



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ELC CASE No. 26 OF 2013

CAROLINE CHERONO KIRUI.....PLAINTIFF

VERSUS

LINER CHERONO TOWET.....DEFENDANT

RULING

1. Judgment was delivered in this matter on 13th July 2018 as follows:

- a) *I grant an order of specific performance compelling the defendant to perform her obligations as set out in the Agreement for Sale dated 20th March 2012.*
- b) *I order the defendant to specifically excise and transfer to the plaintiff a portion measuring 0.404 Hectares, in the area marked 'A' in the sketch annexed to the aforesaid Agreement for Sale, from her parcel No. Njoro/Ngata Block 2/2807(Kirobon).*
- c) *Time within which to apply for the consent of the Land Control Board in respect of the transaction comprised in the Agreement for Sale dated 20th March 2012 is hereby extended by a period of 6 (six) months. The extended period to run from the date of delivery of this judgment.*
- d) *The defendant is hereby compelled to execute all the necessary documents and take all necessary steps to ensure completion of the transaction comprised in the Agreement for Sale dated 20th March 2012. Such execution and such steps to be done within 30 (thirty) days from the date of delivery of this judgment. In default, the Deputy Registrar of this court to execute such documents and take such steps in the place of the defendant.*
- e) *Upon certificate of title in respect of the portion measuring 0.404 Hectares being issued to the plaintiff, the plaintiff to immediately pay to the defendant KShs 50,000 being the balance of the purchase price.*
- f) *I award the plaintiff costs of the suit and interest thereon.*

2. Being dissatisfied with the judgment, the defendant filed Notice of Appeal on 17th July 2018. Shortly thereafter, she filed Notice of Motion dated 8th August 2018 seeking stay of execution of the aforesaid judgment pending hearing and determination of the appeal to the Court of Appeal. This ruling is in respect of the said Notice of Motion.

3. The application is supported by an affidavit sworn by the applicant. She deposed that she will suffer substantial loss if stay is not granted. In her replying affidavit the respondent stated that the applicant had not demonstrated substantial loss and that the application is intended buying time.

4. The application was heard through written submissions. The applicant's submissions were filed on 11th October 2018 while the respondent's submissions were filed on 30th October 2018. I have considered the application, the affidavits and the submissions.

5. The guiding principles while dealing with an application for stay of execution pending appeal emerge from **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.

6. In Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] eKLR, Platt Ag JA (as he then was) stated:

It is usually a good rule to see if order XLI rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money.

7. A litigant seeking stay pending appeal must therefore satisfy the court that substantial loss will result to him if stay is not granted and that the application has been made without unreasonable delay. Needless to state, an appeal ought to have been filed.

8. We have previously noted that indeed an appeal has been filed herein. Regarding the need to file the application without unreasonable delay, the present application was filed less than a month after delivery of judgment. There was thus no unreasonable delay.

9. What about the test of substantial loss? The respondent has argued that the application should be dismissed since the applicant has not demonstrated substantial loss. The answer to the question of whether or not there will be substantial loss if stay is not granted must be sought in this case by looking at the nature of orders that were made in the judgment. An order of specific performance was issued compelling the defendant to perform her obligations as set out in the Agreement for Sale dated 20th March 2012. Further, the court ordered the defendant to specifically excise and transfer to the plaintiff a portion measuring 0.404 Hectares from her parcel No. Njoro/Ngata Block 2/2807(Kirobon) and that if she fails to do so the deputy registrar would take all necessary steps on her behalf. All this means that unless stay is granted, the defendant will lose a portion measuring 0.404 Hectares from her parcel No. Njoro/Ngata Block 2/2807(Kirobon). That certainly will be substantial loss. It is an outcome which is manifest from the judgment and the court sees it even if the applicant does not specifically state so.

10. The last consideration is that of security. The applicant has stated that she is ready to provide such security as will be ordered by the court. I will therefore order security in the nature of payment of taxed costs.

11. In the end I am satisfied that the applicant has made out a case for granting stay of execution pending hearing and determination of an appeal. So as to ensure that the appeal is actively prosecuted, I find it necessary to limit the duration of the stay.

12. I therefore make the following orders:

a) I grant stay of execution of the judgment delivered herein on 13th July 2018 and the resultant decree pending hearing and determination of the defendant's appeal to the Court of Appeal. The stay shall, unless extended, remain in force for only two (2) years from the date of this ruling.

b) The defendant shall deposit the amount that will be determined or agreed to be the party and party costs for this case into an interest earning account in the joint names of the advocates on record for the plaintiff and the defendant herein within 30 (thirty) days of such determination or agreement. In default, the stay order shall automatically stand vacated.

c) Costs of this application are awarded to the plaintiff.

13. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 15th day of May 2019.

D. O. OHUNGO

JUDGE

In the presence of:

Mr Karanja Mbugua for the defendant/applicant

Mr Biko holding brief for Mr Morintat for the plaintiff/respondent

Court Assistants: Beatrice & Lotkomo