



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CIVIL CASE NO. 554 OF 2008**

**NANCY WANJIRU WANGAL.....PLANITIFF**

**VERSUS**

**NATIONAL SOCIAL SECURITY FUND.....1<sup>ST</sup> DEFENDANT**

**DAVID NJOROGE NGARU.....2<sup>ND</sup> DEFENDANT**

**PATRICK NYAMU.....3<sup>RD</sup> DEFENDANT**

**FRED OYUGI.....4<sup>TH</sup> DEFENDANT**

**JOSEPH OLE KIAMBU.....5<sup>TH</sup> DEFENDANT**

**RULING**

1. This is the notice of motion dated 22<sup>nd</sup> February 2016 brought under order 42 rule 6, order 51 rule 1 of the Civil Procedure Rules 2010, Section 1A, 1B, 3A and 63 of the Civil Procedure Act, the inherent jurisdiction of the court and all other enabling provisions of the law.
2. It seeks orders
  1. *Spent.*
  2. *Spent.*
  3. *That there be an order of stay of execution or enforcement of the judgment and decree delivered on 29<sup>th</sup> January 2016 or any part thereof pending the hearing of the intended appeal and/or until further orders of this court.*
  4. *That pending the interparties hearing of this application an interim relief be granted in terms of prayer 2 above.*
  5. *That costs of this application be granted to the applicant herein.*
3. The grounds are on the face of the application and are set out in paragraphs (a) to (L).
4. The application is supported by the affidavit of Patrick Nyamu the 3<sup>rd</sup> defendant/applicant sworn on the 22<sup>nd</sup> February 2016.
5. The application is opposed. There is a replying affidavit sworn by Nancy Wanjiru Wangai, the decree holder/respondent on the 1<sup>st</sup> March 2016.
6. On the 5<sup>th</sup> May 2017 the court directed that the application be canvassed by way of written submissions. I note that only the plaintiff and the 3<sup>rd</sup> defendant put in their written submissions. The rest of the defendants did not put in theirs.

**The 3<sup>rd</sup> defendant/applicant's submissions**

7. This application is brought under order 42 rule 6 of the Civil Procedure Rules. Under section 1A, 1B of the Act, the jurisdiction of this court to grant stay of execution has been fundamentally altered and broadened. He has put forward the case of **African Safari Club vs Safe Rentals Ltd CA, Civil appeal No. 52 of 2010.**

8. The application has been brought without unreasonable delay. A judgment was delivered on 29<sup>th</sup> January 2016. The applicant is reasonably apprehensive that if the orders are not granted he will suffer substantial loss, the reason being he has fully developed a three (3) and six (6) storey residential block of flats which are fully occupied by tenants. The financial status of the plaintiff is unknown and there is no guarantee that if this amount is paid to her she will be in a position to refund the same if the appeal is successful.

9. He has also put forward the cases of **MSA HCCC No. 274 of 2009 Edwin Wambaa Regeru & Another vs Joseph Kariuki Kibara & 6 Others; Butt vs Rent Restrictions Tribunal Civil Appeal NO. Nairobi 6 of 1979 [1982] KLR 417; Otieno vs Ougo Civil Application NO. Nairobi 18 of 1987 [1987] KLR 400; E Muriu Kamau & Another vs National Bank of Kenya Ltd [2009] eKLR.**

10. The applicant is ready and willing to abide by such terms as the court may order in terms of security. He prays that the application be allowed.

#### **The plaintiff's/respondent's submissions**

11. The 3<sup>rd</sup> defendant/applicant has failed to meet the conditions set out under order 42 rule 6 of the Civil Procedure Rules. The legality and/or validity of the plaintiff's title was never challenged or contested at the hearing hence the same remains indefeasible and conclusive proof of ownership. The applicant has failed to demonstrate what loss he will suffer if these orders are not granted. She has put forward the cases of **Meteine Ole Kilelu & 10 others vs Moses K Nailole, Civil Appeal No. 340 of 2008; Kenya Shell Ltd vs Kibiru & Another, Civil Appeal No. 97 of 1986, Nairobi; Nganga Kabae vs Kahunyo Kimani HCCA No 182 of 1999 Nairobi.**

12. The plaintiff/respondent herein is a successful litigant and is entitled to enjoy the fruits of a successful litigation but is being restricted while in pursuit of the same. The applicant is yet to file a record of appeal. There is no explanation for the inordinate delay.

13. He has failed to demonstrate that there exists an arguable appeal with high chances of success nor satisfied the pre requisite conditions set out in order 42 rule 6 of the Civil Procedure Rules 2010. She has put forward the cases of **William Kamunge & 2 Others vs Muriuki Mbithi [2016] eKLR.** The applicant's claim if any is against the 1<sup>st</sup> defendant and not the plaintiff.

14. The intended appeal has no chances of success and it would be in vain and unjust to grant the orders of stay of execution. The application is an abuse of the court process and ought to be dismissed with costs to the plaintiff/respondent.

15. I have considered the notice of motion, the affidavit in support and the annexures. I have also considered the replying affidavit, the written submissions of counsel and the authorities cited. The issue for determination is whether this application is merited.

16. Order 42 rule 6(2) of the Civil Procedure Rules 2010 provides that:-

***“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 may ultimately be binding on him has been given by the applicant.”***

It is clear from the above provision that it requires specific conditions to be met by the applicant in order for orders of stay of execution to be granted.

17. The principles that guide a court in exercising discretion in an application for stay of execution pending appeal are now well settled.

***1. That the application has been brought without undue delay.***

***2. That unless stay is granted the applicant shall suffer substantial loss.***

***3. That the applicant has suffered security for the due performance of the decree that may ultimately be found to be binding upon him.***

18. In the case of **Peter Odande t/a Spreadwith Chemist vs Josephine Wangari Karuya [2006] eKLR**, L Kimaru J stated as follows:-

***“the issue for determination by the court is whether the applicant has established a case to enable the court to grant stay of execution sought. For the court to grant stay of execution it must be satisfied that substantial loss may result to the applicant if stay is not granted. Further that the applicant must have filed the application for stay of execution without unreasonable delay. Finally, the applicant must provide such security as may ultimately be binding on him”***

19. In the case of **Feissal Amin Janmohammed t/a Dunvila Fowarders vs Shami Trading Co Ltd, [2014] eKLR**, Kasango J stated as follows;

***“It is trite law thereore that a stay of execution is generally granted if the applicant has successfully demonstrated that a substantial loss may result to hw therefore that a stay of execution is generally granted if the applicant has successfully demonstrated that a substantial loss im unless the order is made; that the application was made without unreasonable delay and that the applicant has offered proper security”.***

20. I have considered the notice of motion herein. I find that it was brought without undue delay. It is the applicant’s case that he has fully developed three (3) and six (6) storey residential block of flats which are fully occupied. That he is reasonably apprehensive that he will suffer substantial loss if the orders are not granted. The building may be demolished. I find that he has demonstrated substantial loss. He also told the court that he is ready and willing to abide by such terms as the court may order in terms of security.

21. In conclusion, I find merit in this application. I find that the 3<sup>rd</sup> defendant/applicant has put forth sufficient reasons to warrant this court to exercise its discretion in his favour.

22. Accordingly, I allow this application in the following terms:-

***(a) That the 3<sup>rd</sup> defendant/applicant do deposit Kshs.5,000,000 in a joint interest earning account in the names of the plaintiff’s advocate and the 3<sup>rd</sup> defendant’s advocates within sixty (60) days from the date of this ruling in default the stay of execution orders will lapse.***

***(b) In addition the 3<sup>rd</sup> defendant/applicant do deposit the admitted monthly rent of Kshs.460,000 monthly with effect from 5<sup>th</sup> November 2019 in a joint interest earning account in the names of the plaintiff’s advocate and the 3<sup>rd</sup> defendant’s advocate until determination of the appeal.***

***(c) The costs of this application be borne by the defendant/applicant.***

It is so ordered.

**Dated, signed and delivered in Nairobi on this 26<sup>th</sup> day of September 2019.**

**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

.....Advocate for the Plaintiff

.....Advocate for the Defendants

.....Court Assistant