



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NAIROBI

ELC NO. 316 OF 2009

(CONSOLIDATED WITH ELC NO. 634 OF 2009 (O.S))

JOHN NDWARU KINYANJUI – VS- FLORENCE NJOKI KIGO)

FLORENCE NJOKI KIGO.....PLAINTIFF

VERSUS

JOHN NDWARU KINYANJUI

ALIAS KAMAU NDWARU.....DEFENDANT

RULING

On 25th May, 2017 judgment was entered herein in favour of the plaintiff against the defendant pursuant to which the defendant was ordered to vacate all that parcel of land known as L.R No. Dagoretti/Ruthimitu/631 (hereinafter referred to as “the suit property”) immediately failure to which he be forcefully evicted therefrom. A permanent injunction was also issued restraining the defendant and members of his family from occupying, entering, cultivating or in any other way interfering with the suit property. The defendant’s claim over the suit property by adverse possession was dismissed.

On 8th June, 2017, the defendant filed a notice of his intention to appeal against the said judgment of 25th May, 2017 to the Court of Appeal. The defendant also wrote to the Deputy Registrar requesting for the certified copies of the proceedings and judgment for the purposes of the intended appeal.

On 19th June, 2017 the defendant filed an application by way of Notice of Motion dated 16th June, 2017 seeking a stay of execution of the said judgment pending the hearing and determination of the intended appeal to the Court of Appeal. This is the application which is the subject of this ruling. The application was brought on the grounds that the defendant was dissatisfied with the judgment of the court and intended to challenge the same in the Court of Appeal. The defendant averred that he had already filed a notice of appeal and that his intended appeal was arguable and had high chances of success. The defendant averred that his intended appeal would be rendered nugatory unless the stay order was granted. The defendant contended further that he would suffer substantial loss if the application was not allowed.

The plaintiff opposed the application through a replying affidavit sworn on 3rd July, 2017. The plaintiff averred that she purchased the suit property through a public auction and was issued with a title on 31st December, 1997. The plaintiff averred that she purchased the property from a bank which sold the property in exercise of its statutory power of sale after the defendant’s father one, Gabriel Kinyanjui defaulted in his loan repayment to the said bank. The plaintiff averred that the defendant trespassed onto the suit property soon after she acquired the same and refused to vacate thereby necessitating the filing of this suit which was determined on 25th May, 2017 after a long battle with the defendant over the suit property. The plaintiff averred that she had been denied the use of the suit property since 1997 and that it would be a travesty of justice if the court was to allow the said denial to continue by granting the orders sought by the defendant.

The plaintiff averred that she had incurred substantial costs and was continuing to incur more in court battles with the defendant. The plaintiff averred that the defendant did not indicate in the application what loss he would suffer if the stay was not granted. The plaintiff averred that she was the one suffering substantial loss by being denied the use of the suit property. The plaintiff urged the court to dismiss the defendant’s application with costs.

The application was argued by way of written submissions. The defendant field his submissions on 21st February, 2018 which the plaintiff filed her submissions in reply on 8th May, 2018. I have considered the defendant’s application together with the affidavit filed in support thereof. I have also considered the plaintiff’s affidavit in reply to the application and the submissions of counsel.

The power to grant an order for stay of execution pending appeal is provided for in Order 42 Rule 6 (1) of the Civil Procedure Rules. 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.”

In the case of Everlyn Jebitok Keter v Henry Kiplagat Muge & 2 others [2011] eKLR the court stated as follows:

“It is usually a good rule to see if 0.41 r.4 (present Order 42 Rule 6) 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 corner stone of both jurisdictions for granting a stay..... In this case the applicant has not shown how he stands to suffer unless stay is ordered. She has therefore not demonstrated that substantial loss may result to her unless the order of stay is made.”

It is upon the foregoing principles that the defendant’s application falls for consideration. From the material before me, I am satisfied that the defendant has satisfied the conditions for granting an order of stay of execution. It was not disputed that the court ordered the defendant to vacate the suit property in default of which he was to be forcefully evicted from the suit property. It was also not disputed that the defendant was in occupation of the suit property and had been in such occupation since 1997 according to the plaintiff. I have no doubt that the defendant would suffer substantial loss if he is evicted from the suit property which he has been occupying as his residence for several years. Unless the stay is granted, the defendant will have to relocate his residence from the suit property at a great costs and inconvenience. After the defendant has vacated the suit property, the plaintiff will take possession thereof and will be at liberty to deal with the property in whatever manner deemed fit including selling the same. The sale of the suit property will put the same beyond the reach of the defendant if he succeeds in the intended appeal.

Due to the foregoing, I am persuaded that substantial loss would be occasioned to the defendant if the stay sought is not granted. As to whether the application was brought without unreasonable delay, nothing turns out on it. The application was filed within reasonable time and no objection was raised in that regard. The third condition that was to be met by the defendant was the furnishing of security. In his submission, the defendant stated that he was ready to provide reasonable security as may be directed by the court.

It is my finding that all the conditions for granting a stay of execution have been met by the defendant. I therefore allow the application dated 16th June, 2017 in terms of prayer 3 thereof on condition that the defendant pays into an interest earning bank account in the joint names of the advocates on record for the parties a sum of Kshs.500,000/- within 30 days from the date hereof as security in default of which the stay shall stand discharged without any reference to the court. The costs of the application shall be in the cause.

Delivered and Dated at Nairobi this 28th day of February, 2019

S. OKONG’O

JUDGE

Ruling read in open court in the presence of:

Mr. Ambani for the Plaintiff

Mr. Ibrahim for the Defendant

Catherine-Court Assistant