



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT NAKURU

HCC NO 312 OF 2011

JOYCE CHEPKEMOI NG'ENO.....PLAINTIFF

VERSUS

SAMUEL KIPKORIR NG'ENO.....1ST DEFENDANT

JEMORORAN CONSTRUCTION COMPANY LIMITED.....2ND DEFENDANT

AND

ORIENTAL COMMERCIAL BANK LTD.....INTERESTED PARTY

RULING

(Application for stay of execution filed by the unsuccessful plaintiff and parallel application for eviction filed by the 2nd defendant/decree holder; judgment entered for the 2nd defendant in respect of possession of premises occupied by the plaintiff, mesne profits and costs; plaintiff filing an application for stay of execution; stay granted on condition that plaintiff deposits the amount of mesne profits to date and costs within 30 days; in default, she be evicted from the suit premises)

1. This ruling is in respect of two applications, the first being that dated 15 November 2016 filed by the unsuccessful plaintiff and the second being that dated 23 March 2018 filed by the 2nd defendant/decree holder. The application dated 15 November 2016 seeks orders of stay of execution of the decree pending appeal, whereas the application dated 23 March 2018, seeks the eviction of the plaintiff from the premises situated in the land parcel Nakuru Municipality Block 7 /608.

2. This property was initially registered in the name of the 1st defendant who is husband to the plaintiff. Through a sale agreement entered into on 5 October 2010, the 1st defendant sold the suit property to the 2nd defendant. The 2nd defendant thereafter became registered as proprietor of the leasehold title on 6 June 2011. The 2nd defendant then charged the suit property to the interested party. The plaintiff filed this suit on 25 October 2011, claiming that the sale to the 2nd defendant was done fraudulently and behind her back. She argued that her husband held the property in trust for her and her children and could not sell the same without her consent which she asserted she did not give. In her suit she sought orders to have the sale agreement nullified and the title of the 2nd defendant cancelled. The 2nd defendant filed defence and counterclaim where he inter alia sought eviction of the plaintiff from the suit property and mesne profits. I heard the case and delivered judgment on 13 October 2016. I was not persuaded of the plaintiff's case and I dismissed it. I upheld the counterclaim of the 2nd defendant and entered judgment for the 2nd defendant for mesne profits in the sum of Kshs. 30,000/= per month to be calculated from August 2011 till the time that the plaintiff will give vacant possession, alongside costs and interest. I also ordered the plaintiff to vacate the suit property within 30 days of the judgment.

3. I have seen that the plaintiff lodged a Notice of Appeal on 25 October 2016 and soon thereafter filed the application dated 16 November 2016 for stay of execution pending appeal. The plaintiff obtained an interim stay of execution on 25 November 2016 and apparently went to sleep and only served the said application upon counsel for the 2nd defendant on 8 May 2018, after the 2nd defendant had filed the application dated 23 March 2018 for the eviction of the plaintiff from the suit property.

4. I directed that the two applications be heard together and I have taken note of the submissions of both counsel for the plaintiff and counsel for the 2nd defendant.

5. The principles upon which an application for stay of execution is assessed are contained in Order 42 Rule 6 (2) of the Civil Procedure Rules, which provides as follows:-

(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.

6. It is apparent that the court needs to consider three points being :-

(i) Whether the application has been made without unreasonable delay;

(ii) Whether the applicant stands to suffer substantial loss if the stay is not granted; and

(iii) Whether the applicant has furnished security for the due performance of the decree in the event that he loses the appeal.

7. I do not think that the plaintiff can be held to be guilty of unreasonable delay and I do not doubt that she stands to suffer substantial loss if she is evicted from the suit premises. The only thing that I need to be satisfied is for her to provide security in the event that she loses the appeal. In his submissions, Mr. Karanja Mbugua, learned counsel for the plaintiff, left it to court to decide on what should constitute security and further submitted that his client shall abide by the court's decision.

8. There is already judgment in favour of the 2nd defendant and against the plaintiff for mesne profits at the rate of Kshs. 30,000/= per month from August 2011. From August 2011 to October 2018, the time of delivery of this ruling, is about 86 months. The amount that is due as mesne profits to date, at the rate of Kshs. 30,000/= per month is therefore Kshs. 2, 580,000/=. I have also seen that the costs due to the 2nd defendant and payable by the plaintiff have been taxed at Kshs. 1, 368,040/=. What is due to from the plaintiff to the 2nd defendant is thus the sum of Kshs. 3,948,040/= and this is not inclusive of interest for which there was an award for the 2nd defendant. The sum due without factoring interest is therefore just about Kshs. 4,000,000/=. I am prepared to grant the plaintiff a stay of execution of the judgment and decree if she demonstrates the availability of this sum of money within 30 days from the date hereof and if she is ready to deposit this money in a joint interest earning account to be held by her counsel and counsel for the 2nd defendant until the appeal is finalized.

9. I am afraid that if the plaintiff is not able to furnish this sum of money as security, within the stipulated time, then an eviction order will issue in terms of what has been prayed for by the 2nd defendant in its application dated 23 March 2018.

10. On costs, if the plaintiff avails the security ordered, costs of both applications shall abide the outcome of the appeal, but if the plaintiff does not furnish security as ordered, the 2nd defendant shall have the costs of both application dated 15 November 2016 and that dated 23 March 2018.

11. Orders accordingly.

Dated, signed and delivered in open court at Nakuru this 18th day of October 2018.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of : -

Ms. Kabalika holding brief for Mr. Kahigah for the 2nd defendant.

No appearance on the part of M/s Karanja Mbugua & Co. Advocates for the plaintiff.

Court Assistants: Nelima/Carlton.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU