



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO 464 OF 2015**

**OSCAR OCHIENG.....1ST PLAINTIFF**

**RACHAEL AYIEKO.....2ND PLAINTIFF**

**=VERSUS=**

**PRILSCOT COMPANY LIMITED.....DEFENDANT**

**RULING**

1. On 26/2/2009, the plaintiffs brought this suit seeking, *inter alia*, an order of specific performance. On 23/2/2018, this court rendered a judgment in which it decreed specific performance and awarded the plaintiffs costs of the suit. In addition, the court ordered the plaintiff to deposit in court balance of the Purchase Price (Kshs 2,900,000) within 60 days. In default, the award made in favour of the plaintiff was to stand vacated and the suit was to stand dismissed with no order as to costs.

2. On 27/4/2018, the plaintiff's brought a Notice of Motion dated 20/4/2018 seeking the following verbatim orders:

- a) That this application be certified urgent and be heard forthwith exparte.*
- b) That this honourable court be pleased to grant a temporary stay of the judgment and decree given by the court on 23rd February, 2018 pending the hearing and determination of this application*
- c) That the judgment and decree issued by the Honourable Court on 23rd February, 2018 be stayed pending the hearing and determination of the appeal.*
- d) That the costs of this application be provided for.*

3. The application was premised on the following verbatim grounds:

- a) The judgment was delivered on 23rd February 2018 in favour of the plaintiff as against the defendant in terms of prayer (a and (d) of the amended plaint.*
- b) That the court ordered the plaintiff to deposit in court the balance of the purchase price of Kshs 2,900,000 within 60 days and the court to release the money to the defendants.*
- c) That the court placed a default clause in that, should the plaintiffs default the award shall stand dismissed with no orders as to costs.*
- d) That being dissatisfied with part of the said judgment the applicant intend to appeal against the said judgment to the Court of Appeal.*
- e) That the applicants have an arguable appeal with goods prospects of success.*
- f) That the appeal would be rendered nugatory if the stay is not granted.*
- g) That the applicants intend to raise fundamental issues of both law and fact.*

***h) That the defendant/respondent will suffer no prejudice if stay is granted. In the contrary, the applicants shall greatly suffer if the judgment is enforced.***

***i) The application has been made within reasonable time in the circumstances and in very good faith.***

***j) It is in the interest of justice that there be a stay pending the hearing of the application and the intended appeal.***

4. The application is supported by an affidavit sworn on 24/4/2018 by the 1st plaintiff, Oscar Ochieng. He deposes that unless the order of stay of execution is granted, they stand to suffer irreparable loss and damage as the 60 days period within which they were required to deposit the money was too short. The application is unopposed.

5. I have considered the application and deeply reflected on the prayers sought in the application. The judgment which the plaintiffs seek to stay granted the plaintiffs the order of specific performance which they had prayed for. Because the essence of specific performance is that the parties are obligated to discharge their respective obligations under the contract, the party seeking the order is required to discharge his contractual obligations. In my view, the court will not be acting properly if it were to compel the defendant to discharge its contractual obligations while staying the limb of the judgment requiring the plaintiffs to deposit the balance of the purchase price in court.

6. I note that the plaintiffs have not sought an enlargement of the time within which to comply with the order requiring them to deposit the money. I also note that the order of specific performance which they prayed for is what they got. They did not pray for the alternative relief of refund of the deposit.

7. The jurisdiction to grant an order of stay pending appeal is exercised within the framework of Order 42 rule 6 (2). The applicant is required to satisfy the criteria of substantial loss, absence of unreasonable delay and provisions of security for the due performance of the decree. In the present suit, there is no decree against the plaintiffs. The present decree compels the defendant to perform the contract as sought by the plaintiffs. Parties were granted the liberty to move the court for enforcement orders in tandem with common law practice relating to specific performance.

8. In light of the foregoing, the court is not satisfied that a proper case has been made out for grant of an order of stay pending appeal. The upshot is that the plaintiffs' Notice of Motion dated 24/4/2018 is dismissed for lack of merit.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 24TH DAY OF SEPTEMBER 2018.**

**B M EBOSO**

**JUDGE**

**In the presence of:-**

Mr Mugo Advocate for the Plaintiffs

June Nafula - Court Clerk