



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 1282 OF 2015

SCHOLAR WAMBUI WAINAINA.....PLAINTIFF

VERSUS

NDOHO MARKET STALLS LIMITED.....DEFENDANT

R U L I N G

1. Judgment in this suit was delivered by Gacheru J on 3/10/2016 in terms of the following four orders:

a) The Respondent is in breach of the sale agreement entered on 21st April 2011 and is therefore ordered to deliver the registered lease of the suit property known as Apartment No.8413 Block 8 Cypress erected on LR No 209/9871 to the applicant.

b) An order for specific performance is hereby directed at the Respondent to deliver the registered lease in respect of the suit property known as Apartment No. 8413 Block 8 Cypress erected on LR No 209209/9871 to the applicant.

c) An order for specific performance is also hereby directed at the Respondent to comply with special condition 3 of the Sale Agreement dated 21st April 2011 and in particular to deliver to the Applicant the documents specified therein.

d) The costs of this Originating Summons is awarded to the applicant to be borne by the Respondent

2. On 9/1/2017, Ndoho Market Stalls Limited (**the applicant**) brought a Notice of Motion dated 9/1/2017 seeking an order of stay of execution pending the hearing and determination of appeal. The application is premised upon the grounds set out on the face of the application and in the supporting affidavit sworn by the applicant's advocate, Mr David Mereka, namely, that: (i) judgment was delivered in the absence of the judgment debtor; (ii) the court granted interim stay which lapsed on 31/10/2016; (iii) the judgment debtor learnt about the judgment on 8/12/2016; (iv) the judgment debtor has filed a notice of appeal; (v) the decree holder is in possession of the suit property hence she will not suffer any loss; (vi) the judgment debtor appointed M/s Pleng Consultants to obtain a change of user on its behalf in February 2014 and the judgment debtor is yet to receive the change of user; (vii) the intended appeal has arguable appeal with a very high probability of success; (viii) the Judgment debtor's efforts to provide change of user were curtailed by the failure by M/s Pleng Consultants to obtain the change of user.

3. The decree holder opposes the application on the grounds that: (i) the intended appeal is incompetent in the sense that the notice of appeal was filed outside the 14 days period ; (ii) the application is moot and constitutes an abuse of the court process in the sense that the purported draft memorandum of appeal is not by the appellant and no appeal was filed within the stipulated period of 60 days; (iii) the statutory requirements stipulated in Order 42 rule 6 (2) have not been satisfied; (iv) the delay in bringing the application is inordinate and inexcusable; and (v) there is no arguable appeal disclosed.

4. The application was canvassed through written submissions by parties' respective advocates.

5. The court has considered the tenor and import of the stay order sought through the application, the grounds put forth by the judgment debtor/applicant, the respondent's grounds of opposition, and the parties' respective written submissions. The court has also considered the relevant legal framework and the jurisprudential principles guiding the exercise of the discretionary jurisdiction to grant an order of stay pending an appeal.

6. The single question that falls for determination in this application is whether the applicant has satisfied the criteria for grant of an order of stay pending appeal under Order 42 rule 6 of the Civil Procedure Rules.

7. The statutory framework on the exercise of jurisdiction to grant stay pending appeal is set out under Order 42 rules 6(1) and (2) of the Civil Procedure Rules which provides as follows:

1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 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.

8. The jurisprudential principles upon which this court's jurisdiction to grant an order of stay pending appeal is exercised are well settled. An applicant must satisfy the court that the intended appeal or appeal is arguable. Secondly the applicant must satisfy the court that unless an order of stay is granted the appeal, if successful would be rendered nugatory. Lastly the applicant must satisfy the requirements of order 42 rule 6 (2) to the effect that substantial loss may result to the applicant unless the order is made, and that proper security is available for the due performance of the decree.

9. Besides, it is trite that for a stay order to issue on a formal application presented to the court, the applicant is obligated to demonstrate serious intention to pursue an appeal. This is done through filing and service of a compliant notice of appeal, memorandum of appeal and record of appeal where applicable. Where the applicant requires proceedings from the court, evidence of a request for those proceedings would suffice in place of the record of appeal. The above documents are annexed to the supporting affidavit as evidence of the applicant's serious intention to pursue the appeal mechanism.

10. In the present application, the notice of appeal attached to the supporting affidavit was filed on 22/12/2016, more than 70 days from the date when the judgment was delivered. There is no evidence of any court order granted by the court extending the time for filing the notice of appeal outside the 14 days period stipulated by rule 75 of the Court of Appeal Rules. The net effect of the applicant's failure to obtain or annex a copy of the extension order is that there is no evidence of a tenable intended appeal.

11. A second document annexed to the affidavit in support of the application is a draft memorandum of appeal in which one G. Ngugi Waireri is captured as the intended appellant. This particular intended appellant is not a party to the judgment and has not been admitted as a party. For this reason, the draft memorandum of appeal cannot be considered when determining the present application.

12. More important, the applicant has not made any endeavor to demonstrate to the court that it has satisfied the requirements of Order 42 rule 6 (2) in relation to substantial loss and security. The tenor and import of the orders made by Gacheru J is that the judgment debtor was found to have breached the agreement for sale and the judgment debtor was ordered to specifically perform the contract. In urging the court to stay the judgment, the judgment debtor contends that it engaged M/s Pleng Consultants Limited to obtain a change of user and the said agent has failed to obtain the change of user. That in my view is not a basis for staying the order. In my view, at the very best, that would be a basis for seeking further indulgence from the court, for more time, to comply with the order of the court; not a ground for stay.

13. In light of the above reasons, it is my finding that the judgment debtor/applicant has failed to satisfy the criteria for grant of an order of stay pending appeal. Consequently, the Notice of Motion dated 9/1/2017 seeking stay of execution of the judgment entered in this suit is dismissed for lack of merit. The decree holder/respondent shall have costs of the application.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 25TH DAY MAY 2018.

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B M EBOSO

JUDGE

In the presence of:-

Ms Abok Advocate for the applicant

Mr Mureithi Advocate for the Respondent

Ms Halima - Court clerk