



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 614 OF 2016

EDWARD NJUGUNA KANGETHE.....PLAINTIFF

=VERSUS=

JOEL KIEMA MUTINDA.....1ST DEFENDANT

VIOLET NDANU MUTINDA.....2ND DEFENDANT

BOARD OF TRUSTEES NATIONAL

SOCIAL SECURITY FUND.....3RD DEFENDANT

R U L I N G

1. Judgment in this suit was delivered by Kemei J on 22/9/2017 in favour of the plaintiff in the following terms:

a. An order for specific performance directing all the three defendants jointly and severally to transfer the suit premises known as L R No 12948/266 (registered as I R NO 63124) situated at Mountain View, House No 81 in the City of Nairobi, the plaintiff.

b. The 1st, 2nd and 3rd Defendants jointly and severally deliver the following documents to the Plaintiff forthwith.

i. A consent to transfer from the commissioner of lands or equivalent.

ii. Original documents of title of the property

iii. Full paid city council rates clearance water and electricity bills and land rent receipts

iv. Discharge of charge (if any).

v. Copies of 1st and 2nd defendants identity cards and PIN cards

vi. Passport size photographs of the 1st and 2nd defendants

vii. Duly executed but undated transfer of the property in favour of the purchaser or as directed by the purchaser.

viii. A statement from the fund showing how the Kshs8.3 million was arrived at.

ix. Any other documents reasonably required by the purchaser or his advocates to effect registration of the transfer and all documents of title relating to the property in the 1st and 2nd defendants or NSSF possession

c. The 1st, 2nd and 3rd defendants jointly and severally deliver the following documents to the plaintiff forthwith

d. In default of (a) above the Deputy Registrar be and is hereby directed to sign the transfer to the suit premises to the plaintiff.

e. A permanent injunction to restrain the defendants jointly and severally their agents, servants and or employees from breaching the said agreement and further from selling alienating in any manner offering for sale advertising mortgaging

charging assigning and or otherwise dealing with the suit premises known as L R No 12948/266 (registered as IR No 63124) situated at Mountain View, House No 81 in the city of Nairobi.

f. The claim of Kshs 80,000 per month being rental income loss is dismissed

g. The counterclaim is hereby dismissed

h. The 1st and 2nd defendants to bear the costs of the suit.

2. On 28/9/2017, the 1st and 2nd defendants brought a Notice of Motion dated 27/9/2017 seeking orders of stay of execution and review of the judgment. The application was supported by an affidavit signed by the 2nd defendant. The applicants contended that they were desirous of filing an appeal against the judgment of the court; the suit property was their matrimonial home; they did not have money to buy another house; the balance of the purchase price was held in a bank which went under; and they were ready to offer security for the due performance of the decree in this suit. Lastly, they contended that there was a mistake apparent on the face of the record in regard to the award of costs.

3. The plaintiff opposed the application through a replying affidavit sworn on 13/10/2017 and contended that, despite paying purchase price of Kshs 16,000,000 in full, the applicants had continued to occupy the suit premises for years without paying *mesne profits*. He contended further that grant of an order of stay would be unfair. The plaintiff attached a valuation report which indicated that the monthly rental income attached to the house was Kshs 120,000. He urged the court to order the applicants to deposit in court the sum of Kshs 120,000 every month if a stay were to be granted.

4. The court has carefully considered the application together with the rival affidavits and submissions. Two issues fall for determination. The first issue is whether the applicants have satisfied the criteria for grant of a review order in respect of the judgment. The second issue is whether the applicants have satisfied the criteria for grant of an order of stay pending appeal.

5. The legal and jurisprudential principles upon which this court exercises jurisdiction to review its judgment are well settled. Order 45 rules 1 and 2 which contains the applicable legal framework provides as follows:-

Order 45, rule 1. Application for review of decree or order.

1 (1) Any person considering himself aggrieved -

a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

2(1) An application for review of a decree or order of a court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree, or made the order sought to be reviewed

6. Jurisdiction to grant a review order in respect of a judgment is exercised in a suit where the option of an appeal has not been pursued. Secondly, the applicant is obligated to satisfy the court that he has discovered new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time the decree was passed or the order was made or on account of some mistake or error apparent on the face of the record or for any other sufficient reason.

7. In the present application, the applicants have stated that they have elected to appeal against the judgment of Kemei J and they have indeed exercised that right. In my view, the applicants having elected to exercise their right of appeal against the judgment, this court is divested of jurisdiction to grant a review order in respect of the same judgement. The plea for review therefore fails. I will not say more on this issue.

8. The law and jurisprudential principles upon which jurisdiction to grant an order of stay pending appeal is exercised are well settled. The statutory framework is set out in Order 42 rule 6 (1) and (2). A party seeking stay is obligated to satisfy the court that substantial loss may result to him if the stay order is not granted. Secondly, the application seeking stay should be made without unreasonable delay. Thirdly, security for the due performance of the decree is to be provided by the applicant. Besides the above mandatory legal requirements, the applicant is required to satisfy the court that the intended appeal is arguable and that unless the stay order is granted, the appeal, if successful, would be rendered nugatory.

9. On their plea for a stay order, the applicants contended that they have over the years utilized the suit property as a matrimonial home. In response, the respondent urged the court to make provision for security for the due performance of the decree should it deem it necessary to grant stay. Taking into account the unique circumstances of this case, the case put forth by the respondent, the applicable legal framework, and the relevant guiding jurisprudential principles, I would grant a conditional stay limited in time in the following terms:

a. There shall be conditional stay of execution of the decree made herein for a period of twelve (12) months during which time the 1st and 2nd defendants are expected to prosecute their appeal in the Court of Appeal;

b. The 1st and 2nd defendants shall deposit in court a monthly sum of Kshs 120,000 payable on the 5th of every month effective from the date of this ruling. In default of remittance in any single month, the stay order granted herein shall stand vacated; and

c. Unless expressly ordered by the Court of Appeal, the stay order granted herein shall automatically lapse upon expiry of twelve (12) months from the date of this ruling.

d. Costs shall be in the cause.

DATED SIGNED AND DELIVERED AT NAIROBI ON THIS 28TH DAY OF JUNE 2018.

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B M EBOSO

JUDGE

In the presence of:-

Ms Mwangi holding brief for Mr Gachie for the Plaintiff

Ms Mutuku holding brief for Mr Musyoki for the Defendant

Ms Halima Abdi - Court clerk