



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT NAKURU

ELC CIVIL APPEAL NO.4 OF 2019

VIRGINIA WANJIKU MURITU.....APPELLANT

VERSUS

PHILIP WAWERU KURIA.....RESPONDENT

RULING

(Application for stay pending appeal; principles to be applied; applicant having been sued for eviction by the respondent and filing a counterclaim for the land; applicant claiming that she purchased part of the suit land from the respondent; judgment entered for the respondent and applicant ordered to vacate the suit land; appeal against that decision filed; applicant now wishing to have stay pending appeal; stay granted on conditions)

1. The application before me is that dated 5 February 2019 filed by the appellant. It is an application brought pursuant to the provisions of Order 42 Rule 6, and seeks orders of stay of execution pending appeal.
2. To put matters into context, the respondent sued the applicant before the Chief Magistrate's Court at Nakuru, vide Nakuru CMCC No. 946 of 2008. In that suit, the respondent contended to be the registered proprietor of the land parcel Bahati/Kabatini Block 1/2099. He pleaded that around the year 1995, the applicant offered to purchase a portion of the land and the parties entered into a mutual agreement allowing the applicant the said purchase. However, no consent of the Land Control Board was sought but the respondent did allow the applicant to occupy part of the suit land. It is averred that in the year 2005, the applicant started erecting structures on the land contrary to the wishes of the respondent and at that juncture, the respondent withdrew his consent on the occupation of the land by the applicant. The case of the respondent was that the applicant had failed to pay the agreed consideration and he sought the applicant to be permanently restrained from the land, eviction orders against him, mesne profits, costs and interest.
3. The applicant filed defence and counterclaim. He pleaded that in the year 1995, the respondent sold to her a portion of land measuring 50 X 100 feet at Kshs. 70,000/= from the suit land. She pleaded that she not only paid in full but in fact overpaid by Kshs. 1,500/= and despite this, the respondent had failed to transfer the portion that she purchased. She asked that the land be transferred to her.
4. The matter was heard by Hon. Kalo, Chief Magistrate, and in his judgment of 18 December 2018, he found for the respondent and dismissed the applicant's counterclaim. He gave the applicant 60 days to vacate the suit land and demolish any structures on the land. It is this judgment that the applicant has now appealed against.
5. In the application before me, she seeks a stay of execution of the judgment pending the hearing and determination of her appeal. In her supporting affidavit, she has deposed inter alia that she stands to suffer substantial loss if the eviction orders are not stayed and her appeal will be rendered nugatory. She has averred that she lives on the land and that she is aged and sickly.
6. The respondent has filed replying affidavit to oppose the motion. It is his position that a successful litigant is entitled to the fruits of the judgment. He has deposed that the applicant is seeking the court's sympathy by displaying hospital treatment records and the developments on the land, which he avers were made in violation of a court order. He does not believe that an eviction would occasion her any substantial loss. He has further deposed that he is living in fear of the applicant's grandchildren who have been threatening him and his family with death. He has also stated that the applicant has not furnished security and is yet to pay the costs awarded in the Magistrate's Court.
7. I invited both counsel for the applicant and counsel for the respondent to file written submissions which they did. I have taken note of these and of the authorities provided, before arriving at my decision.
8. This is an application 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.

9. 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.

10. On the question of delay, I do not think that this application has been brought after unreasonable delay. The applicant was given 60 days to vacate the land and she has filed this application within the said period, and given that position, I am of the view that the application has been brought timeously.

11. On substantial loss, I am persuaded that there will be substantial loss if the applicant is evicted while there exists a chance of success in the appeal. I have taken note of the submissions of counsel that the successful litigant deserves the fruits of the judgment. I agree to that tenet, only that this needs to be balanced against the right of appeal of the applicant. Taking into consideration the nature of the land and the size of it, and the undisputed fact that the applicant has been on it for a considerable length of time, my view is that in the event that the applicant fails on appeal, the respondent may be adequately compensated by damages in the sum of Kshs. 250,000/= which I now order the applicant to deposit as security in a joint interest earning account to be held in the names of counsel for the applicant and counsel for the respondent. Also to be deposited is the taxed costs at the lower court and the same to be similarly held in a joint interest earning account. These monies need to be deposited within 30 days from today, and if not, then the stay pending appeal will lapse. In the event that the appellants fail on appeal, the deposited money to be forfeited to the respondent.

12. So that the status quo may be maintained, I also order the applicant not to develop any additional structures on the suit land. The respondent is also ordered not to enter into any dealings that may affect the interests of the applicant over the portion of land that she claims.

13. The costs of this application will be costs in the appeal.

14. Orders accordingly.

Dated, signed and delivered in open court at Nakuru this 18th day of July 2019.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of : -

Mrs. Mukira for the applicant.

No appearance on the part of M/s Mirugi Kariuki & Co. Advocates for the respondent.

Court Assistants- Nelima Janepher/Patrick Kemboi

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU