



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 1108 OF 2014

REUBEN NG'ANG'A WAMBURA.....PLAINTIFF

VERSUS

DANIEL KIARIE KIBATHI.....DEFENDANT

RULING

The dispute between the parties revolves around the ownership of all that parcel of land known as L.R No. Dagoretti/Mutuini/T.402 (hereinafter referred to as “the suit property”). The plaintiff brought this suit against the defendant on 11th October, 2006 seeking the following reliefs:

- a) Eviction of the defendant, his family, agents and/or servants or those claiming under him from the suit property;
- b) Removal of the caution lodged by the defendant against the title of the suit property;
- c) Mesne profits and an order for the defendant to settle all the outstanding rates, electricity and water bills up to the date of judgment and giving possession of the suit property to the plaintiff;
- d) Cost and interest and any other relief the court deems fit to grant.

By a judgment delivered on 11th May, 2018, the court found that the plaintiff had proved his case against the defendant and ordered the eviction of the defendant from the suit property if the defendant failed to vacate voluntarily within 120 days from the date of the judgment. The court also ordered the removal of the caution that the defendant had registered against the title of the suit property within the same period if the defendant failed to remove the same.

What is now before me is the defendant’s application brought by way of Notice of Motion dated 10th July, 2018 in which the defendant is seeking an order for stay of execution of the said judgment delivered on 11th May, 2018 and the subsequent decree extracted therefrom pending the hearing and determination of an intended appeal against the same to the Court of Appeal. In his affidavit sworn on 10th July, 2018 in support of the application, the defendant averred that he was dissatisfied with the judgment of the court and had instructed his advocates on record to lodge an appeal against the same to the Court of Appeal. The defendant averred that the said advocates had filed a Notice of Appeal and had also requested the deputy registrar of the court to furnish them with certified copies of proceedings and judgment for purposes of the intended appeal. The defendant annexed to his affidavit copies of the Notice of Appeal and the letter to the deputy registrar requesting for proceedings and certified copy of the judgment. The defendant averred that even before the expiry of the 120 days window that had been granted to him by the court within which he was to vacate the suit property, the plaintiff had started harassing him and threatening to evict him from the property with his family. The defendant averred that the plaintiff had also advertised the suit property for sale. The defendant averred that he would suffer substantial loss if the application was not allowed because the suit property was his matrimonial home and that he had no financial means to purchase another home or to relocate to another place. The plaintiff responded to the application through his own Notice of Motion application dated 28th September, 2018 in which he sought the execution of the judgment of the court by eviction of the defendant from the suit property and the removal of the caution the defendant had registered against the title of the suit property.

The application was argued on 9th October, 2018. The advocate for the defendant submitted that the defendant’s appeal would be rendered nugatory if he was evicted from the suit property. He submitted that the defendant was ready to deposit Kshs. 10,000/- per month in court or in an interest earning account as security pending the hearing of the appeal. He submitted further that the defendant was aged and not working and as such could not raise more than what he had offered as security.

In response, the plaintiff’s advocate submitted that the defendant’s application did not meet the threshold for grant of a stay of execution. She

submitted further that the defendant had not approached the court with clean hands as he was in contempt of court having failed to vacate the suit property as ordered by the court. Finally, the plaintiff's advocate submitted that the defendant had not demonstrated that he had an arguable appeal.

Determination:

I have considered the defendant's application together with the affidavit filed in support thereof. I have also considered the affidavit of the plaintiff that was filed in opposition to the application and the submissions by the respective advocates for the parties. Order 42 Rule 6(1) of the Civil Procedure Rules gives this court power to stay execution of a decree of this court pending appeal. Order 42 Rule 6(2) provides for conditions that must be met before an order for stay of execution is granted. The rule bars the court from making an order for stay of execution unless it is satisfied that the applicant would suffer substantial loss if the stay is not granted, and that the application for stay has been made without unreasonable delay. In addition, the applicant must furnish such security as the court may order for the due performance of the decree in the event of that the appeal fails.

I am satisfied from the material before me that the defendant stands to suffer substantial loss unless the stay sought is granted. The decree sought to be stayed is for possession of the suit property which is occupied by the defendant. If the stay sought is not granted the defendant risks being evicted from the suit property before his intended appeal is heard. Apart from showing the likelihood of substantial loss being suffered, the defendant also had a duty to demonstrate that the application was brought without unreasonable delay and that he was ready and willing to furnish any security that the court could order for the satisfaction of the decree. There is no dispute that the defendant's application was brought without unreasonable delay and that the defendant has offered to furnish security by depositing a sum of Kshs. 10,000/- per month in an interest earning bank account in the joint names of the advocates for the parties pending the hearing of the intended appeal. In the case of Arun C. Sharma v Ashana Raikundalia T/A Raikundalia & Co. Advocates, Misc. Application 802 of 2010 the court explained the purpose of security in the following terms:-

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor...Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”

I am satisfied that the defendant has met the conditions for grant of the stay sought. The security offered by the defendant is however inadequate having regard to the subject matter of the suit. I therefore allow the Notice of Motion application dated 10th July, 2018 on the following terms:

1. The judgement delivered herein on 11th May, 2018 and the decree issued on 31st May, 2018 are stayed for a period of twelve (12) months or pending the hearing and determination of the intended appeal by the defendant to the Court of Appeal whichever comes earlier.
2. The stay is granted on condition that the defendant deposits in an interest earning joint bank account in the names of the advocates for the parties on record, a sum of Kenya Shillings Twenty Five Thousand (Kshs.25,000/-) per month with effect from the 10th day of December, 2018 and on the 10th day of each succeeding month as security pending the hearing and determination of the intended appeal by the defendant to the Court of Appeal.
3. In the event that the defendant defaults in the payment of any one monthly instalment on the due date, the stay granted herein shall stand discharged automatically without any further reference to the court and the plaintiff shall be at liberty execute the decree issued herein on 31st May, 2018 in his favour. In that regard, the Deputy Registrar shall issue warrants for the defendant's forceful eviction from the suit property without any further reference to the court.
4. Each party shall bear his own costs of the application.

Delivered and Signed at Nairobi this 29th day of November 2018

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

Mr. Abdirazak h/b for Ms. Gulenywa for the Plaintiff

Ms. Wanjiku for the Defendant

Catherine Court Assistant