



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

CASE No. 145 OF 2014

MARGARET IMINZA LUYAYI.....PLAINTIFF

VERSUS

MOSES OPUDO MUDAKA.....DEFENDANT

RULING

1. I delivered judgment in this matter on 19th June 2019 as follows:

(i) I order the defendant to vacate from Plot Number Block 14/Unsurveyed Manyani Estate within 21 (twenty one) days from the date of delivery of this judgment. In default, the plaintiff shall be at liberty to evict him.

(ii) I grant a permanent injunction restraining the defendant from trespassing onto and remaining on or in any other manner whatsoever interfering with the plaintiff's use of Plot Number Block 14/Unsurveyed Manyani Estate.

(iii) Each party to bear own costs of the suit.

2. The defendant reacted to the judgment by filing Notice of Appeal on 1st July 2019 followed by Notice of Motion dated 16th July 2019, which is the subject of this ruling. He seeks stay of execution of the decree pending hearing and determination of his appeal. He deposed in the supporting affidavit that he is in occupation of the suit property and that he values it as family home. That he is in danger of eviction in execution of the decree and that he will suffer substantial loss rendering the appeal nugatory if he is evicted.

3. The plaintiff opposed the application through a replying affidavit in which she deposed that the defendant is still in possession of the suit premises and that the application is meant to keep her from enjoying the fruits of the judgment thus causing her irreparable loss and damage. She added that the court should order the applicant to deposit KShs 3 million if he does not vacate.

4. The application was canvassed through written submissions. Relying on the case of **Butt v Rent Restriction Tribunal [1982] 417**, the applicant contended that he will suffer substantial loss if evicted before the appeal is determined. Regarding the issue of security, he argued that the plaintiff's proposal of KShs 3 million is too high and left it to the court to set the appropriate amount. He therefore urged the court to allow the application.

5. The plaintiff on her part argued that the applicant has not demonstrated that he will suffer any substantial loss if stay is not granted, that the applicant has not shown willingness to provide security and that in the event the application is allowed the applicant should be ordered to deposit KShs 3 million as security. The plaintiff further argued that stay cannot be granted since the applicant has not filed any appeal, that the applicant's draft memorandum of appeal discloses no arguable appeal and that the application is meant to keep dragging her in litigation despite the judgment in her favour. She relied on the cases of **Masisi Mwita v Damaris Wanjiku Njeri [2016] eKLR**, **Halai & another v Thornton & Turpin (1963) Ltd [1990] eKLR** and **Abraham Lenauia Lenkeu v Charles Katekeyo Nkaru [2016] eKLR**. She urged the court to dismiss the application.

6. I have considered the application, the affidavits and the parties' respective submissions. This court's jurisdiction to grant stay pending appeal is guided by **Order 42 rule 6 (1) and (2) of the Civil Procedure Rules, 2010** provides as follows:

6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the

court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(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 may ultimately be binding on him has been given by the applicant.

7. The upshot of these provisions are that an applicant seeking stay of execution pending hearing and determination of an appeal must demonstrate that substantial loss will result to him if stay is not granted and that the application has been made without unreasonable delay. As Platt Ag JA (as he then was) stated in **Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] eKLR**, substantial loss is the corner stone of the jurisdiction to grant stay of execution pending appeal. It is virtually impossible for such an application to succeed if an applicant fails to demonstrate that he will suffer substantial loss if stay is not granted.

8. A perusal of the record herein reveals that being dissatisfied with the judgment delivered herein on 19th June 2019, the applicant filed Notice of Appeal on 1st July 2019. Thus, a response to the plaintiff's argument that the applicant has not filed any appeal is found at **Order 42 rule 6 (4)** of the **Civil Procedure Rules, 2010** which provides that "*For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given*". The simple answer is that for purposes of an application for stay of execution pending appeal, an appeal already exists.

9. In the judgment I ordered the applicant to vacate from the suit property within 21 (twenty one) days from the date of delivery of the judgment and that in default of him vacating, the plaintiff be at liberty to evict him. There is no dispute that the applicant is in occupation of the suit property. I therefore agree with him that he will suffer substantial loss if evicted before the appeal is determined. The plaintiff's concerns as to further delay in the litigation can be addressed by limiting the life of stay orders so as to encourage the applicant to proactively prosecute the appeal. Regarding security, I agree with the applicant that the plaintiff's proposal of KShs 3 million is too high. I consider a sum of KShs 500,000 (Five Hundred Thousand) to be appropriate in the circumstances.

10. In view of the foregoing, I make the following orders:

a) I grant stay of execution of the decree herein pending hearing and determination of the appeal by the defendant.

b) Costs of the application are awarded to the plaintiff.

c) The stay is conditional on the defendant depositing in court a sum of KShs 500,000 (Five Hundred Thousand) within 21 (twenty one) days from the date of delivery of this ruling. In default, the stay orders shall automatically lapse and Notice of Motion dated 16th July 2019 shall stand dismissed with costs to the plaintiff.

d) If the defendant complies with the conditions in (c) above, the stay orders will unless otherwise ordered remain in force for only (2) two years from the date of delivery of this ruling.

Dated, signed and delivered at Nakuru this 8th day of October 2020.

D. O. OHUNGO

JUDGE

In the presence of:

Ms Chepngetich for the defendant/applicant

Mr Ojou holding brief for Mr Ochieng for the plaintiff/respondent

Court Assistants: Beatrice Jelimo & Julius Lotkomoi