



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU**

**E.L.C. CASE NO. 164 OF 2015**

**(FORMERLY ELC KERUGOYA NO. 16 OF 2014)**

**KITHINJI KIRAGU.....PLAINTIFF**

**VERSUS**

**TABITHA MUGO.....DEFENDANT**

**RULING**

1. By a notice of motion dated 29<sup>th</sup> November 2018 the Defendant sought an order for the Deputy Registrar to be authorized to sign and execute all necessary documents in order to facilitate transfer of the suit properties to the Defendant in execution of the judgement and decree of the court dated 18<sup>th</sup> October 2018.
2. When the said application was listed before me on 5<sup>th</sup> February 2019 it was allowed as prayed in the absence of the Plaintiff since there was no order for stay of execution or any opposition thereto. There was, therefore, no justifiable cause or excuse to withhold execution.
3. By a notice of motion dated 19<sup>th</sup> February 2019 and filed on 28<sup>th</sup> February 2019, brought under **sections 3A, 1A and 1B of the Civil Procedure Act (Cap. 21), Order 42 and Order 51 of the Civil Procedure Rules** the Plaintiff sought the setting aside of the orders made on 5<sup>th</sup> February 2019 and stay of execution of the decree pending the hearing and determination of an intended appeal to the Court of Appeal.
4. By consent of the parties, the orders made on 5<sup>th</sup> February 2019 in favour of the Defendant were set aside and it was directed that the Defendant's notice of motion dated 29<sup>th</sup> November 2018 be heard afresh alongside the Plaintiff's application for stay pending appeal.
5. The Defendant filed a replying affidavit sworn on 26<sup>th</sup> February 2019 in opposition to the Plaintiff's application for stay. It was contended, *inter alia*, that the Plaintiff was not diligent in that he had failed to apply for stay of execution without undue delay; that the Plaintiff was not in possession of the suit property; and that no substantial loss had been demonstrated to warrant a stay.
6. The Plaintiff filed a further affidavit sworn on 14<sup>th</sup> May 2019 in support of his application for stay in which he urged the court to maintain the existing *status quo* until the hearing and disposal of the intended appeal. It was contended that unless a stay was granted then substantial loss may result as the intended appeal may be rendered nugatory.
7. The record shows that the Plaintiff filed written submissions on the two applications on 4<sup>th</sup> June 2019 whereas the Defendant filed her submissions on 4<sup>th</sup> April 2019.
8. The court has considered the two applications on record, the affidavits in opposition to each as well as the respective written submissions of the parties. Ideally, the application for stay should have been determined first since its success would render the determination of the application for execution of the decree unnecessary. However, since there was an omission by the court in directing so, the two applications shall be considered together.
9. The court has considered the entire material on record as well as the submissions on record. It is on record that by its judgment and decree dated 18<sup>th</sup> October 2018, the court dismissed the Plaintiff's suit whereas it allowed the Defendant's counter-claim for adverse possession. It would appear that the Plaintiff was aggrieved by the said judgement in consequence whereof he filed a notice of appeal on 23<sup>rd</sup> October 2018.
10. The record also shows that the Plaintiff did not bother to seek a stay of execution of the decree until the Defendant moved the court for execution as indicated earlier on. The Plaintiff's application for stay may well be construed as an afterthought merely intended to delay the process of execution.

11. The court is aware that under the provisions of **Order 42 Rule 6 (2) of the Civil Procedure Rules**, an applicant is only entitled to an order of stay upon meeting the following conditions:

- a. Demonstrating the risk of substantial loss unless the stay is granted.
- b. Filing the application without unreasonable delay.
- c. Providing security for the due performance of the decree.

12. The court is aware that the two suit properties which are the subject of the suit are registered in the name of the original Plaintiff who is deceased. The Plaintiff, who appears to be the administrator of the estate, has not provided details on current state of administration of the estate and what steps, if any, have been taken towards distribution of the estate.

13. The court is of the view that there is a risk of substantial loss in the sense that should the Plaintiff succeed on appeal, the suit properties may be out of his reach, if say, the Defendant were to alienate them upon execution of the decree. Such loss may render the appeal, if successful, nugatory or barren. The court has a duty to prevent such a barren result.

14. 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.”**

15. On the other hand, should a stay of execution be granted without any other protective order to preserve the suit properties, there might be a barren result should the Plaintiff dispose of the suit property before or after losing the appeal. The court has to strike a balance between the interests of both the Plaintiff and the Defendant. The suit property should be available to the successful litigant upon conclusion of the intended appeal.

16. The court has considered the issue of delay in the filing of the application for stay. There is no doubt that there was a delay of about 4 months on the part of the Plaintiff in filing the application for stay. Although there was no plausible explanation for such delay, the court is of the view that the Defendant did not suffer prejudice as a result of such delay. The Plaintiff shall be penalized in costs for such delay which resulted in the Defendant incurring costs in execution of the decree.

17. On the issue of security for due performance of the decree, the court is of the view that no security may be required in the circumstances of this case because of the orders the court shall be making in the matter. The court shall make an order for preservation of the suit properties pending the hearing and determination of the intended appeal.

18. The upshot of the foregoing is that the court is inclined to grant the Plaintiff’s application for stay pending appeal. In the event, the Defendant’s application for execution shall be held in abeyance (or stayed) pending the determination of the intended appeal.

19. The court therefore makes the following orders for disposal of the matter:

- a. The Plaintiff’s notice of motion dated 19<sup>th</sup> February 2019 is hereby allowed in terms of order No. 4 thereof.
- b. The stay of execution shall last for a period of 2 years from the date hereof or until conclusion of the intended appeal, whichever comes first.
- c. An order of inhibition under **section 68 of the Land Registration Act, 2012** shall be registered against *Title Nos. Mbeti/Gachuriri/438 and 439* until conclusion of the intended appeal.
- d. The Deputy Registrar shall furnish the Plaintiff with copies of proceedings and other documents for purposes of appeal within 45 days.
- e. The Defendant’s notice of motion dated 29<sup>th</sup> November 2019 is hereby held in abeyance pending the determination of the intended appeal or the lapse of the stay orders.
- f. The Plaintiff shall pay the Defendant thrown away costs of KShs.15,000/- within 30 days from the date hereof.

20. It is so ordered.

**RULING DATED, SIGNED and DELIVERED in open court at EMBU this 27<sup>TH</sup> DAY of JUNE, 2019.**

In the presence of Ms. Nyandwaro holding brief for Mr. Morris Njagi for the Plaintiff and Ms. Maina holding brief for Mr. A.P. Kariithi for the Defendant.

Court Assistant Mr. Muinde

**Y.M. ANGIMA**

**JUDGE**

**27.06.19**