



REPUBLIC OF KENYA
HIGH COURT OF KENYA AT MOMBASA

CIVIL APPEAL NO. 20 OF 2015

NOOR SAID..... APPELLANT

-VERSUS-

MARY MWAWASI MANGA..... RESPONDENT

(Being an Appeal from the Judgment of the Hon. R.O. Odenyo delivered on 29th January 2015 in Mombasa CMCC No. 3901 of 2000)

RULING

Introduction

1. The Appellant seeks the following orders in her Notice of Motion application dated 2nd March 2015 (hereinafter “the application”):
 - i. **Spent.**
 - ii. **Spent**
 - iii. **That there be stay of execution of the decree/judgment delivered by Honourable R. O. Odenyo on 29th January 2015 pending hearing and determination of the appeal filed herein.**
 - iv. **That the Respondent be restrained by himself, her servants or agents or otherwise from selling, disposing of, alienating, charging and/or in any manner parting with possession of house No. 568 on Plot No. 21 Section XXX Chaani Mombasa West pending hearing and determination of the application herein and the appeal.**
 - v. **That the costs of the application be provided for.**

Appellant's Case

2. The Appellant's case is that house No. 568 on Plot No. 21 Section XXX Chaani Mombasa (“the suit property”) belonged to Salim Awadh Suleiman, the Appellant's husband who is now deceased. That the Respondent has been in possession of the suit property as a tenant of the Appellant and not as the lawful owner.
3. The Appellant averred that the Respondent had been paying rent for the suit property and annexed to her Further Affidavit sworn on 30th March 2015, copies of receipts for rent she claimed were paid by the Respondent in 1986 and 1987. The Appellant also produced a copy of a letter dated 8th August 1996 written to the Respondent by the Appellant's lawyers, Y.A. Ali Advocates demanding rent arrears of Kshs. 87,200/=. The Appellant stated that after the Respondent failed to comply with the said demand, the Appellant proceeded to file a case at the Rent Restriction Tribunal at Mombasa in Case No. 377 of 1996 in which the Respondent was ordered to pay the Appellant Kshs. 87,000/= plus mesne profits and to give the Appellant vacant possession of the suit premises with effect from 1st December 1996.

4. It is the Appellants case that unless the stay and injunction orders are granted, the Appellant will suffer substantial loss and the appeal will be rendered nugatory because the Respondent is likely to dispose of the suit property since she is in actual possession of the same.

Response by the Respondent

5. The Respondent opposed the Application through a Replying Affidavit sworn by herself on 13th March 2015. According to the Respondent, she is in current occupation of the suit premises not as a tenant but as the owner. That if it was true that the Respondent was a tenant as alleged by the Appellant, then there should have been documentary proof of the allegations through rent receipts and lease agreement.
6. The Respondent contended that if it were true that she was a tenant, then the Appellant should have counter-claimed for rent and mesne profits at the lower court which she did not.

Appellant's Submissions

7. The Appellant filed two sets of submissions; on 12th May 2015 and on 22nd May 2015. The Appellant submitted that she satisfied the conditions necessary for granting of stay of execution as laid down in Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010. That she will suffer substantial loss if stay is not granted, that the application was filed without unreasonable delay and that the Appellant is willing to give security as the court deems fit. The Appellant relied on the case of **M.M Butt vs Rent Restriction Tribunal & Another, Nairobi Court of Appeal Civil Appeal No. 6 of 1979** to underscore her submission that the court ought to exercise its discretion in a way so as to prevent the appeal, if successful, from being rendered nugatory. The Appellant submitted that the court has the inherent jurisdiction to ensure that justice is indeed served and not curtailed.
8. On the prayer for restraining order against the Respondent from selling the suit property, the Appellant submitted that she is apprehensive that the Respondent might proceed to dispose of the suit premises since the lower court already granted her ownership.

Respondent's Submissions

9. The Respondent's Written Submissions were filed on 18th May 2015. The Respondent submitted that the receipts annexed by the Appellant do not show who issued them. She submitted that substantial loss must be demonstrated by pleadings and evidence and that it was not enough for a party to simply allege that he will suffer substantial loss.
10. The Respondent also submitted that the Appellant did not give or offer to give any security. That the giving of security is mandatory under Order 42 (2), (a) and (b).
11. According to the Respondent, by claiming that the suit property belonged to her deceased husband, the Appellant is admitting that she lacks the *locus standi* to institute this appeal because she does not have letters of administration of her late husband's estate. In response to this submission though, the Appellant stated that it is the Respondent who had sued her in the lower court in her personal capacity and she participated in those proceedings as such and therefore the Respondent is estopped from raising such objection at this stage.

The Issue for Determination

12. The issue for the court's determination is whether the Appellant has demonstrated a basis upon which the Court should grant stay of execution of the decree made on 29th January 2015 and restraining orders to bar the Respondent from disposing of the suit property.

Analysis

Stay Pending Appeal

13. The conditions which an applicant must satisfy in order for an order of stay of execution to be

granted are now well settled. In the case of Peter Ondande t/a Spreawett Chemis –Vs- Josephine Wangari Karanja [2006] eKLR, L. Kimaru, J. stated as follows:

“The issue for determination by the court is whether the applicant has established a case to enable the court grant him the order of stay of execution sought. For the court to grant stay of execution, it must be satisfied that substantial loss may result to the applicant if stay is not granted. Further, the applicant must have filed the application for stay of execution without unreasonable delay. Finally, the applicant must provide such security as may ultimately be binding upon him.”

14. This court adopted the above holding in the case of Feisal Amin Janmohammed T/A Dunyia Forwarders v. Shami Trading Co. Ltd Mombasa High Court Civil Appeal No. 65 of 2013 [2014] eKLR and stated as follows:

“It is trite law, therefore, that a stay of execution order is generally granted if the applicant has successfully demonstrated that a substantial loss may result to him unless the order is made, that the application was made without unreasonable delay and that the applicant has offered proper security.”

15. Those are the conditions which the applicant must successfully demonstrate. The impugned judgment was delivered on 29th January 2015. This application was filed on 2nd March 2015. There was a delay of one month. That delay was not inordinate. The Appellants did not expressly state in the application and the affidavits in support thereof that she is willing to provide security. However, the same was stated in the Appellant's Written Submissions and I take it to mean that the Appellant is willing to furnish security if ordered by this court.

16. On the issue of substantial loss the Appellant states that unless the judgment is not stayed, the Appellant will suffer substantial loss because the Respondent may sell the suit property and so there is likelihood that the Appellant will lose ownership of her house which is a source income for her. I agree with the Appellant that since the lower court already granted ownership of the suit property to the Respondent, she may dispose of the same if she so wishes and doing so may result to substantial loss to the Appellant since the subject and substratum of the appeal shall have been transferred and defeated. It is therefore my view that the Appellant has satisfied the three conditions necessary for the grant of the stay order.

Restraining Order

17. The Appellant seeks an order of injunction to restrain the Respondent from disposing of the suit property pending hearing and determination of the appeal. In the case of JULIUS MUSILI KYUNGA V KENYA COMMERCIAL BANK LIMITED & ANOTHER [2012] eKLR, Muriithi, J. stated as follows regarding the principles for the grant of injunction pending appeal:

“In considering the principles for the grant of injunction pending appeal, the Court of Appeal has developed the tests that the appeal must not be frivolous, or the applicant must show that he has an arguable appeal, and that the appeal, if successful, should not be rendered nugatory. See Madhupaper v. Paddy Kerr and Githunguri v. Jimba Credit, supra.

18. On a *prima facie* basis, I do not think that the appeal is frivolous. I say so in light of the receipts which though contested by the Respondent, tend to show that the Respondent might have been a tenant in the suit premises. Further, the fact the Appellant had obtained judgment against the Respondent in Mombasa Rent Restriction Tribunal Case No. 377 of 1996 for rent arrears and mesne profit is a *prima facie* pointer that the appeal is not frivolous. The Respondent does not seem to dispute the existence of that judgment. The appeal, if successful, should not be rendered nugatory. In the end I do grant the following orders:

i. There be stay of execution of the judgment and decree delivered by Honourable Odenyo on 29th

January 2015 in Mombasa CMCC No. 3901 of 2000 pending hearing and determination of this appeal.

- ii. The Respondent is hereby restrained either by herself, agents or servants from selling, disposing of, charging or in any manner parting with possession of House No. 568 situate on Plot No. 21 Section XXX Chaani Mombasa West pending hearing and determination of this appeal.
- iii. The costs of the Notice of Motion dated 2nd March 2015 shall abide with the outcome of the appeal.

Dated and delivered at Mombasa this 9th day of July 2015.

MARY KASANGO

JUDGE

9th July 2015

Coram

Before Hon. Justice Mary Kasango

C/Assistance – Kavuku

Present for:

Appellant:

Respondent:

Court Ruling delivered in their presence/absence in open court.

MARY KASANGO

JUDGE