



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 194 OF 2018

MARY NJERI WANDERI.....PLAINTIFF

VERSUS

JAMES NYAMWEYA MAMBOLEO T/A NYAMWEYA

MAMBOLEO & CO. ADVOCATES.....1ST DEFENDANT

HAYANGA & CO ADVOCATES.....2ND DEFENDANT

JERRY ABONGO OKOKO.....3RD DEFENDANT

NDIRANGU NJENGA.....4TH DEFENDANT

JOSEPH NJENGA GATIMU.....5TH DEFENDANT

CHIEF LAND REGISTRAR, NAIROBI.....6TH DEFENDANT

ATTORNEY GENERAL.....7TH DEFENDANT

R U L I N G

1. The Court rendered a judgment in this matter on 30th September 2019 dismissing the plaintiffs' claims against the defendants. The plaintiff was inter alia ordered to vacate the suit property within 14 days from the date of judgment failing which an order of eviction to issue. The plaintiff was further ordered to pay to the 4th and 5th defendants mense profits at the rate of Kshs.360,000/= per month from 9th May 2018 up to the time she vacates the property.

2. The plaintiff in the suit had sought orders for specific performance of her contract of sale with the 3rd defendant and for orders annulling and cancelling the transfers of the suit property **LR No. 451/47/LVIII Nakuru Municipality** effected to the 4th and 5th Respondents. The Court found these prayers unmerited and dismissed them as against the plaintiff.

3. The plaintiff being aggrieved by the Court's judgment has filed a Notice of Appeal signifying her intention to appeal to the Court of Appeal against the whole judgment delivered by Munyao J, on 30th September 2019. That consequent to filing the Notice of Appeal the plaintiff has filed the instant Notice of Motion dated 11th October 2019 under the provisions of Order 46 Rule 6 of the Civil Procedure Rules. The applicant Vide the application seeks the following substantive orders:-

1. That pending interpartes hearing of this application, there be a stay of execution of the judgment and decree of the judgment and decree of this Court issued on 30th September 2019.

2. That pending the hearing and determination of the appeal filed in the Court of Appeal, there be a stay of execution of the judgment and decree of the Court issued on 30th September 2019.

3. That cost of this application be provided for.

4. The application is premised on the grounds set out on the body of the application and the affidavit sworn in support thereof by the plaintiff.

The plaintiff avers that she had performed the terms of the agreement of sale entered into with the 3rd defendant though not strictly as had been provided. She stated she was a victim of her erstwhile advocate who failed to remit all the funds deposited with him forcing her to withdraw instructions and further make arrangements to pay the funds not remitted by the advocate through another advocate. The plaintiff avers that the 3rd defendant accepted to receive late payments and let her in occupation and that she was using the premises as her residence and that if stay was not granted she would be rendered homeless in case she was evicted as decreed by the Court.

5. The 4th and 5th defendants filed a replying affidavit dated 17th October 2019 through the 4th defendant, **Ndirangu Njenga** in opposition to the plaintiff's application. The 4th and 5th defendants aver that they procedurally and validly purchased the suit property which was legally transferred into their names. The 4th and 5th defendants aver that the plaintiff is unlawfully occupying their property whilst she has no valid claim against them. The plaintiff's claim, if any, would be against the 3rd defendant with whom the plaintiff had contracted and not against the 4th and 5th defendants.

6. The 4th and 5th defendants claim they are entitled as of right as the registered owners of the suit property to possession of the suit property. The defendants aver that contrary to assertions by the plaintiff that she stands to suffer substantial loss if stay of execution of the decree is not granted, the 4th and 5th defendants aver that they are the ones who are bound to suffer continuing loss and damage as the owners of the property if the plaintiff does not yield possession to them. The defendants aver that they are entitled to the fruits of the judgment issued in their favour.

7. In the present matter, the Court after hearing the parties on their evidence, pronounced a judgment that went against the plaintiff. It is a fact that the property the subject matter of the suit is presently registered in the names of the 4th and 5th defendants after the agreement of sale they had entered with the 3rd defendant was completed. The agreement of sale for the same property that the 3rd defendant had entered into with the plaintiff was for various reasons not completed. The plaintiff however was allowed into possession of the property and was during the trial in such occupation. The Court assessed the rental income for the property at Kshs.360,000/= per month and it was on that basis the award of mesne profits in favour of the 4th and 5th defendants was made. As the Court had found the 4th and 5th defendants entitled to ownerships of the property, the rationale was they were losing rental income of Kshs.360,000/= per month and hence the award. If the Court grants stay of execution, the 4th and 5th defendants will continue to lose the income and in case the plaintiff is unsuccessful in the appeal, it could prove difficult for the defendants to recover the amount.

8. The Power of the Court from which an appeal is preferred against its judgment to order of stay of execution is discretionary. The Court appealed from may under Order 42 Rule 6(1) may for sufficient cause order stay of execution of a decree or order. Order 42 Rule 6(2) provides the conditions that an applicant for stay of execution needs to satisfy for stay to be granted. The sub rule provides as follows:-

(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.

9. I am mindful that the plaintiff is in possession and occupation of the suit property. She has a right of appeal and has exercised that right. The 4th and 5th defendants equally have a valid judgment which has adjudged them as the rightful owners of the suit property. Unless and until that judgment is set aside on appeal in the event the plaintiff is successful the 4th and 5th defendants remain entitled to receive the income from the property. The essence of the stay of execution sought by the plaintiff should essentially have the effect of preserving the property until the appeal is heard and determined and further in conformity with Order 42 Rule 6(2) should afford some security of sorts to the 4th and 5th defendants as the successful litigants in the suit. The plaintiff in the judgment was ordered to pay mesne profits at Kshs.360,000/= with effect from 9th day of 2018 until vacant possession is delivered to the 4th and 5th defendants. Considering that nearly 18 months have elapsed from the effective date of the payment, it is my determination that the plaintiff offers security equivalent to 24 months of the amount ordered to be paid monthly. I am conscious that there is very little likelihood that the record of appeal would be lodged and the appeal heard and determined within a period of less than 12 months from the date the record of appeal is filed considering the workload in the Court of appeal and the backlog in the Court.

10. In the premises I grant stay of execution of the judgment and decree on the following terms:-

(i) That the plaintiff deposits into Court as security a sum of Kshs.8,480,000/= within the next 30 days from the date of this ruling.

(ii) That in the event the security deposit in terms of (i) above is not placed, the stay of execution granted will lapse and will stand vacated and the 4th and 5th defendants will be at liberty to proceed with execution.

(iii) The costs of the application are awarded to the 4th and 5th defendants.

RULING DATED SIGNED AND DELIVERED AT NAKURU THIS 28TH DAY OF NOVEMBER 2019.

J M MUTUNGI

JUDGE