



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

ELC APPEAL No. 4 OF 2018

MOSES NDUNGU MBOGO.....1ST APPELLANT

ROSE WANJIKU NDUNG'U.....2ND APPELLANT

VERSUS

MOSES NG'ANG'A KIMANI.....RESPONDENT

RULING

1. The appellants and the respondent have been engaged in litigation in Naivasha CMCC No. 157 of 2016 wherein the respondent is the plaintiff while the appellants are the defendants. The dispute revolves around a parcel of land known as LR No. Nyandarua/Olaragwai/7746 which the respondent claims to have bought from the 1st appellant and fully paid for. On 21st June 2016, the subordinate court allowed the respondent's application for summary judgment thereby granting specific performance of the relevant agreement for sale, ordering removal of a caution which the 2nd appellant had registered and authorizing the executive officer of the court to sign documents needed for finalization of the transaction. Being aggrieved by the said decision, the appellants filed an application dated 12th July 2016 seeking review and/or setting aside of the orders of 21st June 2016. The subordinate court considered the application and dismissed it in a ruling delivered on 8th May 2018. This appeal is in respect of the orders of 8th May 2018.

2. On the same day that the appellants filed the Memorandum of Appeal they also filed Notice of Motion dated 17th May 2018 through which they sought stay of execution of the summary judgment entered on 21st June 2016 in Naivasha CMCC No. 157 of 2016 together with all the consequential orders pending hearing and determination of this appeal. This ruling is in respect of Notice of Motion dated 17th May 2018.

3. The application is supported by an affidavit sworn by the 1st appellant. He deposed that the respondent is in the process of executing the decree of the subordinate court and that they will be greatly prejudiced if that happens as they will have been deprived of an opportunity to be heard. He also deposed on many other matters but which go to the merits of the appeal.

4. The respondent opposed the application through a replying affidavit which he swore. He stated that the appellants are keen on delaying the matter. Just like the appellants, he focused mainly on matters which go to the merits of the appeal.

5. The application was heard by way of written submissions. The applicants argued that they will suffer substantial loss if stay is not granted as once the decree of the subordinate court is executed they will lose the suit property. They added that the application had been filed timeously and that they are willing to abide by conditions set by the court as regards security. On his part, the respondent argued that the applicants had not demonstrated substantial loss and that as successful litigant he should be allowed to enjoy the fruits of his litigation. He added that the applicants further not entitled to the orders sought since they had not provided security and since they had approached the court with unclean hands.

6. I have considered the application, the affidavits filed as well as the submissions. The law relating to an application for stay of execution pending appeal is found at **Order 42 rule 6 (1) and (2) of the Civil Procedure Rules, 2010** which provides:

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 may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision 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 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.

7. To succeed the applicants must satisfy the court that substantial loss will result to them if stay is not granted and that the application has been made without unreasonable delay. They should also give security. Key in all these considerations is the test of substantial loss. Unless the applicants establish substantial loss there would be no reason to keep the respondent from the fruit of his judgment. See **Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] eKLR**.

8. In this case, if stay of execution is not granted the natural consequence will be that specific performance of the agreement for sale will be enforced and the suit property will most likely change hands. Such an outcome will certainly amount to substantial loss. On the question of whether the application has been made without unreasonable delay, I note that the orders sought to be stayed were made on 8th May 2018 and that the present application was filed on 17th May 2018. There is certainly no unreasonable delay. Regarding security, the applicants have not offered any specific security. Still, the court can impose such security as it deems appropriate. I note that the sale agreement between the parties indicates that the purchase price for the suit property was KShs 320,000. I consider this amount to be appropriate as security. The upshot is that I am persuaded that a case has been made for granting stay. So as to ensure that the appeal is actively prosecuted, I will limit the period of its validity.

9. In the end, I make the following orders:

a) I grant stay of execution of the summary judgment entered on 21st June 2016 in Naivasha CMCC No. 157 of 2016 together with all the consequential orders pending hearing and determination of this appeal.

b) The order of stay of execution is conditional on the appellants depositing KShs 320,000 in an interest earning account in the joint names of advocates on record for the parties as security within 30 (thirty) days from the date of delivery of this ruling. In default the order of stay of execution shall automatically lapse.

c) Upon the appellants complying with (b) above, the order of stay of execution of execution shall, unless otherwise ordered, remain in force for only 1 (one) year from the date of delivery of this ruling.

d) Costs of the application shall be to the respondent.

10. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 22nd day of May 2019.

D. O. OHUNGO

JUDGE

In the presence of:

Ms Kimure holding brief for Ms Wangari for the appellants/applicants

No appearance for the respondent/respondent

Court Assistants: Beatrice & Lotkomo