



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ENVIRONMENT AND LAND CASE No. 27 B OF 2017

WINNIE WAMBUI KARIYU.....PLAINTIFF

VERSUS

KAGECHE BORO.....DEFENDANT

RULING

1. This ruling is in respect of defendant's Notice of Motion dated 1st December 2017, an application pursuant to which the defendant seeks stay of execution of the orders issued by this court on 23rd November 2017 pending hearing and determination of an intended appeal. The application is brought under Order 42 Rule 6 of the Civil Procedure Rules and is supported by two affidavits sworn by the defendant.

2. It is deposed in the affidavits that the defendant is aggrieved by the ruling and orders of this court made on 23rd November 2017 and has filed Notice of Appeal in respect thereof. It is further deposed that the defendant resides on the suit property and that plaintiff intends to execute the aforesaid orders by evicting him from the property. In such an eventuality, the defendant will suffer substantial loss.

3. The plaintiff opposed the application through a replying affidavit sworn by herself. It is stated therein that the defendant has been on the suit property illegally, that previous efforts to evict the defendant have been met by various hurdles, that the defendant has tendered no evidence to show that he will suffer substantial loss if the orders sought are not granted and that no security has been offered.

4. The application was heard by way of written submissions. The applicant's submissions were filed on 25th January 2018 while the respondent's submissions were filed on 26th February 2018. I have considered the application, the affidavits, submissions and the authorities cited therein.

5. The principles applicable in determining whether or not to grant stay of execution pending appeal arise from **Order 42 rule 6 (1) and (2)** of the **Civil Procedure Rules, 2010** which provides:

6.(1) 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.

6. To succeed, the applicant must satisfy the court that substantial loss will result to him if stay is not granted and that the application has been made without unreasonable delay. He must also satisfy the court that he has furnished security. The court of Appeal stated in **Butt v Rent Restriction Tribunal [1979] eKLR** as follows:

If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal, if successful, may not be nugatory. A stay which would otherwise be granted ought not to be refused because the judge considers that another, which in his opinion

will be a better remedy, will become available to the applicant at the conclusion of the proceedings.

*It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in *Wilson v Church (No 2) 12 Ch D (1879) 454 at p 459. In the same case, Cotton LJ said at p 458:**

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.”

Megarry J, as he then was, followed Wilson (supra) in *Erinford Properties Limited v Cheshire County Council [1974] 2 All ER 448 at p 454 and also held that there was no inconsistency in granting such an injunction after dismissing the motion, for the purpose of the order is to prevent the Court of Appeal’s decision being rendered nugatory should that court reverse the judge’s decision. The court will grant a stay where special circumstances of the case so require, per Lopes LJ in the *Attorney General v Emerson and Others 24 QBD (1889) 56 at p 59.**

7. In ***Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] eKLR***, Platt Ag JA (as he then was) stated:

It is usually a good rule to see if order XLI rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money.

8. A perusal of the record herein confirms that the applicant filed Notice of appeal on 30th November 2017, signalling intention to appeal to the Court of Appeal against this court’s ruling and order of 23rd November 2017. I found as follows in the said ruling:

From the foregoing discussion, it is clear to me that the plaintiff has established a prima facie case with a probability of success. Damages cannot adequately compensate the plaintiff if the defendant were to continue with the destructive acts. In the circumstances, I grant an injunction restraining the defendant by himself, his agents, servants and/or employees or otherwise howsoever from trespassing upon, entering upon, encroaching, constructing upon, destroying, or in any other manner interfering with the plaintiff/applicant’s quiet and peaceful enjoyment of L.R. No.398/19 (Original No. 398/10/4) situated South of Naivasha Township in the Republic of Kenya pending hearing and determination of this suit. [Emphasis supplied]

9. One of the grounds advanced by the applicant in the present application is that the respondent intends to evict him and that he will suffer substantial loss if such an eventuality materialises. The respondent’s replying affidavit confirms the intention to evict when she sates therein that attempts to evict the applicant have faced hurdles and that granting stay would amount to allowing the applicant to remain on the suit property illegally.

10. It is also contended by the applicant that the respondent extracted an order which included “remaining” on the suit property as one of the things the defendant was restrained from. As can be seen from the above relevant portion of my ruling, no such word was included in the ruling. The Deputy Registrar ought to have been keener while approving the draft order presented by the plaintiff. If I intended to order an eviction, I would have considered the principles applicable in granting an order in the nature of a mandatory injunction and if I came to the conclusion that an eviction was merited, I would have expressly stated so in the ruling. To the extent that there is an intended eviction, I am persuaded that the applicant has demonstrated that he will suffer substantial loss if stay pending appeal is not granted.

11. Regarding the test whether the application has been made without unreasonable delay, I note that the ruling and order sought to be appealed from was made on 23rd November 2017 and that the application for stay of execution pending appeal was filed on 1st December 2017, about one week later. There has therefore been no unreasonable delay.

12. On the issue of security, the applicant who states that he has been on the suit property since 1980 contends that the same can be addressed by a decree for mesne profits if the respondent succeeds at the main trial. The respondent on the other hand submitted that failure on the part of the applicant to offer security is detrimental to the application. It must be remembered that the decision of whether or not to grant stay pending appeal is a discretionary one. The discretion extends to the court determining what security is appropriate whether or not the applicant has offered any security. From the material previously placed before the court by the parties, I note that the suit property measures approximately 25 acres and that the plaintiff contends that she bought it way back in the year 2015 at a consideration of KShs 160,000,000. The defendant leased the premises sometime between 1981 and 1984. The rent that was paid is not stated. In the circumstances, I consider that security of KShs 2,000,000 (two million) would be appropriate in the circumstances.

13. In view of the foregoing discussion, I am persuaded that stay pending appeal ought to issue. The stay will be for a limited period so as to ensure that the appeal is prosecuted timeously.

14. In the end, I make the following orders:

a) The order of the court made on 23rd November 2017 is hereby stayed pending hearing and determination of an appeal. The stay shall unless otherwise ordered, remain in force for 18 (eighteen months) from the date of delivery of this ruling or until the appeal is determined, whichever occurs earlier.

b) The defendant shall deposit security in court in the sum of KShs 2,000,000 (two million) within 21 (twenty one) days from the date of delivery of this ruling. In default, the order made in (a) above shall automatically lapse and Notice of Motion dated 1st

December 2017 shall stand dismissed with costs to the plaintiff.

c) Costs of the application are awarded to the defendant.

15. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 28th day of September 2018.

D. O. OHUNGO

JUDGE

In the presence of:

Mr Waiganjo for the defendant/applicant

Mr Kimani holding brief for Mr Kisila for the plaintiff/respondent

Court Assistants: Gichaba & Lotkomoi