



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC 1227 OF 2013

HESBON K. LIMISI.....PLAINTIFF/RESPONDENT

=VERSUS=

DELILAH ACHIENG MATHEWS.....1ST DEFENDANT/RESPONDENT

ARGWINGS KODHEK OCHIELY.....2ND DEFENDANT/APPLICANT

THE CHIEF LANDS REGISTRAR, NAIROBI.....3RD DEFENDANT/RESPONDENT

RULING

1. This is the notice of motion dated 3rd March 2020 brought under section 1A, 3A and 63 (e) of the Civil Procedure Act, Order 42 Rule 6 (1) and Order 51 Rule 1 of the Civil Procedure Rule 2010.

2. It seeks orders:-

(1) Spent.

(2) Spent.

(3) That there be a stay of execution of decree emanating from the judgment that was delivered on 6th February 2020 pending interparties hearing of this application.

(4) That this honourable court does issue such further orders or directions that it may deem fit to grant in the interest of justice.

(5) That the costs of this application be in the cause.

3. The grounds are on the face of the application and are:-

(a) There is already judgment in favour of the plaintiff which was passed on 6th February 2020.

(b) The 2nd defendant is dissatisfied with the said judgment and has lodged a Notice of Appeal and will appeal to the Court of Appeal against the said judgment.

(c) The 2nd defendant therefore makes this application seeking interim stay of execution of the judgment pending the hearing of this application inter-parties and subsequently pending the hearing of the 2nd defendant's Intended Appeal.

(d) The 2nd defendant has already applied for typed copies of proceedings to enable him to prosecute his appeal with the shortest time possible.

(e) If an order for stay is not granted, the 2nd defendant will suffer substantial loss since he will be evicted from the suit property and he will be deprived of his property which he validly and lawfully purchased from the 1st defendant.

(f) If stay of execution is not granted, the 2nd defendant's intended appeal will be rendered nugatory as the plaintiff will move to evict him and cause the registration of the property in his (the plaintiff's) name and in the event that the 2nd defendant's appeal succeeds he will be forced to go to court and seek orders of deregistration of the plaintiff and further orders of eviction. This will occasion a lot prejudice of substantial loss.

(g) The 2nd defendant is ready to provide security for due performance as may be ordered by the court.

4. The application is supported by the affidavit of Argwings Kodhek Ochiely, the 2nd defendant/applicant sworn on the 3rd March 2020 and a further affidavit sworn on the 31st August 2020.

5. The application is opposed. There is a replying affidavit sworn by Hesbon K. Limisi the plaintiff/respondent sworn on the 17th July 2020 and a further affidavit sworn on the 13th August 2020.

6. On the 21st July 2020, the court with the consent of the parties directed that the application be canvassed by way of written submissions.

7. It is the 2nd defendant/applicant's submissions that there is an order directing the 3rd defendant to effect transfer of this suit property to the plaintiff. That there is also an active order for payment of mesne profits and an order for payment of general damages of Kshs.300,000/-.

8. It is further the 2nd defendant's submissions that as a way of providing security for due performance of the decree under order 42, he has ceded possession of the house on a without prejudice basis. That if the registration of the house is effected in the name of the plaintiff and if mesne profits are paid he will suffer substantial loss in the event his appeal is allowed. He has put forward the cases of **Kenya Shell Ltd vs Benjamin Karuga Kibiru & Another [1986] KLR; Sewankambo Dickson vs Ziwa Abby HCT-00-CC MA 0178 of 2005.**

9. He further submitted that the act of transfer of the house to the plaintiff involves actions which are to be done by the 3rd defendant and as submitted in the event the appeal succeeds, the 2nd defendant will be forced to commence other proceedings to reverse the act and thus incur costs that are preventable by the grant of an order of stay.

10. The 2nd defendant has ceded possession of the house as a form of security for due performance. This amounts to sufficient security for due performance.

11. The application for stay was made without undue delay given that the judgment was delivered on 6th February 2020. He prays that the application be allowed.

12. It is the plaintiff's/respondent's submission that the 2nd defendant's/applicant's application does not conform with the mandatory provisions of law as set out under order 42 rule 6(1) and (2) of the Civil Procedure Rules.

13. That no, order of stay of execution should be granted unless the 2nd defendant/applicant is ordered to deposit Kshs.2,760,000/- in the joint interest earning account of both parties' counsel. He has put forward the case of **Governors Balloon Safaris Ltd vs Skyship Company Ltd & Another CA Civil Application NO. Nai 32 of 2015; Kenya Shell Ltd vs Benjamin Karanja Kibiru & another CA Civil Application Nai 97 of 1986.**

14. He prays that the 2nd defendant's/applicant's application be dismissed with costs.

15. I have considered the notice of motion, the affidavits in support and the replying affidavit. I have also considered the written submissions filed on behalf of the parties and the authorities cited. The issues for determination are:-

(i) Whether the 2nd defendant's/applicant's application meets the threshold for grant of orders of stay of execution pending appeal.

(ii) Who should bear costs?

16. The principles guiding the grant the stay of execution pending appeal are well settled. **Order 42 rule 6(2)** of the Civil Procedure Rules provides that:-

“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.”

17. It is clear from the above provision that for an order of stay of execution to be granted, specific conditions must be met by the applicant.

18. I have considered the notice of motion herein. I find that it has been brought without unreasonable delay.

19. It is not in dispute that the 2nd defendant/applicant has ceded possession of the house to the plaintiff/respondent. In paragraph 3 of the further affidavit of Hesbon K. Limisi sworn on the 13th August 2020, he states, ***“That on 12th August 2020 the 2nd defendant/applicant in the presence of the provincial administration officials in Langata (the area chief and the area county commissioner) willingly handed over the suit premises to myself and I am currently in occupation of the same effective 12th August 2020 (annexed hereby and marked exhibit ‘HKL1’ is a copy of the document by the 2nd defendant/applicant signing off the suit premises to myself)”***. This has been confirmed by the 2nd defendant/applicant.

20. It is the 2nd defendant’s/applicant’s case that he stands to suffer substantial loss should the 3rd defendant effect transfer in favour of the plaintiff before the appeal is heard and determined. The plaintiff/respondent on the other hand contends that the application has been overtaken by events as the 2nd defendant/applicant has ceded possession of the house to the plaintiff.

21. I note that there is also an order for the 2nd defendant to pay general damages and mesne profits. I am of a view that he has demonstrated good faith by ceding possession of the house to the plaintiff/respondent.

22. In the case of **Feisal Amini Jan Mohammed t/a Dunvia Forwarders vs Shami Trading Co. Ltd MSA HC Civil Appeal No. 65 of 2013 [2014] eKLR Kasango J** 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 that may result to him unless the order is made, that the application is made without unreasonable delay and that the applicant has offered proper security”.

23. I am guided by the above authority.

24. I have considered the circumstances of this case. I find that the 2nd defendant’s/applicant’s application meets the requirements as set out under order 42 rule 6 of the Civil Procedure Rules.

25. In conclusion, I find merit in this application and I grant the orders sought namely:

(a) That an order of stay of execution of the decree emanating from the judgment delivered on 6th February 2020 is hereby granted pending the hearing and determination of the intended appeal on condition that the 2nd defendant/applicant do deposit a sum of Kshs.200,000 in the joint interest earning account of both parties’ counsel within forty five (45) days from the date of this ruling. In default the orders of stay shall lapse.

(b) That costs of this application do abide the outcome of the appeal.

It is so ordered.

Dated, signed and delivered in Nairobi on this 19th day of November 2020.

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L. KOMINGOI

JUDGE

In the presence of:-

No appearance for the Plaintiff/Respondent

No appearance Respondent/Applicant

No appearance for the 3rd Respondent

Phyllis - Court Assistant