



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC APPEAL NO. 2 OF 2019

ALICE WACHEKE MUIRURI.....APPELLANT/ APPLICANT

VERSUS

PETER IRUNGU KARANU.....RESPONDENT

RULING

What is before Court for determination is the Appellant's Notice of Motion application dated the 28th January, 2019 brought pursuant to Order 42 Rule 6 of the Civil Procedure Rules. The Appellant seeks for a stay of execution against the orders of Hon. S.M. Shitubi (CM) in Kajiado CM ELC No. 140 of 2018 delivered on 24th January, 2019 pending the outcome of the Appeal.

The application is premised on the grounds that a ruling was delivered on 24th January, 2019, and an order made lifting the caution registered by the Appellant over LR KAJIADO/KAPUTIEI NORTH/2333 hereinafter referred to as the 'suit land', The Appellant being aggrieved by the said Ruling lodged an Appeal which has high chances of success. The Appellant is apprehensive that the Respondent may execute the order lifting the caution and proceed to subdivide the suit land before the hearing and determination of the Appeal, which would render it nugatory.

The application is supported by the affidavit of the Appellant ALICE WACHEKE MUIRURI where she deposes that in May 2018, she filed an application vide Kajiado CMEC 140 of 2018 seeking injunctive orders against the Respondent from selling the suit land as she had purchaser's interest having paid Kshs. 11.5 million out of the contractual sum of Kshs. 17.5 million. She explains that the Respondent filed an application seeking for removal of caution which the Hon. Magistrate allowed. She contends that the Magistrate erred in law and in fact for finding that the balance of convenience tilts in favour of the Respondent and dismissed the application by predetermining her suit.

The Application is opposed by the Respondent PETER IRUNGU KARANU who filed a replying affidavit where he averred that the interlocutory application was without merit. He insists the instant application does not comply with Order 42 Rule 2 of the Civil Procedure Rules for a grant of a stay of execution. He admits entering into a Sale Agreement with the Appellant to sell the suit land and confirms she paid Kshs. 5.5 million out of Kshs. 12 million. He explains that it is the Appellant who failed to adhere to the terms of the Sale Agreement and despite being served with a completion notice, she did not pay the final purchase price culminating in the said Agreement being rescinded. He contends that the lower court found that the Appellant had not established a prima facie case and insists the Appellant only pleaded loss for the deposit she paid which can be refunded. He reiterates that the removal of the caution was legal and he can dispose off his property to a third party.

Both the Appellant and the Respondent filed their respective submissions that I have considered.

Analysis and determination

Upon consideration of the instant Notice of Motion including the affidavits and the submissions, the only issue for determination is whether there should be a stay of execution of the orders of Hon. S.M. Shitubi (CM) in Kajiado CM ELC No. 140 of 2018 delivered on 24th January, 2019 pending the outcome of the Appeal.

It is not disputed that the orders dated the 24th January, 2019 were dismissing the Appellant's application for injunction and lifting the caution over the suit land. The Appellant has lodged an Appeal against the said orders. I note in the instant application the Appellant seeks a stay of execution against the said orders pending Appeal. The Appellant has submitted that she had brought the application without unreasonable delay, will suffer substantial loss and it is pertinent to preserve the suit land pending the outcome of the Appeal. The Respondent submitted that the Appellant will not suffer any substantial loss if the stay is denied as she has sought for refund of the purchase price in her claim in the lower court. The Respondent has relied on the cases of **Samwel Kiprono Sang V Rosemary Chebet Koros, David Musyoka Nzuki & Housing Finance Corporation Of Kenya Ltd (2019) eKLR** and **Machira t/a Machira & Company Advocates V East African Standard (2002) 2 KLR 63** to support his arguments.

Order 42 Rule 6 (2) of the Civil Procedure Rules provides that: *'No order for stay of execution shall be made under sub rule (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 may ultimately be binding on him has been given by the applicant.'*

A perusal of the Memorandum of Appeal shows that the main issue the Appellant is appealing against regards proposal to refund the purchase price and the time to make the refund, which could only be determined once the suit was set down for hearing on its merits. In the case of **Samwel Kiprono Sang V Rosemary Chebet Koros, David Musyoka Nzuki & Housing Finance Corporation Of Kenya Ltd (2019) eKLR** the Court held that: *'No doubt in law and in fact that the process of execution has been put in motion or is likely to be put in motion, by itself does not amount to substantial loss. Even when the execution has been levied and completed, that is to say, the attached properties have been sold as is the case here, that does not amount to substantial loss under Order 42 rule 6 of the Civil Procedure Rules. This is because execution is a lawful process. '*

Further in the case of **Butt v Rent Restriction Tribunal [1982] KLR 417** the Court gave guidance on the principles to be observed in granting a stay of execution and stated that:

"The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. '

In the current scenario, and in associating myself with the two decisions cited above, I do not see any good grounds to enable me grant a stay of execution and further since the suit in the lower court is yet to be determined, there is no substantial loss the Applicant will suffer if the stay is not granted. It is my considered view that the Appellant is still entitled to obtain a refund of the purchase price that she had paid once the lower court matter is heard and determined.

It is against the foregoing that I find the Notice of Motion dated the 28th January, 2019 unmerited and will disallow it. I direct that the Appeal be set down for hearing expeditiously within 60 days from the date hereof.

Costs will be in the cause.

Date signed and delivered in open court at Kajjado this 17th day of July, 2019

CHRISTINE OCHIENG

JUDGE