



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 736 OF 2015

JAVID IQBAL KARIM (Suing as legal representative

of the estate of GULAM FATIMA).....1ST PLAINTIFF

ABDUL KADHEER MUGHAL (Suing as attorney

of HAJIRA BIBI W/O ALLAH RAHIM WAZIR

MOHAMED MUGHAL D/O FATEH MOHAMED

executrix of the estate of the late WAZIR

MOHAMED MUGHAL).....2ND PLAINTIFF

=VERSUS=

ZE YUN YANG).....DEFENDANT

RULING

On 23rd February, 2018, judgment was entered herein for the plaintiffs against the defendant in the sum of Kshs. 4,702,313/- that the court found to be the balance of the purchase price for L.R No. 209/1673 that the plaintiffs sold to the defendant on 4th February, 2004. The plaintiffs were also awarded the costs of the suit. What is now before the court is the defendant's application brought by way of Notice of Motion dated 12th July, 2019 seeking a stay of execution of the said judgment. The application that was supported by the affidavit of the defendant dated 12th July, 2019 was brought on the grounds that the defendant was dissatisfied with the said judgment and had filed a notice of intention to appeal against the same to the Court of Appeal. The defendant averred that it was ready and willing to furnish security for the performance of the decree in favour of the plaintiffs.

The defendant averred further that the plaintiffs were persons of unknown means and as such if the decretal amount was released to them, they would not be able to refund the same to the defendant should the intended appeal be successful. The defendant averred that if the plaintiffs proceeded with the execution of the decree, his appeal would be rendered nugatory thereby subjecting him to irreparable harm. The defendant annexed to his affidavit in support of the application among others; a copy of the Notice of Appeal dated 5th March, 2018 and a draft Memorandum of Appeal.

The application was opposed by the plaintiffs through a replying affidavit sworn by the plaintiffs' advocate, Mohamed Tariq Khan on 17th September, 2019. In the affidavit, the plaintiffs averred that the application did not meet the threshold for granting a stay of execution set out in Order 42 Rule 6 of the Civil Procedure Rules. The plaintiffs contended further that the draft memorandum of appeal did not raise any triable issue and that the application was brought after inordinate delay. The plaintiffs contended further that the application was an afterthought. The plaintiffs contended further that they were persons of means and as such were capable of refunding the decretal amount should the defendant's intended appeal succeed. The plaintiffs contended further that the judgement the execution of which was sought to be stayed was delivered after a period of 13 years from the time the suit was filed and that it would be highly prejudicial if the application by the defendant that was intended to deny the plaintiffs the enjoyment of the fruits of the said judgment was allowed. The plaintiffs averred in the alternative that if the court was inclined to grant the application, the court could consider staying the execution in respect of a half of the principal amount only and could direct the other half to be deposited in an interest earning joint account in the names of the advocates on record for the parties. The plaintiffs averred further that the costs of the suit could also be taxed and deposited in the said joint account.

The application was argued on 6th February, 2020 when Mr. Khan appeared for the plaintiffs while Mr. Muriithi appeared for the defendant/applicant. In his submission in support of the application, Mr. Muriithi reiterated the grounds set out on the face of the application

and on the supporting affidavit of the defendant. Mr. Muriithi submitted that the delay in the filing of the application was caused by an application that was filed by the plaintiffs seeking to review the judgment the subject of the application before the court in respect of which a ruling was delivered on 2nd April, 2019. Mr. Muriithi submitted further that since the judgment was delivered by Gacheru J. in the Environment and Land Court at Thika, the defendant waited for the file to be brought back to Milimani before bringing the present application. Mr. Muriithi submitted that the defendant was willing to deposit the entire decretal amount in a joint account as security for the performance of the decree.

In his submission in reply, Mr. Khan also reiterated the contents of his replying affidavit sworn in opposition to the application. He submitted that the defendant had not demonstrated that it stood to suffer substantial loss if the stay sought was not granted. Mr. Khan submitted that the plaintiffs were capable of paying back the decretal amount in the event that the intended appeal was successful. Mr. Khan submitted further that the defendant had not demonstrated that the plaintiffs were not persons of means as alleged. Mr. Khan submitted that the plaintiffs had no objection to the principal amount being deposited in a joint account in the names of the advocates on record. He however insisted that the costs should be paid forthwith to the plaintiffs or an appropriate security be given by the defendant in respect thereof.

Determination.

I have considered the defendant's application together with the affidavit filed in support thereof. I have also considered the affidavit filed by the plaintiffs in opposition to the application. I have similarly considered the submissions that were made before me by the respective advocates for the parties. The defendant's 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.”

I am in agreement with the plaintiffs that the defendant's application was brought after along interval from the date of the judgment sought to be stayed. The delay has however been explained by the defendant to the satisfaction of the court. On the issue of substantial loss, the defendant has contended that the plaintiffs have no known assets or sources of income and as such there is a likelihood of them not refunding the decretal amount if the same is paid to them should the defendant succeed in the intended appeal. The defendant has contended that there is a likelihood of the appeal if successful being rendered nugatory. On their part, the plaintiffs have contended that they are persons of means and have the ability to refund the decretal amount if paid to them.

In George Mbiti Kiebia & Another v Isaya Theuri M'Intari & Another [2014] eKLR the Court of Appeal stated that:

“Under Section 112 of the Evidence Act, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him. How the appellant got registered as proprietor of Land Parcel No. 70 is a fact within the knowledge of the appellant and it was incumbent upon the appellant to dislodge the notion that Land Parcel No. 70 was ancestral clan land and refute that he was not registered as proprietor as a representative of the family of the late M'Kiebia.”

The means through which the plaintiffs could pay back the decretal sum of Kshs. 4,702,313/- if released to them were facts within their own knowledge. Section 112 of the Evidence Act placed the burden on the plaintiffs to prove that they had the means of refunding the decretal amount should the intended appeal by the defendant succeed. In the replying affidavit that was sworn by their advocate, the plaintiffs did not provide particulars of their assets or sources of income. Although the said advocate claimed that the plaintiffs were individuals of means, he did not place any evidence before the court of the alleged means. In the absence of evidence that the plaintiffs have the means of refunding the decretal amount if paid to them should the defendant succeed in the intended appeal, I am in agreement with the defendant that he is likely to suffer substantial loss if the stay sought is not granted. There is a likelihood of the defendant not recovering the decretal amount once paid to the plaintiffs. The appeal if successful would therefore be rendered nugatory. On the issue of security, the defendant has agreed to deposit the entire decretal amount into an interest earning bank account in the joint names of the advocates for the parties. That in my view would be sufficient security.

The upshot of the foregoing is that the defendant has satisfied the conditions for granting a stay of execution. I therefore make the following orders;

1. Execution of the judgment delivered on 23rd February, 2018 is stayed pending the hearing and determination of the defendant's intended appeal to the Court of Appeal.
2. The plaintiffs shall deposit in an interest earning bank account in Nairobi in the joint names of the advocates on record for the parties a sum of Kshs. 5,500,000/- as security within 30 days from the date hereof in default of which the stay granted herein shall

lapse automatically without any further reference to the court.

3. Each party shall bear its own costs of the application.

Delivered and Dated at Nairobi this 24th day of September, 2020

S. OKONG'O

JUDGE

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

Ms. Athman h/b for Mr. Khan for the Plaintiffs

Mr. Muriithi h/b for Mr. Gathu for the Defendant

Ms. C. Nyokabi - Court Assistant