



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 34 OF 2011

ANN MUMBI HINGA.....PLAINTIFF

VERSUS

WILLIAM MWANGI GATHUMA.....1ST DEFENDANT

JANET WANJIKU MWANGI.....2ND DEFENDANT

RULING

In a judgment that was delivered on 22nd September, 2017, the court dismissed the plaintiff's claim and entered judgment for the defendants in their counter-claim against the plaintiff on the following terms:

- (1) The plaintiff is ordered to transfer L.R No. 18096 to the defendants and sign and handover all the appropriate and necessary documents to effect the transfer to the defendants or in the alternative to cause the suit land to be subdivided and excised from L.R No. 3994/11 and transfer to the defendants 1 acre piece of land shown and occupied by the defendants forthwith.
- (2) In default of No. 1 above, the Deputy Registrar is hereby directed to execute all the necessary documents to effect transfer of L.R No. 18096 to the defendants or in the alternative is directed to sign all necessary and appropriate documents to facilitate the subdivision and excision from L.R No. 3994/11 and transferred to the defendants 1acre piece of land shown and occupied by them.
- (3) A permanent injunction is hereby issued restraining the plaintiff from breaching the sale agreement, or charging, selling, re-entering, taking possession, remaining, erecting or continuing to erect any building or structures upon the suit property being L.R No. 18096 or in any way interfering the defendants' quiet possession and enjoyment of the suit property.
- (4) The plaintiff shall pay the costs of the suit and the counter-claim to the defendant.

Following that judgment, the plaintiff's advocates filed a notice on 27th September, 2017 of the plaintiff's intention to appeal against the same to the Court of Appeal. The plaintiff's advocates also wrote to the Deputy Registrar requesting for typed and certified copies of the proceedings and judgment.

What is now before the court is the Notice of Motion dated 16th October, 2017 seeking an order for stay of execution of the judgment and decree given on 22nd September, 2017 pending the hearing and determination of the intended appeal to the Court of appeal. The application which was supported by the affidavit of the plaintiff was brought on the grounds that the plaintiff had preferred an appeal to the Court of Appeal against the whole judgment made by the court on 22nd September, 2017. The plaintiff averred that the appeal was arguable and had high chances of success. The plaintiff averred that unless the stay sought was granted, the defendants would proceed with the execution of the judgment by having the suit property transferred to their names. The plaintiff averred that if this happens while her appeal was pending, she would be highly prejudiced as the substratum of the appeal would have been lost and the appeal if successful rendered nugatory. The plaintiff averred further that she was ready to comply with all conditions that may be imposed by the court for grating the order sought. The appellants averred that the application was brought without unreasonable delay and that she stood to suffer substantial loss unless the stay sought was granted.

The application was opposed by the defendants through affidavit and further affidavit sworn by the 1st defendant on 9th November, 2017 and 16th February, 2018. The defendants contended that the plaintiff's application had no merit in that the plaintiff had not satisfied the conditions for granting an order for stay of execution. The defendants contended that since they had paid the full purchase price for the suit property to the plaintiff, the plaintiff stood to suffer no loss if the property was transferred to them. The defendants averred further that they had been in possession of the suit property since 2003 and as such the plaintiff would not suffer any prejudice if the defendants remained in possession of the suit property. The defendants averred further that the judgment of the court was incapable of being stayed in that staying the same would amount to allowing the plaintiff's claim that was dismissed by the court. The defendants averred that the orders granted by the court if stayed would extend to the plaintiff undue advantage over them. The defendants averred further that they were capable of satisfying any loss that the plaintiff may suffer if the stay was not granted and she emerges successful on the intended appeal.

The application was argued by way of written submissions. The plaintiff filed her submissions on 19th October, 2018 while the defendants filed their submissions on 18th October, 2018. I have considered the application together with the affidavit filed in support thereof. I have also considered the affidavits filed in opposition to the application and the submissions by the advocates for the parties. In the case of Northwood Services v Mac & More Solution Ltd. [2015] eKLR that was cited by the defendants in their submissions, the court stated that:

“The purpose of an application for stay of execution pending appeal is to preserve the subject matter in dispute so that the rights of the Appellant who is exercising his undoubted right of appeal, are safeguarded and the appeal if successful is not rendered nugatory. However, in doing so, the court will weigh this against the success of a litigant who should not be deprived of the fruits of his judgment. The court is called upon to ensure that neither party suffers prejudice. This was well stated in the case of Portreiz Maternity v. James Karanga Kabia, Civil Appeal No. 61 of 1997 where the court had this to say-

“That right of appeal must be balanced against an equally weighty right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right.” ”

Order 42 Rule 6(2) provides as follows:

“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.”

I have at the beginning of this ruling set out the reliefs that were granted by the court against the plaintiff. I am in agreement with the defendants that some of the reliefs are not capable of being stayed as such stay would either prejudice the defendants or will grant to the plaintiff what the judgment had denied them pending the hearing of the appeal. The stay would therefore not achieve the purpose for which the stay is normally required which is to preserve the subject matter of the suit. In the circumstances, I am of the view that the dismissal of the plaintiff's suit against the defendants, a declaration that the plaintiff is not entitled to rescind the agreement dated 2nd May, 2003 between the plaintiff and the defendants and an order of a permanent injunction restraining the plaintiff from among others, breaching the said agreement for sale, charging, selling, re-entering, taking possession of or erecting any structures on the suit property or in any way interfering with the defendants' quiet possession of the suit property cannot be stayed. Save as aforesaid, I am satisfied that the plaintiff would suffer substantial loss if the other reliefs that were granted by the court are not stayed more particularly the order that directed the plaintiff to forthwith transfer the suit property to the defendants. I am in agreement with the plaintiff that once the property is transferred to the defendants, nothing would stop the defendants from disposing off the same to third parties thereby putting the same beyond the reach of the plaintiff in the event that she succeeds in the intended appeal. Although the defendants have contended that they are capable of paying to the plaintiff the current market value of the suit property which has been put at Kshs.40 million, no evidence has been placed before the court of that ability. As to whether the application was brought without unreasonable delay, I am satisfied that that was the case. The application was brought before the expiry of 1 month from the date of the judgment sought to be stayed. With regard to security, the plaintiff had undertaken to abide by whatever condition the court may impose while granting the orders sought.

Due to the foregoing, I would allow the plaintiff's application partially and conditionally. I therefore make the following orders:

1. There shall be a stay execution of the judgment and decree of this court given on 22nd September, 2017 limited to orders in paragraphs 3, 4 and 7 of the decree issued on 17th October, 2017.
2. The stay granted in paragraph 1 above shall be for a period of 24 months from the date hereof or until the hearing and determination of the intended appeal to the Court of Appeal whichever comes earlier.
3. The plaintiff shall deposit in an interest earning bank account in the joint names of the advocates for the parties on record a sum of Kshs.1,000,000/- as security within 30 days from the date hereof in default of which the stay orders granted in paragraphs (1) and (2) above shall stand discharged automatically without any further reference to the court.
4. The costs of the application shall be in the cause.

Delivered and Dated at Nairobi this 30th Day of April 2019

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

Ms. Okoth h/b for Mr. Mahinda for the Plaintiff

Ms. Nyakundi h/b for Mr. Kingati for the Defendants

