



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC NO. 460 OF 2011

MICHEAL NDUNGU MBUGUA

LILY K. MUSINGA

FRANCIS KIARIE KARIUKI.....PLAINTIFFS

VERSUS

CECILIA WANJIRU COOPER alias

CECILIA WANJIRU EARNEST

MICHEAL MURIITHI MUTHIL.....DEFENDANTS

RULING

1. For determination is Notice of Motion dated 21st September 2018 brought under Section 1A, 1B, 63(e) of the Civil Procedure Act and Order 42 rule 6 of the Rules. The defendants, who are applicants asked for orders that;

(a) Spent;

(b) Spent;

(c) That upon inter partes hearing of his application the Honourable Court be pleased to order a stay of execution of the judgement/decree delivered herein on 2nd August 2018 pending the hearing and determination of the appeal filed in the Court of Appeal against the said judgement and decree.

(d) That any other further orders the court deems just and fit to be granted.

(e) That the costs of this application be provided for.

2. The motion is premised on the grounds spelt on the face of it to wit;

(i) The applicant shall suffer substantial loss unless the stay is granted.

(ii) The alienation of Plot No. MN/1/17640 would be irrevocable notwithstanding the successful outcome of the pending appeal.

(iii) The policy of law is for the court to exercise its best discretion so as to prevent the appeal filed from being rendered nugatory as was held in the case of M. H Butt –versus The Rent Restriction Tribunal.

3. The application is opposed by the grounds of opposition filed on 7th December 2018. Plaintiff stated that the application was brought after 1 ½ months which is inordinate delay. That the balance of the purchase price is being held in a joint interest earning account thus the defendants will not suffer any irreparable loss if stay is not given. That the interest of the 1st defendant in the suit property was extinguished by the sales mentioned in the proceedings. The respondents also pleaded that the applicants should be ordered to deposit with the deputy registrar as security the original title deed for Plot No. 17640/II/MN for the due performance of the decree. In sum, the respondents/ plaintiffs

urge the court to dismiss the application with costs to them.

4. Order 42 rule 6(2) sets out conditions that an applicant should satisfy before being granted an order for stay of execution pending appeal. The applicant submitted that the application was made timeously i.e judgement delivered on 2nd August 2018 and application filed on 25th September 2018. Indeed this court does agree that application was filed without undue delay. The applicant at paragraph 10 of her submissions listed grounds which she states constitute substantial loss. The applicant accuses the respondents of not paying the purchase price in full for the plot under sale which plot was not MN/II/17640. Secondly that if the transfer is effected in respect to plot no MN/II/17640 in favour of the plaintiffs, the plaintiffs are likely to alienate the plot to 3rd parties beyond her reach. Lastly that the alienation and enforcement of the order shall destroy the subject matter of the appeal to the applicant's detriment. The application was supported by the 2nd defendant.

5. The plaintiffs urged that the 1st defendant will not suffer substantial loss because she no longer has any interest in the suit property having sold the same to the 2nd defendant. This may be true but which position still exposes the 1st defendant/applicant in so far as having received monies for sale she is under obligation to give land to the person who bought from her or refund the money as the case may be. Secondly the 2nd defendant said he was supporting the application as the outcome of the same will affect his interest. If the court declines to grant the stay based on the argument presented by the respondents, the court will be put in a situation of having to deal with another application for the 2nd defendant is likely to file. Therefore by virtue of the obligation imposed on the 1st defendant as a vendor pursuant to the sales referred to by respondents I am persuaded that the 1st defendant/applicant has an interest to seek the protection of the law through a stay.

6. The 2nd objection raised by the respondents was that the balance of the purchase price to the tune of Kshs3,755,780/= is being held in the joint interest account thus the applicant will not suffer any loss. In my opinion and I so hold, the money being held in the joint interest account serve the interests of both sides in this suit and not necessarily that of the applicant only. Consequently the same should not be used to the disadvantage of the applicant.

7. There is already a notice of appeal filed. Further this file was released for typing of proceedings pending delivery of the ruling. There is a certificate of delay issued by the Deputy Registrar on 8th November 2018 confirming that the proceedings have been typed. All these demonstrate that the appeal is ready for hearing. In the circumstances I do not see the need for making a further order for security in the terms proposed by the respondent i.e directing the applicant to deposit with the Deputy Registrar of this court the title deed for Plot No. MN/II/17640.

8. In conclusion, I am satisfied that the 1st defendant/applicant has demonstrated sufficient cause for this court to grant the orders of stay of execution as prayed in no 3 of the application which order I do hereby grant. I also order that the costs of this application do abide the outcome of the appeal.

Dated, Signed and Delivered at Mombasa this 10th day of July 2019.

A. OMOLLO

JUDGE.