



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

CIVIL SUIT NO. 288 OF 1990

JAMES MACHARIA1ST PLAINTIFF

LUCY MWIHAKI MACHARIA2ND PLAINTIFF

VERSUS

MOHAMMED NAZIR KHANDEFENDANT

RULING

(Application for stay pending appeal; property in issue sold by plaintiffs to defendant; plaintiffs seeking to cancel the sale; suit by plaintiffs dismissed and plaintiffs ordered to give vacant possession and pay mesne profits and damages; substantial loss; property leased out by the plaintiffs to a tenant; plaintiffs not in occupation of it; no substantial loss if vacant possession is given; no demonstration that the defendant is impecunious so as to stay payment of the monetary award; application dismissed)

1. The application before me is that dated 30 May 2016 filed by the unsuccessful 2nd plaintiff. It is an application brought inter alia under the provisions of Order 42 Rule 6 of the Civil Procedure Rules, 2010 and principally seeks an order of stay of execution of the judgment delivered on 10 May 2016 pending appeal to the Court of Appeal.

2. The suit itself was filed in the year 1990 and the dispute was over the property Nakuru Municipality Block 12/165. This property was previously registered in the name of the two plaintiffs who are man and wife. In the year 1989, they entered into an agreement with the defendant, vide which they sold the suit land to the defendant. The property was thereafter transferred to the defendant but the plaintiffs continued to be in possession of it. Through this suit, the plaintiffs contested the sale agreement and wished to have it nullified. The defendant on his part filed a defence and counterclaim vide which he inter alia sought vacant possession of the property, mesne profits and damages.

3. I heard the case and delivered judgment on 10 May 2016. In my judgment, I upheld the agreement of sale and declared that the defendant is the proper owner of the suit land. I awarded the defendant the sum of Kshs. 1,920,000/= as mesne profits and general damages in the sum of Kshs. 2,000,000/=. I also ordered the plaintiffs to vacate the suit premises. Aggrieved by the judgment, the 2nd plaintiff has filed a Notice of Appeal.

4. In this application, the 2nd plaintiff has averred that the upshot of the judgment is that she will be evicted from the suit premises and lose possession of it. It is her view that the appeal will be rendered nugatory if the same is executed and that she will lose possession of it. The 1st plaintiff has filed grounds

in support of the motion and has basically stated that the appeal will be rendered nugatory if it is executed.

5. The defendant has opposed the motion by filing a replying affidavit. He is of the view that the application has no merit. He has deposed inter alia that in the course of the hearing of the suit, the plaintiffs did admit that they were not in occupation of the property and he has pointed out that all they will suffer is loss of rent which is recoverable if they were to succeed on appeal. He has also averred that the plaintiffs have not tendered any guarantee that they can or are willing to make good the monetary award. He has stated that he is a man of means and capable of refunding the plaintiffs if they succeed on appeal.

6. I have considered the matter alongside the submissions of counsel. The application is premised upon Order 42 Rule 6. Subrule 2 of rule 6 is squarely in issue and the same is drawn 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.

7. It will be seen from the above that in an application for stay pending appeal, the applicant needs to demonstrate that he has filed his application without unreasonable delay, and show that he stands to suffer substantial loss if the stay is not granted. The applicant must also furnish such security as may be ordered.

8. In our case, I don't think there is contention that the application has been filed promptly and without delay. The two issues in my view are whether the applicant has demonstrated that she stands to suffer substantial loss if the application is not allowed and the issue of security.

9. Substantial loss is actually the cornerstone of an application of this nature, for the court needs to see to it that the appeal, if successful, is not rendered nugatory. In our case, it did emerge in evidence that the plaintiffs reside in the United States of America and that they have let out the premises to a tenant. The rent received was said to be Kshs. 20,000/=. It follows therefore that the applicant is not in occupation of the property. Save for loss of rent, which to me in the circumstances of this case does not amount to substantial loss, there is no other loss which will be suffered by the applicant. Neither will the loss of rent render the appeal nugatory if the appeal is successful. In so far as the decree relates to possession of the property, I am unable to grant a stay for the same. In essence, I am not persuaded to grant a stay of execution pending appeal on the order to give vacant possession.

10. The other aspect of the decree was the monetary award. On this, it has not been demonstrated to me that the defendant is an impecunious man, or will be unable to refund the money if the same is paid to him. It in fact did emerge in evidence that the plaintiff is a managing director of a motor company. I am of the opinion that the applicants have not shown that they will lose their money if they make good the monetary aspect of the decree. I therefore see no basis of granting stay on the monetary aspect of the decree.

11. From the foregoing it will be seen that I see no merit in this application and the same is hereby dismissed with costs.

12. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 15th day of February 2017.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of :