



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 176 OF 2014

MARION KAARI MBUI.....PLAINTIFF

VERSUS

ELISHA MBOGO NTHIGA.....DEFENDANT

RULING

1. By a notice of motion dated 7th November 2018 brought under the provisions of **sections 1A, 1B, 3, 3A and 63(e) of the Civil Procedure Act (Cap 21), Order 42 Rules 6 and Order 51 of the Civil Procedure Rules** (hereinafter *the Rules*) and **all other enabling provisions of the Law**, the Defendant sought an order for stay of execution of the judgement and decree of the court dated 25th October 2018 pending the hearing and determination of an intended appeal to the Court of Appeal.

2. The said application was based upon the grounds set out on the face of the motion. It was contended that the Defendant was aggrieved by the said judgement in consequence of which he filed a notice of appeal. It was further contended that the intended appeal had high chances of success and that unless the stay sought was granted the intended appeal would be rendered nugatory, if successful. The Defendant then offered to abide by any reasonable conditions on provision of security and deposit of title deeds for the suit properties.

3. The said application was supported by the supporting affidavit sworn by the Defendant on 6th November 2018 together with the annexures thereto. The Defendant essentially reiterated and expounded upon the grounds set out in the notice of motion. The Defendant was apprehensive that should the Plaintiff be registered as proprietor of the suit properties she might sell or charge them before the intended appeal is heard and concluded.

4. The Plaintiff filed a replying affidavit sworn on 13th November 2018 in opposition to the said application. The Plaintiff contended that the said application was frivolous and merely intended to deny her the fruits of her judgement. It was contended that the Plaintiff had never occupied and utilized the suit property and that he had not demonstrated what substantial loss, if any, he might suffer unless a stay was granted. It was further contended that the Defendant had not attached a copy of a memorandum of appeal to demonstrate that he had an arguable appeal. The court was consequently urged to dismiss the said application.

5. When the said application was listed for hearing on 22nd November 2018 the court directed the parties to canvass it through written submissions. The parties were given 45 days within which to file and exchange their respective submissions. The record shows that the Defendant filed his submissions on 30th November 2018 whereas the Plaintiff filed hers on 8th March 2019.

6. The court has considered the Defendant's said application, the Plaintiff's replying affidavit in opposition thereto as well as the written submissions on record. The main question for determination is whether or not the Defendant has satisfied the legal requirements for the grant of stay of execution pending appeal.

7. Order **42 Rule 6(2) of the Rules** on stay of execution stipulates as follows;

“6. (2) No order for stay of execution shall be made under subrule (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”.

8. The court does not agree with the Plaintiff's submission that the Defendant is bound to demonstrate that he has an arguable appeal or one with good chances of success. Although the requirement of showing an arguable appeal is a mandatory requirement before the Court of

Appeal under **Rule 5 (2) (b) of the Court of Appeal Rules**, it is not a mandatory requirement under **Order 42 Rule 6 of the Rules**. The case has also noted that the High Court case of **Re Global Tours & Travels Ltd, Winding up Cause No. 43 of 2000** which was relied upon by the Plaintiff concerned an application for stay of further **proceedings** and not stay of execution of a decree or order.

9. The court shall, therefore, confine itself to a consideration of the three main conditions set out under **Order 46 Rule 6 of the Rules**. There is no doubt from the record that the Defendant filed the application for stay without unreasonable delay. It was not contended otherwise by the Plaintiff. There is also no doubt that the Defendant has offered security for the due performance of the decree by offering to deposit the title documents before court and to comply with any reasonable conditions which the court may impose.

10. The only requirement in controversy is whether or not the Defendant has demonstrated the element of substantial loss. The court agrees with the Plaintiff's submission that the fact of execution *per se* does not necessarily constitute substantial loss. In the case of **James Wangalwa & Another Vs Agnes Naliaka Chesolo ELC Misc Application No. 42 of 2012** it was held *inter alia*, that;

“No doubt in law, the fact that the process of execution has been put in motion or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the Civil Procedure Rules. This is so because execution is a lawful process.”

11. In the case of **Butt Vs Rent Restriction Tribunal [1979] eKLR** the Court of Appeal stated as follows in its consideration of an application for stay;

“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett LJ in Wilson Vs Church (No 2) 12 Ch. D ([1879] 454 at P 459. In the same case, Cotton LJ said at P 458:

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.”

12. The Defendant stated in his supporting affidavit that his intended appeal might be rendered nugatory if the suit properties were to be alienated by the Plaintiff before determination of the intended appeal. The Plaintiff did not, in her replying affidavit, challenge that allegation. She did not contend that she had no intention of alienating or dealing with the suit properties until conclusion of the intended appeal. The court is of the view that if the suit properties were to be registered in the name of the Plaintiff there would be nothing to stop her from dealing with them in such manner as to make them available upon conclusion of the intended appeal.

13. The court is further of the opinion that the risk of the intended appeal being rendered nugatory, if successful, may constitute substantial loss within the meaning of **Order 42 Rule 6(2) of the Rules**. Accordingly, the court is satisfied that the Defendant has sufficiently demonstrated the risk of substantial loss as required by law.

14. The upshot of the foregoing is that the court finds merit in the Defendant's notice of motion dated 7th November 2018 and the same is hereby allowed in the following terms:

a. There shall be a stay of execution of the judgement and decree of this court dated 28th October 2018 for a period of 2 years or until conclusion of the intended appeal to the Court of Appeal, whichever comes earlier.

b. The Defendant shall deposit in the court the original Title Deeds for *Title Nos. Ngandori/Kiriari/4236, 4237 and 4238* within 14 days as a condition for stay in default of which the stay shall lapse.

c. The Deputy Registrar shall supply the Defendant with copies of the proceedings and a certified copy of the decree for purposes of appeal within 45 days.

d. Costs of the application to the Plaintiff.

15. Orders accordingly.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 21st day of MARCH, 2019.

In the presence of Mr Okwaro for the Plaintiff and Mr Kathungu holding brief for Mr Gekonge for the Defendant.

Court clerk Muinde.

Y.M. ANGIMA

JUDGE

21.03.19