



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 83 OF 2013

DOMINIC MBURU NJUGUNAPLAINTIFF

VERSUS

PETER NJUGUNA GITAU.....1ST DEFENDANT

GATIMU KARIITHI2ND DEFENDANT

RULING

(Application for stay of execution pending appeal; principles to be considered; application allowed on conditions)

1. The application before me is that dated 8 March 2019 filed by the unsuccessful plaintiff. It is an application seeking orders of stay of execution of the judgment delivered on 6 March 2019 pending appeal. The application is opposed.
2. By way of background, the applicant commenced this suit through a plaint which was filed on 13 January 2010. He claimed to have purchased the land parcel Nakuru Municipality Block 16/286/15 (new number Nakuru Municipality/Block 16/634) from the 1st defendant on 2 July 2002 which money he claimed to have paid in full. He then proceeded to make developments on the suit land. He filed this suit because in January 2010, the 2nd defendant came to the plot and claimed to also have purchased it from the 1st defendant, and mentioned to have title to it. In the suit, he wished to be declared the lawful owner of the suit property and an order to declare the sale to the 2nd defendant as null and void. He further wished to have cancelled the certificate of title of the 2nd defendant and for him to be issued with title.
3. The 2nd defendant filed defence and counterclaim. He pleaded that he purchased the suit land from the 1st defendant and now holds the certificate of title. In his counterclaim, he sought vacant possession of the land together with mesne profits.
4. The defence of the 1st defendant was that he neither sold the land to the plaintiff/applicant nor to the 2nd defendant.
5. I heard the matter and delivered judgment on 6 March 2019. It was my view that the plaintiff/applicant had not made out a case that he had a valid sale agreement for the suit land and I further held the view that the applicant had developed a plot that was never sold to him. I entered judgment for the 2nd defendant and directed the applicant to give vacant possession within 14 days of the judgment. I did not make any award in respect of mesne profits. I also directed the applicant to pay the costs of the suit to the 2nd defendant. It is this judgment that the applicant wishes to appeal and he has already filed a notice of appeal.
6. In this application, the applicant avers that he has lived on the suit land for the last 16 years and that he has erected permanent residential houses of the value of over Kshs. 4 Million. He is of the view that the value of the developments are adequate security for any loss that the 2nd defendant/respondent may suffer.
7. The respondent has opposed the motion by filing a replying affidavit. He has first averred that the notice of appeal is defective as it was served upon him 22 days after it was filed contrary to the 7 days stipulated in the Court of Appeal rules. He has also denied that the applicant has been on the suit land for over 16 years. He has contended that the applicant had no right to make the developments in issue as he was not the registered owner and that he made the developments despite being warned by the respondent. He does not think that the applicant has demonstrated any substantial loss that he may suffer if stay is not granted and neither has he provided any security for the due performance of the decree. He believes that he deserves to enjoy the fruits of his judgment since he is the registered owner.
8. I invited both counsel for the applicant and counsel for the respondent to file written submissions which they duly did. I have taken these into account before arriving at my decision.

9. The application before me is for stay pending appeal, and therefore the provisions of Order 42 Rule 6 (2) apply. The said law is drawn as follows :-

Order 42 Rule 6 (2)

(2) No order for stay of execution shall be made under subrule (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 my ultimately be binding on him has been given by the applicant.

10. Flowing from the above it will be seen that there are three elements that need to be satisfied being :-

- (i) That the application has been made without unreasonable delay;
- (ii) That the applicant stands to suffer substantial loss if the order of stay is not made;
- (iii) That the applicant is ready to furnish security.

11. On the question of delay, I do not think that this application has been brought after unreasonable delay. The judgment in this matter was delivered on 6 March 2019 and this application was filed on 11 March 2019 which is just about five days after the judgment. The application has certainly been filed promptly without unreasonable delay.

12. I will combine the second and third limbs of the application in the discourse that follows, that is, determine whether the applicant stands to suffer substantial loss, and if so, determine what sort of security the applicant needs to provide for the performance of the decree in case he loses the appeal.

13. In his submissions, Mr. Kimatta, learned counsel for the applicant, inter alia submitted that if the developments that the applicant has made on the suit land are demolished, then the applicant will stand to suffer substantial loss and this will render the appeal nugatory. He submitted that there is need to preserve the property erected on the suit land pending appeal. He further submitted that the income that is generated from the rental houses in the property can be used to offset whatever loss the respondent will suffer.

14. I agree with Mr. Kimatta, that if the respondent takes over the property and demolishes it, the applicant stands to suffer substantial loss in the event that he succeeds on appeal. The respondent in his reply has indeed not given any undertaking not to interfere with the developments in case the same are handed over to him. I am therefore persuaded that it is necessary to preserve the suit land in the state that it is pending hearing and determination of the appeal.

15. It must however be remembered that it has now been decreed that the property belongs to the respondent, and the respondent is the person who is entitled to enjoy the benefits of that property yet again, there is a chance that it may be held on appeal that the property belongs to the applicant. Balancing the interests of the applicant and the respondent, I think the applicant needs to give security in the form of a rough equivalent of the proceeds of rent that he stands to collect for the duration of the appeal. When he gave evidence, the applicant stated that he collects a total of Kshs. 58,000/= as rent every month. If I give a conservative 2 years for the hearing of the appeal, the total income that stands to be collected is Kshs. 1,392,000/=, and I have not even made any provision for increase of rental income.

16. I am thus persuaded to grant a stay of execution of the judgment on condition that the applicant deposits the sum of Kshs. 1,392,000/= in a joint interest earning account in the names of counsel for the applicant and the respondent, within the next 30 days, as security for the due performance of the decree. The applicant also needs to bond himself to preserve the property in no worse state than it is currently, and not make any additional developments, or any alterations of developments on the same, pending the hearing and determination of the intended appeal, and be ready to pay damages in the event of breaking such bond. Such bond needs to be provided within the next 30 days. In addition, the applicant will also need to deposit the taxed costs in the same joint interest earning account, within 30 days of taxation. If the applicant cannot make available for deposit the said sum of Kshs. 1,392,000/= within 30 days and cannot bond himself as provided above, and does not deposit the taxed costs within 30 days of them being taxed, then the stay order will automatically lapse and the decree may be executed.

17. On the costs of this application, in the event that the applicant complies with the conditions above, the costs shall abide the outcome of the appeal, but if he cannot, then the applicant will shoulder the costs thereof.

18. Orders accordingly.

Dated, signed and delivered in open court at Nakuru this 25th day of July 2019.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of : -

Mr. Kimatta present for the applicant.

No appearance on the part of M/s Henia, Anzala & Co for the 2nd defendant.

Court Assistants. Nelima Janepher/Patrick Kemboi.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU