IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 78 OF 1999

GODFREY NG'ANG'A THANJI ……..…… PLAINTIFF

VERSUS

JAMES KAMAU KIGONDU & ANOR …… DEFENDANTS

Coram: Mwera J

Nyaga for plaintiff

Ms Nyawira for Ibrahim for defendant

Njoroge court clerk

RULING

The plaintiff/applicant filed a notice of motion dated 10.12.10 under the now repealed Order XLI Rule 4 Order L Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act praying:

i) that the court's orders of 9.12.10 be stayed pending the final determination of an intended appeal; and

ii) that the defendant/respondents be restrained from interfering with the applicant's occupation of the land called DAGORETTI/WAITHAKA/202.

In the grounds it was set out that judgement herein was read on 9.12.10. A prayer by an oral application for stay was declined, and the learned judge directed that this formal application be preferred. The sought stay ought to issue because the applicant has been in occupation of the suit land for over 20 years.

Mr Paul Nyaga, advocate for the applicant swore a supporting affidavit, stating that he had been authorized to do so by his client and he had had the conduct of this matter on his behalf.

It was deponed that Justice Aganyanya dismissed the suit on 9.12.10. And with that that the injunction that had been in place in favour of the applicant who had been in occupation of the suit premises since 1990, lapsed. That the applicant was dissatisfied with the judgement and therefore preferred an appeal by filing a due notice. So in the interests of justice, a stay should be granted to the applicant. The application had been brought within reasonable time. An interim order was granted. The application was served and on 16.12.10 the 2nd defendant swore a replying affidavit.

Therein it was deponed that execution ought to proceed because for 16 years the deponent had suffered for not being able to utilize his land, because the applicant by virtue of a sale agreement he entered into with the 1st defendant was claiming ownership – an agreement which the trial court found void for lack of a land control board consent. That the applicant had failed to demonstrate how the application satisfied conditions for a stay eg. the substantial loss to be suffered if the order is refused. The trial court had directed that the 1st defendant do refund the purchase price paid by the applicant. He stood to suffer no loss and besides he had not offered any security for due performance of the decree.
Further, that an injunction sought ought not issue as that could amount to this court "sitting on its own appeal." And lastly that the supporting affidavit having been sworn by the applicant's lawyer, was fatally defective. Only the applicant himself could swear to issues concerning substantial loss.

Asked to submit, it was urged on behalf of the applicant that the motion under review was supported by two affidavits - one by the applicant and the other by his advocate. It may be remarked on here that the motion was supported by an affidavit of the applicant's advocate only. Moving to the substance, it was claimed that the suit land had been the permanent address of the applicant since 1990. He had then lived there for 3 years, built a permanent house and sank a borehole. Then judgement followed 20 years later. Thus evicting the applicant on a decree to be extracted, would occasion him substantial loss. He would be rendered homeless. Some two cases which did not appear quite relevant here were cited. The submission ended with a remark that with the judgement having been delivered on 9.12.10, and this application filed on 10/12/10, that was without unreasonable delay. And that the security for due performance of a decree given as a condition under the provision governing stay applications like this, was meant to cater for money decrees and not land cases. The land would always be there and in the event the appeal was lost, the respondent would always have it.

The 2nd defendant/respondent's submission began by stressing that no substantial loss could be suffered by the applicant who had testified before the trial judge that he had built semi – permanent structures on the land. These could be easily removed. Agreeing that judgement had come after 20 years, the respondent saw this to stress more how for so long he had been kept away from enjoying his land. Noting that the plaintiff did not "buy" that land from the 2nd defendant but from the 1st defendant, whose agreement of sale was found void, the court was told that that was a special circumstance that should lead it to decline issuing the orders sought. And although the application was brought only a day after the judgement, the applicant had not offered any security for due performance of the decree. Order X L 1 Rule 4 Civil Procedure Rules did not distinguish between decrees following money or land claims.

Having the foregoing in mind, this court is minded to find that when this application was filed on 10/12/10 following the judgement of 9.12.10, it was without unreasonable delay. That takes care of one of the 3 conditions to be fulfilled when a party desires a stay pending appeal.

Then as regards security for due performance of a decree, the other condition, it is the court if inclined to grant a stay which orders for this. Nonetheless, a prudent applicant ought to make a proposal to the court and the respondent, and an attractive proposal it should be, to gain favour with the court. The applicant did not take that course but then that is left at that. The court is not minded to delve into the novel argument put forth by the applicant that order XL1 Rule 4 Civil procedure Rules was meant for money decrees and not those involving land. This had no basis.

Coming, to the last condition, demonstrating that substantial loss will befall the applicant in the event a stay order is not given, the court was not satisfied that Mr. Nyaga in his supporting affidavit made that out. Of course, in the submission it was stated that the applicant had built a permanent house on the suit land while on his part the 2nd defendant stated that the applicant had given evidence at the trial that he had built semi – permanent structures.

Be that as it may. But in the circumstances of this case as stated but not denied by the plaintiff, that the 2nd defendant was the registered proprietor of the suit land which the 1st defendant made to sell to the plaintiff by way of a sale agreement that was found void for want of the local land control board consent, all this having nothing to do with the 2nd defendant, it is only fair that the prayers laid be and are hereby refused. What has been stated above however in no way stands in the way of the plaintiff to wage his appeal on its merits.

Last but not least the court is obliged to observe that this application could as well be considered as premature. The applicant prayed for a stay of execution of a decree and yet perusing of the record did not yield either a decree, an application to execute it or warrants of execution! Anyway, the end of it all is that this application is dismissed with costs.

Delivered on 2/3/11.

J. W. MWERA

JUDGE