



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL NO. 49 OF 2018

THE CHAIRMAN FULL GOSPEL CHURCH (KANGARA).....APPELLANT

-V-

FREDRICK MWORIA M' NCHIRU.....RESPONDENT

(Being an appeal from the judgment/decree of Hon. J.M IRURA SRM delivered on 24/10/2018 in Nkubu SRMCC No. 358 60 of 2014)

RULING

1. Before me is a Notice of Motion application brought pursuant to Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules 2010, Sections 1A, 1B and 63 (c) and (e) of the Civil Procedure Act Cap 21 of the Laws of Kenya, filed in court on 23rd November 2018, in which the Appellant/Applicant seeks a stay of execution of the judgment in Nkubu SRMCC No. 60 of 2014, delivered by J.M Irura (SRM) on 24th October 2018 and all consequential orders pending the hearing and determination of this appeal.
2. The gist of the application is that the Appellant was aggrieved by a judgment delivered by the Magistrate, whereby the Appellant was ordered to pay general damages for breach of contract assessed at Kshs 150,000 and Land Parcel No. Nkuene/Ukuu/793 was ordered to revert back into the names of the Respondent. It is further averred that the Respondent was in the process of implementing the terms of the judgment and that the Appellant was the registered proprietor of the land. The Appellant thus contended that if the judgment was implemented, he would stand to suffer irreparable loss.
3. The application was opposed via a replying affidavit filed in court on 9th January 2019, by the Respondent where he contended that the Appellant's single aim was to procrastinate execution of the court's decree, and that the Appellant would not suffer monumental loss or damage as alleged, since the church had no building on the suit parcel.
4. It was submitted for the Appellant that it had satisfied the requirements for grant of stay of execution as provided for under Order 42 Rule 6 of the Civil Procedure Rules. Applicant is willing to abide by any terms that the court may deem fit to set in granting the prayers. It is also submitted that Respondent would not suffer any prejudice.
5. On the other hand it was submitted for the Respondent that this was a very old matter having been filed in court way back in the year 2004 and that the same was determined on 24th October 2018 and judgment fairly ruled in his favour and that as such the appeal was an afterthought . It is further submitted that the aim of the applicant is to frustrate the judgment delivered in his favour.
6. I have carefully considered this application and the rival submissions of the parties. The Appellant is essentially seeking stay of execution of the judgment in Nkubu SRMCC No. 60 of 2014. The conditions precedent pursuant to which a grant of stay of execution can be issued are provided under Order 42 Rule 6 of the Civil Procedure Act. These are that; A court must be satisfied that substantial loss would occur unless the order is issued and that the said application has been brought without delay. The applicant is further enjoined to offer such security for the due performance of such decree as may be ultimately binding on him.
7. With regard to whether substantial loss would occur to the Appellant if the instant orders are not issued, the Appellant contended that in the Judgment, the Land Parcel No. Nkuene/Ukuu/793 was to revert back to the names of the Respondent herein, a fact which the Respondent has not disputed.
8. In the case of ***Tropical Commodity Supplies Limited and Others vs International Trade Bank Limited [2000] 2 EA***, Ogola J stated that substantial loss does not represent any particular mathematical formula but is a qualitative concept that refers to any loss, great or small that is of real worth or value, or a loss that is of real value as distinguished from loss without value or loss that is merely nominal. In the circumstances of this case, I am of the considered opinion that the Appellant has shown to the satisfaction of this court that substantial loss would occur if an order of stay of execution is not issued.
9. With regard to whether there has been unreasonable delay, the impugned judgment that the Appellant seeks to appeal against was

delivered on 24th October 2018, whereas the instant application was filed in court on 23rd November 2018. This was exactly a period of one month from the date of the impugned judgment. In my considered opinion a period of one month cannot be said to be unreasonable and I am satisfied that the Appellant has met this condition as well.

10. With regard to the last condition namely; provision of security, the Appellant contended that he was ready and willing to abide by any terms and conditions that this court may deem fit to set in granting his prayers. It is therefore apparent that the Appellant has met the conditions precedent for grant of stay of execution as provided for under Order 42 Rule 6 of the Civil Procedure Rules.

11. Taking into totality all the circumstances in this case and having come to the conclusion that the Appellant has met the conditions precedent for issuance of the orders of a stay of execution, I find that the Appellant's application dated 23rd November 2018 has merits. I allow the same in the following terms;

- 1) There is to be a stay of execution of the Judgment for a period of one year from the date of delivery of this ruling.**
- 2) The sum of Kshs.150,000/= is to be deposited in court by the Applicant within 40 days from today and in default, the stay orders shall lapse and the Respondent shall be at liberty to execute.**
- 3) The costs of this application shall abide the outcome of the appeal.**

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 8TH DAY OF MAY, 2019 IN THE PRESENCE OF:-

C/A: Kananu

Ashaba holding brief for Kaimenyi for applicants

Respondents

HON. LUCY. N. MBUGUA

ELC JUDGE