



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 252 OF 2014

JULIETA MARIGU NJAGI.....PLAINTIFF

VERSUS

VIRGINIA NJOKI MWANGI.....1ST DEFENDANT

JOHN NGARI NGUNGI.....2ND DEFENDANT

RULING

1. By a notice of motion dated 5th November 2018 brought under the provisions of **Order 42 Rule 4 and 6 Order 43 Rule 1(d), 2 & 3 of the Civil Procedure Rules** (hereinafter *the Rules*), **sections 75, 3 and 3A of the Civil Procedure Act (Cap. 21) and all other enabling procedure of the Law and the Constitution of Kenya**, the Defendants sought the following orders;

- a. *That this application be certified as urgent and be heard ex-parte in the first instance owing to its urgency.*
- b. *That the court be pleased to grant a stay of execution of the judgement of this court issued on 20th September 2018 and all consequential orders pending the hearing of this application.*
- c. *That the honorable court be pleased additionally and/or in the alternative grant an order of maintenance of status quo as it is such that no transfer, registration, charge or any other process be registered against LR. No. Nthawa/Riandu/450 pending the hearing and determination of this application.*
- d. *That the honourable court be pleased additionally and/or in the alternative grant an order of maintenance of status quo as it is such that no transfer, registration, charge or any other process be registered against LR. No. Nthawa/Riandu/450 pending the hearing and determination of the appeal or intended appeal.*
- e. *That Appellant be granted unconditional leave to appeal the court decision by being provided with the proceedings expeditiously.*
- f. *That costs of this application be provided for.*

2. The said application was based upon the grounds set out on the face of the notice of motion. It was contended that the Defendants were aggrieved by the judgement of this court dated 20th September 2018 and that they desired to appeal against it. It was contended that the intended appeal had high chances of success and that it was in the interests of justice for the orders sought to be granted.

3. The said application was supported by an affidavit jointly sworn by the Defendants on 5th November 2018. The said affidavit reiterated and expounded upon the grounds set out in the notice of motion. It was contended that unless a stay of execution was granted, the Defendants would suffer irreparable loss and damage as they may be evicted from the suit property.

4. The Plaintiff filed a replying affidavit sworn on 22nd November 2018 in opposition to the said application. It was contended that the application was an afterthought which was merely intended deny her from enjoying the fruits of her judgement. It was contended that the Defendants had not demonstrated that they would suffer any substantial loss unless the stay was granted.

5. The Plaintiff further contended that the intended appeal had no chances of success. It was contended that the application was frivolous and an abuse of the process of court. The plaintiff asked the court to order the Defendants to deposit Kshs.3,000,000/- as security for costs. She, therefore, asked the court to dismiss the application for stay.

6. When the said application was listed for hearing on 22nd November 2018, the advocates for the parties agreed to canvass it through written submissions. The parties were consequently granted 45 days within which to file and exchange their respective submissions. By the

time of preparation of the ruling, however, none of the advocates had filed written submissions.

7. The court has considered the Defendants' said application and the Plaintiff's replying affidavit in opposition thereto. The court is of the view that the following issues arise for determination in this application;

- a. Whether the Defendants have made out a case for stay of execution of the decree pending appeal.
- b. Whether the Defendants have made out a case for an order for maintenance of *status quo* to stop any transfer, charge or other dealing with the suit property.

8. The requirements for the grant of stay of execution of a decree or order are contained in **Order 42 Rule 6 of the Rules**. In particular, **Order 42 Rule 6(2)** stipulates 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 main aspects for consideration are whether the Defendants have demonstrated the risk of substantial loss and whether the application for stay was filed without unreasonable delay. It is in the discretion of the court to make an order for provision of security for due performance of the decree should the Defendants intended appeal ultimately fail.

10. The record shows that the judgement of the court was delivered on 20th September 2018 whereas the Defendants moved the court for stay on 6th November 2018. Although there was a delay of about one and a half months in the filing of the application, the court does not consider such delay to be unreasonable.

11. On the question of substantial loss, the Defendants are apprehensive that they may be evicted from the suit property before their intended appeal is heard and determined. The court has considered the material on record on this issue. There is no doubt that the Defendants were in possession of the suit property at the time of trial of the suit. They had also been in possession for some considerable period before trial. The court is of the opinion that if the Defendants are evicted at this time before their intended appeal is heard and determined their lives might be seriously disrupted. They may lose some of their necessities of life such as shelter and food. That may constitute substantial loss.

12. The court is also aware of the following observations made in **Butt Vs Rent Restriction Tribunal (1979) eKLR**;

“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.”

13. The second issue for consideration is whether an order for maintenance of *status quo* as framed in **Order No. 4** of the notice of motion dated 5th November 2018 should be granted. What the Defendants are in reality seeking is an order of *inhibition* to prevent any further dealings with the suit property pending the hearing and determination of the appeal. The court is not satisfied that the Defendants have made out a case for the grant of such an order for two reasons. First, that prayer goes beyond the scope of the judgment dated 20th September 2018. No order of that nature was sought or canvassed in the main suit on the basis of which the judgement was delivered. Second, the Defendants' counterclaim was for adverse possession. That claim is based upon a right of prescription. It runs with the land regardless of any intervening change of ownership. See **Wasui Vs Musumba [2002] 1 KLR 396**. There is no legal basis for the Defendants' fears that the suit property might change hands before their intended appeal is determined.

14. The upshot of the foregoing is that the court finds that the Defendants have made out a case for the grant of an order of stay of execution of the decree only. The rest of the prayers in the notice of motion are hereby declined. There is no need for imposing an order for security for due performance of the decree since the Defendants can still be evicted if they are unsuccessful in their appeal. Consequently, the court therefore makes the following orders;

- a. There shall be a stay of execution of the decree dated 20th September 2018 together with all consequential orders for a period of two (2) years or until the hearing and conclusion of the intended appeal, whichever is earlier.
- b. The Deputy Registrar shall furnish the Defendants with copies of the proceedings, a certified copy of the decree and other necessary documents for purposes of appeal within 30 days from the date hereof.
- c. Costs of the application to the Plaintiff.

15. It is so ordered.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **23RD** day of **MAY, 2019**.

In the presence of the Plaintiff present in person; Mr. Kathungu holding brief for Mr. Kahuthu for the Defendants.

Court Assistant Mr. Muinde

Y.M. ANGIMA

JUDGE

23.05.19