



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

CIVIL SUIT NO.8 OF 2015

KIENZL HEMUTH.....PLAINTIFF

-VS-

MARIA MUTISYA.....DEFENDANT

RULING

1. By a Notice of Motion dated 5th October, 2018, and brought under Order 42 Rule 6 of the Civil Procedure Rules and Sections 3 and 3A of the Civil Procedure Act, the Defendant/Applicant seeks orders that this Honourable Court be pleased to stay the execution of the decree herein pending the hearing and determination of this Application and pending the hearing and determination of the Defendant's appeal. The Application is based on the grounds set down therein and supported by the affidavit of Maria Mutisya, the Applicant sworn on 5th October, 2018.
2. The Applicant avers that she is aggrieved by the Judgment of this Court delivered on 20th September, 2018, and has lodged an appeal to the Court of Appeal. The Applicant has annexed a Notice of Appeal dated 21st September, 2018. It is the Applicant's contention that the appeal shall be rendered nugatory should the court not grant the orders sought. The Applicant avers that she is ready and willing to abide by any conditions the court may impose upon her. That the application has been brought without undue delay.
3. The Application is opposed by the plaintiff who filed grounds of opposition dated 15th October, 2018. The Plaintiff states that the Application is misconceived and an abuse of the court process. That the Applicant lives in Germany and will not be prejudiced if the orders sought are not granted. The Plaintiff wants the Applicant to deposit security equivalent to the current value of the Suit Property and to deposit the original title deed of the Suit Property in court. That the Application is only meant to delay justice.
4. The Applicant submitted that she has deposited all the three title deeds of the Suit Properties with the court as directed and is ready and willing to further comply with any condition which the court may order. The Applicant contends that she has already lodged the requisite Notice of Appeal and would move with haste to prepare the Record of Appeal so that the appeal is heard and determined. It is the Applicant's submission that she has met all the requirements for stay of execution pending appeal, and that the appeal would be rendered nugatory should the orders sought not be granted.
5. The Plaintiff/Respondent submitted *inter alia*, that no appeal has been filed and that the Application is an attempt to deny the Respondent from enjoying the fruits of judgment. That the Applicant is in possession of the Suit Properties to the exclusion of the Respondent and has not taken steps towards filing the appeal to the detriment of the Respondent. It is the Respondent's submission that the Applicant will not suffer any damage as she does not stay on the Suit Property because she lives and works in Germany.
6. I have considered the Application. The only issue for determination is whether this court should stay execution of the orders granted on 20th September 2018 pending determination of the appeal before the Court of Appeal.
7. Order 42 Rule 6 sets out the conditions that must be met before an order for stay of execution is allowed. It stated as follows:

(Order 42, Rule 6.) Stay in case of appeal

6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as to it seem just, and any person aggrieved by an order of stay made by the court from whose decisions the appeal is preferred may apply to the appellate court to have such order set aside.

(2) 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 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 relief is discretionary but the discretion must be exercised judiciously and upon defined principles of law, not capriciously or whimsically. Therefore stay of execution should only be granted where sufficient cause has been shown by the Applicant. In determining whether sufficient cause has been shown, the court would be guided by the three principles provided under Order 42 Rule 6 above. Firstly, the Application must be brought without undue delay; secondly, the court will satisfy itself that substantial loss may result to the Applicant unless stay of execution is granted; and thirdly, such surety as the court orders for the due performance of such decree or order has may ultimately be binding on him has been given by the applicant.

9. In this particular case, the order appealed against was made on 20th September, 2018 and the Application herein was filed on 5th October, 2018. The period between filing of this Application and the issuance of the orders is about 14 days. I therefore find that there was no delay on the part of the Applicant in bringing this application.

10. I have perused the application and the documents annexed thereto. There is on record and filed a Notice of Appeal dated 21st September, 2018. The law does not allow this court at this stage to determine whether the appeal is merited or not.

11. The Applicant herein needs to demonstrate that she will be occasioned substantial loss if stay is not if stay is not granted. Has the Applicant demonstrated that she will suffer substantial loss if the order of stay is not granted? From the affidavit in support of the Application and the submissions, the Applicant has failed to demonstrate to this court how she will suffer substantial loss from the implementation of the order. The Applicant has simply stated that the appeal shall be rendered nugatory if stay is not granted. This court takes cognizance of the fact that a stay of execution helps preserve the subject matter of the appeal so that it is not rendered nugatory if it succeeds. In this case, I am not satisfied that the intended appeal will be rendered nugatory if the stay herein is not granted. The subject matter of the suit which is land will still be present post the appeal. Should the appeal succeed, the applicant's name would be reinstated in the register. I do not find it necessary to order for any security from the Applicant as the stay orders have been refused.

12. For the foregoing reasons, I find the notice of motion dated 5th October 2018 as lacking in merit and hereby dismiss it with costs. I order that the original title documents of the suit properties deposited in court to be released to the plaintiff forthwith.

DATED, SIGNED and DELIVERED at MOMBASA this 30th day of May 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Mrs. Omollo for Plaintiff/Respondent

Wafula holding for Okanga for Defendant/Applicant

Yumna Court Assistant

C.K. YANO

JUDGE