



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC APPEAL NO. 82 OF 2016**

**JAMES NGANGA KARANJA.....APPELLANT**

**VERSUS**

**GRACE MUKAMI NDUNGU.....1<sup>ST</sup> RESPONDENT**

**STANLEY MAINA GATUMBI.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The appellant brought a suit in the Principal Magistrates' Court at Kikuyu ("the lower court") against the respondents seeking; an order that the executive officer of the court does sign the relevant documents to facilitate the transfer of all that parcel of land known as land Title No. Dagoretti/Kinoo/2021(hereinafter referred to as "the suit property") to the appellant, an order directing the 1<sup>st</sup> respondent to perform and/or complete the contract entered into between the appellant and the 1<sup>st</sup> respondent in respect of the suit property and, in the alternative, an order that the 1<sup>st</sup> respondent does compensate the appellant at the then current value of the suit property.

2. In the lower court, the appellant averred that at all material times, the suit property was registered in the name of the 1<sup>st</sup> respondent's late husband, Johnson Ndungu Nganga (deceased). The appellant averred that the 1<sup>st</sup> respondent applied for grant of letters of administration in respect of the estate of the deceased and caused the suit property to be registered in her name as trustee of her six (6) children. The appellant averred that on 20<sup>th</sup> May, 2010 he entered into an agreement with the 1<sup>st</sup> respondent under which the 1<sup>st</sup> respondent agreed to sell to him the suit property at a consideration of Kshs. 400,000/- on the terms and conditions that were set out in the said agreement. The appellant averred that whereas he fulfilled his part of the contract by paying the full purchase price, the 1<sup>st</sup> respondent refused and/neglected to execute the necessary documents to facilitate the transfer of the suit property to him. The 1<sup>st</sup> respondent filed a defence and counter-claim. The 1<sup>st</sup> respondent denied the appellant's claim and sought by way of a counter-claim; a declaration that the agreement for sale dated 20<sup>th</sup> May, 2010 between the 1<sup>st</sup> respondent and the appellant was null and void, an order that the appellant vacates and hands over possession of the suit property to her and an injunction restraining the appellant from entering, utilizing and/or in any other way interfering with the suit property. The appellant did not file a defence to the counter-claim. The 2<sup>nd</sup> respondent was added to the suit later as an interested party. The 2<sup>nd</sup> respondent's interest in the subject matter of the suit did not come out clearly from the pleadings and proceedings of the lower court.

3. The lower court case was heard by Hon. E. Michieka SRM who delivered a judgment in the matter on 23<sup>rd</sup> May, 2016. The lower court entered judgment for the appellant against the 1<sup>st</sup> respondent in the sum of Kshs. 400,000/- being the refund of the purchase price which the appellant had paid to the 1<sup>st</sup>

respondent for the suit property together with interest thereon at court rates from the date of judgment until payment in full. The court also allowed the 1<sup>st</sup> respondent's counter-claim against the appellant.

4. The appellant was dissatisfied with the said judgment and decree of the lower court and filed this appeal against the same on 15<sup>th</sup> June, 2016. The appellant has challenged the judgment of the lower court on several grounds. Together with the memorandum of appeal, the appellant brought an application by way of Notice of Motion dated 21<sup>st</sup> July, 2016 seeking a stay of execution of the said judgment pending the hearing and determination of the appeal. On 22<sup>nd</sup> July, 2016, the appellant was granted interim order of stay of execution pending the hearing of the application inter partes. The application for stay was brought on the grounds that the appellant was dissatisfied with the judgment of the lower court and has preferred an appeal to this court and that although the 1<sup>st</sup> respondent was aware of the appeal filed herein and the order of temporary stay of execution that had been issued by the lower court, the 1<sup>st</sup> respondent had made two attempts to forcefully take over possession of the suit property. The appellant averred that he would suffer substantial loss if the stay is not granted.

5. On 24<sup>th</sup> February, 2017, the appellant brought another application by way of Notice of Motion of the same date seeking a temporary injunction (conservatory order) restraining the respondents from transferring, sub-dividing, disposing of, attaching, or in any other way interfering with the title, or trespassing and/or interfering in any way with the appellant's peaceful possession of the suit property pending the hearing and determination of the appeal and an order of prohibition prohibiting the registration of any other or further dealings with the suit property pending the hearing of the appeal. This second application was brought on the grounds that while the appeal herein is pending, 1<sup>st</sup> respondent with an intention to defeat the same has purported to subdivide the suit property and to dispose of the same to a third party. The appellant has contended that the 1<sup>st</sup> respondent's action aforesaid has no legal foundation and amounts to trespass. The appellant has averred that unless this court grants the orders sought, the appellant would be dispossessed of the suit property and the appeal herein shall be rendered nugatory.

6. The appellant's two applications seeking stay of execution and injunction were opposed by the respondents through two separate affidavits sworn by the 1<sup>st</sup> respondent. The stay application was opposed through a replying affidavit sworn by the 1<sup>st</sup> respondent on 10<sup>th</sup> April, 2017. The 1<sup>st</sup> respondent contended that the appellant's appeal has no merit. The 1<sup>st</sup> respondent contended that after completing succession proceedings in respect of the estate of her husband, she subdivided the suit property and transferred portions thereof to a third party to raise the decretal amount that was awarded to the appellant by the lower court. The 1<sup>st</sup> respondent has contended that the suit property is no longer in her name and as such she has no reason to trespass on the same or to evict the appellant therefrom. The 1<sup>st</sup> respondent has contended that there was no court order stopping her from sub-dividing the suit property. The 1<sup>st</sup> respondent has contended that the appellant has not demonstrated that he will suffer substantial loss if the order of stay is not granted. The 1<sup>st</sup> respondent has contended further that the appellant has not indicated that he is willing to furnish security for the performance of the decree of the lower court.

7. The respondents responded to the injunction application through a replying affidavit also sworn by the 1<sup>st</sup> respondent 10<sup>th</sup> April, 2017. In this affidavit, the 1<sup>st</sup> respondent reiterated the contents of her affidavit in opposition to the stay application. The 1<sup>st</sup> respondent has contended that the suit property ceased to exist in 2014 when she subdivided the same and caused portions thereof to be registered in her name. The 1<sup>st</sup> respondent contended that she has since transferred what was formerly the suit property to a third party. The 1<sup>st</sup> respondent has contended that since the suit property has been transferred to a third party, the orders sought by the appellant against the respondents cannot be granted.

8. The two applications were argued together before me on 19<sup>th</sup> June, 2017 when Mr. Maruja appeared for the appellant/applicant while Mr. Nganga appeared for the respondents. I have considered the applications together with the affidavits filed in support thereof. I have also considered the 1<sup>st</sup> respondent's affidavits in opposition to the application and the submissions by the advocates for both

parties. As was held in the case of Halai & Another –vs- Thornton & Turpin (1963) Ltd [1990] KLR 365, for the court to grant an order for stay of execution, three conditions must be satisfied. The first condition is that the applicant must establish sufficient cause to warrant the granting of the stay sought. Secondly, the applicant must satisfy the court that substantial loss would ensue if the stay sought is not granted and lastly, the applicant must furnish security and the application must be brought without unreasonable delay.

9. On the material before me, I am satisfied that the appellant has met the conditions for granting the stay sought. The stay application was brought without unreasonable delay and the appellant has demonstrated that he stands to suffer substantial loss if the judgment of the lower court is not stayed. The evidence before me shows that the appellant took possession of the suit property in 2010 and has put up thereon his matrimonial home. It is not contested that if the stay sought is not granted, the appellant would be evicted from the suit property. It is not a light matter to lose a home. The expense involved in setting up another home similar to the one occupied by the appellant would be substantial leave alone the inconvenience. I am satisfied from the foregoing that a case has been made out for the stay sought. On issue of security, it is for the court to impose security for the performance of the decree sought to be stayed as the circumstances of the case may demand.

10. The disposal of the stay application takes me to the appellant's application for injunction or conservatory order. The evidence placed before me by both parties shows that the suit property is no longer in existence. The material before the court shows that the suit property has been subdivided and portions thereof transferred to a third party, John Kamau Thuku. The circumstances under which the said subdivision was done and the date when the same actually took place is however not very clear from the evidence on record. I am in agreement with the respondents that the injunctive relief and the order of restriction/prohibition sought by the appellant in respect of the suit property cannot issue in the circumstances since the order of the court cannot attach to a nonexistent parcel of land.

11. I wish to add that an order of injunction pending appeal is not granted as a matter of course. An applicant must demonstrate that he has an arguable appeal. Having perused the judgment of the lower court and the grounds of appeal put forward by the appellant, I doubt if the appellant has an arguable appeal against the decision of the lower court. For the foregoing reasons, I find no merit in the application for injunction/conservatory order.

12. In conclusion, the appellant's Notice of Motion application dated 24<sup>th</sup> February, 2017 fails and is hereby dismissed. On the other hand, the Notice of Motion application dated 21<sup>st</sup> July, 2016 succeeds and is allowed on the following terms;

a. The Judgment delivered by Hon. E. Michieka SRM on 23<sup>rd</sup> May, 2016 in KIKUYU SPMCC No. 302 of 2013 and the decree extracted pursuant thereto are hereby stayed pending the hearing and determination of the appeal filed herein.

b. Interest that was payable by the 1<sup>st</sup> respondent to the appellant on the sum of Kshs. 400,000/- pursuant to the said judgment shall accrue from the date of the determination of the appeal herein in the event that the judgment of the lower court is upheld and the said amount becomes payable by the 1<sup>st</sup> respondent to the appellant or from the date of the expiry of the stay granted herein for whatever reason before the determination of the appeal.

c. The stay is granted on condition that the appellant shall deposit in an interest earning bank account in Nairobi in the joint names of the advocates on record for the parties a sum of Kenya Shillings Two Hundred and Fifty Thousand (Kshs. 250,000/=) as a security within the next ninety(90) days from the date hereof failure to which the stay granted herein shall automatically lapse without any further reference to the court.

c. The costs of the two applications shall be in the cause.

