



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ELC No. 40 OF 2013

MICHAEL WAWERU.....1ST PLAINTIFF

PHILISIA NYAMBURA.....2ND PLAINTIFF

VERSUS

GRACE NYOKABI KINUTHIA.....DEFENDANT

RULING

1. On 20th July 2018, this court granted the defendant a conditional order of stay of execution of the judgment and decree herein pending hearing and determination of the defendant's appeal to the Court of Appeal. The condition imposed was that defendant deposits security of KShs 1, 200, 000 (one million two hundred thousand) in court within 21 (twenty one) days from the said date and in default, the stay orders would automatically lapse.

2. Slightly over two weeks later, the defendant filed Notice of Motion dated 8th August 2018 seeking an order that the ruling of 20th July 2018 be reviewed and an alternative security in the form of Title Number Ndarugu/Karatu/3387 be added. She also sought an order that the said title be deposited in court and the registered proprietor be sworn as a security for the sum of KShs 1, 200, 000.

3. The application is supported by an affidavit sworn by the defendant as well as another affidavit sworn by Charles Waruiru Karanja who is the registered proprietor of Title Number Ndarugu/Karatu/3387. The plaintiffs opposed the application through Grounds of Opposition. The application was canvassed through written submissions. Both sides filed and exchanged submissions.

4. I have considered the application, the Grounds of Opposition and the submissions. The applicant seeks review. In that regard, **Section 80** of the **Civil Procedure Act** and **Order 45 Rule 1** of the **Civil Procedure Rules** are instructive. The said **Section 80** provides:

Any person who considers himself aggrieved-

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act,

may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

5. **Order 45 Rule 1** provides:

1. (1) Any person considering himself aggrieved-

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

6. The applicant has not cited any discovery of new and important matter or evidence, or any mistake or error apparent on the face of the record as a basis for the application. Though not expressly stated so, I assume that the application is made on the ground of "other sufficient

reason". The applicant contends that she is an old lady of over 80 years of age and that she is unable to raise the sum of KShs 1,200,000. She adds that she approached Charles Waruiru Karanja, the registered proprietor of Title Number Ndarugu/Karatu/3387, who has agreed to deposit his said title as an alternative security. She annexed a copy of the title deed, certificate of search as at 30th July 2018 and a valuation report dated 1st August 2018. The report assessed the value of the property "for court purposes" as KShs 4,500,000.

7. The plaintiff is opposed to the application on the grounds that the security offered is not suitable, that such security should be in the name of the defendant and that the proposed security should be transferred to the name of the defendant for it to be acceptable.

8. It should be recalled that pursuant to judgment delivered in this matter on 31st October 2017 by Y. M. Angima J., the court allowed the plaintiffs' suit as prayed and dismissed the defendant's counterclaim. The plaintiffs' claim as captured at paragraph 2 of the said judgment was a permanent injunction restraining the defendant from trespassing into the suit properties. The plaintiffs also prayed for mesne profits and special damages for some destroyed crops.

9. As I understand it, the plaintiffs are not in principle opposed to substitution of security. They however find the security offered inappropriate and unsuitable. I understand their concerns. The property offered is not owned by the applicant. If it became necessary to realise the security, there could potentially be new litigation with an entirely new party. That would certainly render the proposed alternative security to be of little value as an instrument of protecting the plaintiffs' interests during pendency of the appeal. Additionally, I note that even though Charles Waruiru Karanja stated in his affidavit that he had signed transfer documents in respect of Title Number Ndarugu/Karatu/3387 and that he would surrender the said transfer documents as well as the title document to the court, no copy of the signed transfer was exhibited.

10. Doing the best that I can to balance the right of the applicant who says that she is an old lady of over 80 years of age to pursue her appeal vis-à-vis the rights of the plaintiffs as successful litigants, I am persuaded that I should grant review on such terms as would address the plaintiffs' concerns.

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

i. The stay granted on 20th July 2018 is conditional on the defendant depositing security of KShs 1,200,000 (one million two hundred thousand) in court within 21 (twenty one) days from the date of delivery of this ruling. In the alternative, the defendant to deposit in court within 21 (twenty one) days from the date of delivery of this ruling, the original of the title deed in respect of Title Number Ndarugu/Karatu/3387, a certified copy of the green card in respect of the parcel and transfer forms in respect of the parcel executed in favour of the plaintiffs and duly attested.

ii. In default, the stay orders shall automatically lapse and Notice of Motion dated 24th January 2018 shall in that event stand allowed with costs to the plaintiffs.

iii. Costs of Notice of Motion dated 8th August 2018 shall be to the plaintiffs.

12. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 26th day of June 2019.

D. O. OHUNGO

JUDGE

In the presence of:

No appearance for defendant/applicant

Mr Towett holding brief for Prof Wangai for plaintiffs/respondents

Court Assistants: Beatrice & Lotkomoi