



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

ELCA CASE NO. 15 OF 2018

SUSAN WANJA MBOGO.....APPELLANT

VERSUS

JOSPHAT MBOGO KAGAU.....RESPONDENT

(Being an appeal from the judgement of Hon. Thomas T. Nzyoki (Senior Principal Magistrate) delivered on 13th September, 2018 in the Principal Magistrate's Court Civil Case No. 63 of 2015 at Siakago)

RULING

1. By a Notice of Motion dated 15th January 2019 brought under **Order 50 Rule 10 of the Civil Procedure Rules** (hereinafter *Rules*), **sections 1A and 3A of the Civil Procedure Act (Cap. 21) and all enabling provisions of the law**, the Appellant sought a stay of execution of the judgement and decree in *Siakago Principal Magistrate Civil Case No. 63 of 2015* dated 13th September 2018 pending the hearing and determination of the pending appeal.
2. The said application was based upon the several grounds enumerated on the face of the motion some of which went beyond the scope of the judgement dated 13th September 2018. It was contended that the pending appeal might be rendered nugatory unless an order of stay was granted; that the pending appeal had high chances of success; and that unless the Respondent was restrained from evicting her the appeal might be rendered nugatory.
3. The said application was supported by the Appellant's own supporting affidavit sworn on 15th January 2019 which expounded upon the grounds set out in the motion. It was contended that the Respondent was on the verge of selling the property in dispute, that is, *Title No. Nthawa/Riandu/4689* (hereinafter *the suit property*) whilst her appeal was pending. It was contended that she had been in occupation of the suit property for over 12 years and that unless the *status quo* was maintained her pending appeal might be rendered nugatory.
4. The Respondent, who is the Appellant's husband, filed a replying affidavit sworn on 5th February 2019 in opposition to the said application. He denied that he intended to sell the suit property at all. He stated that he acquired the suit property jointly with his first wife Mary Wambeti Mbogo and that they had extensively developed it by the time the Appellant came into the property. It was further stated that the Appellant had denied both the Respondent and his first wife access to the suit property. The Respondent contended that he wanted to subdivide and share out the suit property with both his wives as well as himself.
5. When the said application was listed for hearing on 12th February 2019 Ms. Mutegi prosecuted it on the basis of the grounds set out in the application and the supporting affidavit whereas Ms. Rose Njeru opposed the same on the basis of the contents of the Respondent's replying affidavit. Ms. Mutegi emphasized that it was the Appellant who was in physical possession of the suit property and that the Respondent was not residing thereon.
6. The court has considered the Appellant's said application, the replying affidavit in opposition thereto as well as the oral submissions of the parties. It is evident that the question of possession or occupation of the suit property was not the subject of the suit before the Magistrate's court. The question of eviction of the Appellant was not an issue in that suit either. The Respondent had simply filed a suit seeking removal of the caution placed on the suit property by the Appellant.
7. It is, therefore, evident that the removal of a caution has nothing to do with eviction of the Appellant. A caution is not equivalent to an injunction which can protect the Appellant from eviction. Consequently, a party who has placed a caution upon another's property can still be evicted without violation of any law on cautions.
8. Be that as it may, the principles to be considered in an application for stay pending appeal are stipulated in **Order 42 Rule 6 of the Rules**. In particular, **Rule 6(2)** thereof states as follows;

“(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.”

9. The Appellant is therefore required to demonstrate substantial loss; that the application was made without unreasonable delay and, where applicable, provide security for due performance of the decree. The court is of the view that the first two factors fall for consideration.

10. It would appear from the material on record that the Appellant claims to have a licensee’s interest in the suit property. That is the reason she lodged the caution in the first instance. It would appear to the court that should the suit property be alienated whilst her appeal is pending, then there might be a barren result should she ultimately succeed on appeal.

11. But where is the evidence of the risk of disposal? Apart from a bare statement in the Appellant’s affidavit to that effect, there was no evidence on record to demonstrate that the Respondent intended to dispose of the suit property. On the contrary, the Respondent swore a replying affidavit in which he denied any intentions to sell the suit property. He swore that all he intended to do was to sub-divide the suit property so that he and his two wives could share it amongst themselves. He was unable to obtain consent of the Land Control Board to that effect because of the subsisting caution. It is noteworthy that the contents of the replying affidavit were not challenged or controverted by the Appellant by way of affidavit. The court, therefore, finds no evidence of substantial loss within the meaning of **Order 42 Rule 6(2) of the Rules**.

12. The second aspect for consideration is whether the application was filed without unreasonable delay. It is common ground that the judgement the subject of the appeal was delivered on 13th September 2018. There is no dispute that the instant application for stay was filed on 15th January 2019. The application was therefore filed more than 4 months after delivery of judgement. The Appellant did not render any explanation whatsoever for the delay of 4 months in the filing of the application. The court therefore finds and holds that the application for stay was not filed without unreasonable delay.

13. The upshot of the foregoing is that the court finds that the Appellant has failed to demonstrate the first two conditions for the grant of a stay pending appeal. The application for stay shall accordingly fail. The court has, however, noted that the Appellant has moved expeditiously to file a record of appeal. The court is, therefore, inclined to make an order for maintenance of *status quo* for a period of four (4) months only to enable the Appellant prosecute the appeal to its logical conclusion. The latter order shall be granted under **section 3A of the Civil Procedure Rules (Cap. 21)**.

14. The court, therefore, makes the following orders;

a. The Notice of Motion dated 15th January 2019 is hereby dismissed with no order as to costs.

b. The existing *status quo* shall be maintained for the next four (4) months only to enable the Appellant prosecute the appeal to its logical conclusion.

15. It is so ordered.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 30TH day of MAY, 2019.

In the presence of Ms. Kungu holding brief for Mr. Andande for the Appellant and Ms. Rose Njeru for the Respondent.

Court Assistant Mr. Muinde

Y.M. ANGIMA

JUDGE

30.05.19