the absence of such certified copy of the lower court decree or order and to proceed to strike out the application before it as incompetent.

In this case, the Applicant has not explained away its failure to annex the required certified copy of the decree or order in respect of which the application is made to show cause why the court should not follow the practice to strike out this application. The court will therefore proceed to strike out this

application for incompetence.

On substantive merits, the above stated course notwithstanding, this application is supported by the affidavit of **Moses N. Gichuhi** sworn on 2nd April 2014. In the affidavit the applicant states that they had instructed their advocates to file an appeal against the judgment on 28th June, 2013 in **Thika CMCC No.982 of 2008**. The applicant applied for order of stay of execution on 17th July 2013 under certificate of urgency which was declined on 11th March 2014. The applicant further stated that the ruling was delivered in the absence of both counsels. The applicant blames the Magistrate for the delay in the prosecution of the matter for not forwarding the file after the delivery of the ruling. The applicant also claims that the appeal has merit and high chances of success and if the orders are not granted the applicant will suffer loss as the title deed will be cancelled and the green card rectified and the Respondent will be issued with title.

The application is contested. The Respondents stated that the plaintiff wants to deny them the fruits of their judgment which has been denied close to two (2) decades. The Respondents are very old women who have been denied their land for several years and this court should not punish them further by allowing the stay. They claim the appeal as filed does not raise concrete issues other than those canvassed in the trial court. They argue that an appeal should not automatically operate as stay of execution.

The applicant submitted that the subject matter of the appeal is land to which it holds title. The decree of the lower courts directed the applicant to surrender the title to the 2nd defendant who is the Land Registrar for cancellation so that the same can be re-issued to the Respondent. The applicant further submits that they will be highly prejudiced if the land is disposed of before the appeal is heard and determined. The applicant also submits that they are willing to abide by any terms and conditions set by the court. They state that they have not attempted to dispose or develop the land so nothing detrimental to the Respondent will occur if the appeal does not succeed.

The Respondent on their part submit that the applicant has not shown the court how or what loss will be suffered if these directions are effected and the suit reverted to the original owner. They state that the court judgment was that the manner in which the Respondent lost proprietorship was through fraud and all subsequent sales were declared null and void. The Respondent further submitted that Order 42 Rule 6 requires the Appellant to show either by evidence or pleadings that the loss is irreversible if stay is not granted.

I have considered the application together with both the supporting and replying affidavits.

The main principles of being granted a stay of execution are set out under **Order 42 Rule 6 (2) of civil procedure Rules** are:

(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

To grant or refuse an applicant stay of execution is accordingly, discretionary. The Court of Appeal at Nairobi in the case of **Butt v. Rent Restriction Tribunal (Madan, Miller and Porter, JJ.A)** while considering an appeal from the High Court refusing a stay of execution pending appeal held;

“1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principal in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judges' discretion.

3. A Judge should not refuse a stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the applicant at the end of the proceedings.

4. The court in exercising its discretion whether to grant or refuse an application for stay, will consider the special circumstances of the case and unique requirements.”

In the instant case, the applicant is seeking a stay of execution of the rectification of the land register. The applicant has not demonstrated the actual substantial loss it may suffer if the orders are not granted. The applicant has not really demonstrated adequately that it holds title to the land the subject of this matter, although the Respondent has not denied the Applicants averment over the issue, thus showing the Respondent's concession thereon.

On whether the application has been made without unreasonable delay, the Applicant's explanation for delay was that he filed an application to stay the execution in the lower court on 17th July 2013. The ruling was delivered 11th March 2014 denying the applicant the orders. In the supporting affidavit the applicant have stated that the magistrate is to be blamed for the delay. In the court's view there is no delay in bringing the current application. The court delivered its ruling on 11th March 2014 the current application was filed 2nd April 2014 that is within the required time.

On the security to be given, the applicant has not stated what security they will furnish. The applicant has only stated in their submissions that they are willing to abide by the terms and conditions that will be set by the court. Order 42 rule 6 (2b) requires the applicant to provide such security as may ultimately be binding upon him. The applicant has not, therefore, met the requirement for the provision of a security.

The final orders of this court shall accordingly be as follows: -

ORDERS

1. The application for stay of execution is hereby both struck out and/or dismissed on condition that if the land, the subject of this appeal is in the meantime transferred in favour of the Respondents before this appeal is determined, the Respondents shall not transfer the same or alienate it in any manner before this appeal is finally determined.

2. The costs of this application shall be met by the Applicant in any event.

Dated and delivered at Nairobi this 11th day of March, 2015.

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JUDGE