



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT NYAHURURU

ELC CASE NO 310 OF 2017

ARTHUR MATHITU NDERITU & JOSEPH

WACHIRA NDERITU suing as representatives of

STANELY NDERITU NGARI (deceased).....PLAINTIFF/APPLICANT

VERSUS

SETTLEMENT FUND TRUSTEES.....1st DEFENDANT

AYUB WANG'ONDU KIBIL.....2nd DEFENDANT

NYANDARUA DISTRICT LAND REGISTRAR.....3rd DEFENDANT

RULING

1. Before me for determination is the Notice of Motion dated 9th October 2017 brought under *Section 1A, 1B, 3A of the Civil Procedure Act Order 9 rule 9, order 22 rule 22, order 42 rule 6 and order 51 Rule 1 of the Civil Procedure Rules*, where the Applicant seeks:

i. Spent

ii. Spent

iii. Spent

iv. That this honorable court do issue an order of stay of execution of the decree issued on the 4th May 2012 pending the hearing and determination of the Plaintiff's appeal being Nairobi Civil Appeal No. 242 of 2012

v. That cost of the application be provided for.

2. The said application is premised on the grounds on the face of it as well as the sworn affidavit of Arthur Mathitu Nderitu sworn on the 9th October 2017.

3. It is worth noting that after the parties had argued the present application inter partes on the 17th December 2017 and while awaiting a report from the land valuer, the Plaintiff/Applicant subsequently filed a Notice of Motion dated 31st October 2017 brought under *Section 1A, 1B, 3A of the Civil Procedure Act, Order 42 and order 51 of the Civil Procedure Rules*, seeking for an order for temporary stay of execution of the decree order issued on the 6th February 2017 together with its consequential orders pending the court's direction on the 4th December 2017.

4. The court then directed that since the application dated the 31st October 2017 had sought for substantially the same orders as the application dated the 9th October 2017, that the subsequent application shall stand with no orders, pending a mention dated on the 14th December when the present application was to be mentioned.

5. On the 14th December 2017 when the matter came up for mention, and the court having satisfied itself on the filing of the valuation report, I then gave a date for ruling for the Notice of Motion dated 9th October 2017 with an order of stay of execution pending the delivery

of the ruling.

6. Counsel to the parties had disposed of the present application by oral submission wherein Counsel for the Plaintiff/Applicant submitted that a decree was issued in favour of the Defendant/Respondent on the 4th May 2012 wherein the plaintiff, having been aggrieved filed their memorandum of Appeal in the Court of Appeal on the 20th September 2012 being Nairobi Court of Appeal Civil Appeal No.242 of 2012.

7. That on the 3rd October 2017, the Plaintiff/Applicant received information that the execution was to be effected against him which then formed the basis of the present application for the court to determine as to;

i. Whether the purported execution was regular.

ii. Whether the Plaintiff/applicant should be accorded stay of execution.

8. Based on the above issues, the Applicant's Counsel submitted that pursuant to Order 9, rule 9 of the Civil Procedure Rules, parties had consented to the change of counsel representing the Applicant and as such, the court do consider them as properly on record.

9. Counsel further submitted that the provisions of Order 22, rule 18 of the Civil Procedure Rules were clear to the effect that where an application for execution was made more than one year after the date of the decree, against the legal representative of a party to the decree, the court executing the decree ought to issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him. That in the present case, this was not done despite the decree having been issued on the 4th May 2012. The threat to execute happened on the 3rd October 2017 which was more than one year after the date of the decree. No such notice had been issued. To this effect therefore Counsel submitted that the purported execution on the 3rd October 2017 was irregular.

10. On whether the Plaintiff/applicant should be accorded stay of execution, Counsel relied on order 42 rule 6 to submit the said provisions set down the grounds of stay of execution and invited the court to consider them when exercising its discretionary powers on whether to stay the execution or not.

11. Counsel submitted that the Applicant would suffer irreparable loss if they were not granted the stay as the execution would create a state of affair that would affect the chances of success of the Appeal. Further that the Applicant was willing to deposit security of a sum of Ksh 160,000/- in a joint interest account to be held by counsel of respective parties, for due performance of such a decree.

12. That there had been an Appeal filed as per the annexed memorandum of Appeal and that and that if the execution was granted, there would be destruction of property which would render the Appeal nugatory and the Appeal would be an exercise in futility.

13. That when the Respondent threatened to carry out the execution on the 3rd October 2017, the Applicant moved the court on the 9th October 2017 without delay and as such they had neither caused prejudiced to the Respondent nor caused them any injustice. Counsel prayed for the orders sought to be allowed.

14. The Application was opposed by the 2nd Respondent's counsel who while relying on his client's affidavit sworn on the 13th October 2017 submitted that although they were not opposed to the applicant's prayer No 2 to have the firm of Ojienda and Company Advocates come on record for the Plaintiff/Applicant, they however submitted that the Applicant had not come to court with clean hands as there was a decree on record that gave the applicant 60 days to vacate the suit premises and default for an eviction order to issue.

15. That the Applicant disobeyed that court order and has stayed on the suit premises for 5(five) years long after the said orders were issued. That although the 2nd Respondent had tried to solve the issue amicably with the Applicant, his advances had failed.

16. That a Notice to show cause dated the 3rd March 2015 was issued to the Applicant before the 2nd Defendant/Respondent filed the application seeking for eviction orders on the 25th May 2016. The said application was served upon the Applicant/ Plaintiff and the, matter was heard and allowed a process which is within the Applicant's knowledge.

17. That since then, no attempt had been made to evict him and thus the filing of the current application for stay after 5 (five) years should not be an excuse and/or allowed.

18. That the matter arose in the year 1985, and after the delivery of the Judgment herein, there has been no evidence by the applicant showing that he has been desirous of prosecuting their Appeal in the Court of Appeal, no letter to the Deputy Registrar Court of Appeal has been attached, instead, the Applicant/Plaintiff has been enjoying being in possession of the suit property.

19. Counsel submitted that because the valuation of the suit property was about 23 million, that if the court was inclined in granting the orders so sought, then the Applicant/Plaintiff ought to deposit half of that amount in court.

20. In rejoinder, Counsel for the Applicant submitted that the valuation of the subject suit had been made from the bar and was untenable. That it would be prudent to have the said suit land valued by an independent valuer.

21. The court thus directed parties to agree on an independent valuer before the ruling could be delivered which they did, and the property was valued by Fortune Realtors Ltd and a report was filed in court on the 4th December 2017 placing the value of the suit land Ref No. Nyandarua/south Kinangop/3273 at a market value of Ksh 33,500,000/=(Thirty three million, five hundred thousand only)

22. I have considered the submissions by Counsel to the respective parties in respect to the application by way of a Notice of Motion dated 9th October 2017 wherein the Applicant sought for orders of stay of execution of the decree issued on the 4th May 2012 pending the hearing and determination of the Plaintiff's Appeal being Nairobi Civil No. 242 of 2012.

23. That the applicant's contention is to the effect that he be granted stay of execution, after being dissatisfied with the decree passed by the High court sitting in Nairobi, because he had preferred an appeal to the Court of Appeal to challenge the said decision. His further contention is that unless the stay of execution sought is granted, the appeal shall be rendered nugatory if successful as the same had an overwhelming chance of success.

24. In so submitting the Applicant's Counsel relied on the supporting affidavit of Arthur Mathitu Nderitu sworn on the 9th October 2017 whose depositions basically explained the grounds upon which the application is predicated, setting out the history of the dispute as determined by the High court. The Applicant also annexed an Application by way of notice of motion for substitution of the Applicant/Appellant as well as a Memorandum of Appeal in the Court of Appeal dated the 1st October 2013 and 20th September 2012 respectively.

25. Counsel submitted that if the Application was not allowed, the Applicant stood to suffer substantial loss that would be in compensable if execution proceeds and in the likely event that the Appeal eventually succeeded and that as a sign of good faith the Applicant was willing to deposit the sum of Ksh 160,000/= in an interest earning bank account in the joint names of the respective advocates for the parties.

26. The application by the applicant was opposed by the Respondent who filed his replying affidavit dated the 13th October 2017 on the 16th October 2017 where he contended that the application lacked merit as the Applicant was in blatant disobedience of court order having stayed on the suit premises for more than 5(five) years after the decree for eviction had been issued. That the Applicant had been served with a Notice to show cause dated the 3rd March 2015 before the 2nd Defendant/Respondent filed the application seeking for eviction orders on the 25th May 2016.

27. That the said application was served upon the Applicant/ Plaintiff and the, matter was heard and allowed a process which the Applicant has known all along.

28. That the applicant had not given any reason as to why he had not prosecuted his appeal 5 years down the lane and also why the present application was filed after 5 years. That the dispute arose in 1985 and it was in the best interest of justice and fairness that the same comes to an end. That if the Court was inclined in granting the orders so sought, then the Applicant/Plaintiff ought to deposit half of that amount of the value of the suit property in court.

29. I have carefully considered the application by the applicant, the supporting affidavit, annexures, the replying affidavit as well as the oral submissions made by both parties Counsel. I find two issues for determination arising therein namely:

- i. Whether the applicant has satisfied the court on conditions for grant of stay of execution of decree pending appeal.
- ii. What orders this court should make.

30. On the issue of whether the applicant is deserving of the orders of stay of execution of decree pending the hearing and determination of the appeal herein, the law applicable is Order 42 Rule 6 of the Civil Procedure Rules which stipulates as follows:

No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2)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.

31. There are three conditions for granting of stay order pending appeal under Order 42 Rule (6) (2) of the Civil Procedure Rules to which :

- a) The court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered;
- b) The application is brought without undue delay and
- c) 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.

32. On the first condition of proving that substantial loss may result unless stay order is made. It was incumbent upon the applicant to demonstrate what kind of substantial loss he will suffer if the stay order was not made in his favour.

33. What amounts to substantial loss was expressed by the Court of Appeal in the case of **Mukuma V Abuoga (1988) KLR 645** where their Lordships stated that;

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

34. The applicant contends that he would suffer irreparable loss if he is not granted the stay as the execution would create a state of affair that would affect the chances of success of the Appeal. No evidence was however provided on the kind of irreparable loss he would suffer if the order of stay was not granted.

35. On the second condition, upon perusal of the court record, this Court finds that the Plaintiff/Applicant filed the application for stay of execution on 9th October 2017 more than five (5) years after delivery of the Judgment 22nd March 2012, which judgment was being appealed from. There was no explanation as to why he had taken such a long time to file the application. He cannot therefore be said to have made the said application without unreasonable delay and is guilty of laches. I find that he also did not come to court with clean hands.

36. On the last condition as to provision of security, the Plaintiff/Applicant in their submissions were emphatic that he was willing to deposit security of Ksh 160,000/- in a joint interest account to be held by counsel of respective parties, for due performance. According to the valuation report, the subject suit is worth Ksh 33,500,000/= (Thirty three million, five hundred thousand only) which when compared to the security offered by the Applicant is quite minimal and/or inadequate in the circumstance.

37. The Plaintiff’s claim against the Defendant herein dates back to the Plaintiff filed way back on the 18th December 1998 wherein the 2nd defendant /Respondent filed his defence and counterclaim thereafter

38. Section 1A, 1B and 3A of the Civil Procedure Act are clear to the effect that:

(1) the overriding objective of this Act and the rules made hereunder is to facilitate, the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act;

(2) the court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in sub-section (1);

(3) A party to civil proceedings or an Advocate for such a party is under a duty to assist the court to further the overriding objective of the Act, and to that effect, to participate in the process of the court and to comply with the directions and orders of the court.”

30. Section 1B provides as follows:

(1) For the purposes of furthering the overriding objective specified in Section 1A, the court shall handle all matters presented before it for the purpose of attaining the following aims –

a. the just determination of proceedings;

b. the efficient disposal of the business of the court;

c. the efficient use of the available judicial and administrative resources;

e. the timely disposal of the proceedings, and all the proceedings in the court, at a cost affordable by the respective parties; and

f. the use of suitable technology.”

39. Section 3A. provides as follows:

Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

40. Having found that the conditions necessary for grant of orders for stay of execution to issue under Order 42 Rule 6(2) of the Civil Procedure Rules have not been met by the Plaintiff/Applicant and further, having regard to the above captioned provisions of the law as stipulated under Section 1A, 1B and 3A of the Civil Procedure Act, I find that this court is not inclined to grant the order of stay of execution so sought. In the circumstance, the Plaintiff/Applicants’ Notice of Motion dated 9th October 2017 is hereby denied and dismissed with costs to the 2nd Defendant /Respondent.

Dated and delivered at Nyahururu this 26th day of February 2018.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE