



IN THE REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NAIROBI

MILIMANI LAW COURTS

ELC NO. 611 OF 2010

DEVKAN ENTERPRISES LIMITED.....PLAINTIFF

=VERSUS=

MUTAMAYO TRADERS (KENYA) LIMITED.....DEFENDANT

RULING

1. This is a Ruling in respect of two separate applications filed by the Plaintiff and the defendant. The application by the Plaintiff seeks orders enforcing a judgement delivered in its favour on 16th May 2016. The one by the defendant seeks stay of execution pending appeal.
2. The genesis of the two applications can be traced to an agreement for sale between the Plaintiff and the defendant in respect of a property known as **LR No. Ruiru Township/409**. The Plaintiff had wanted to purchase the property but the transaction did not go through as the defendant did not provide completion documents within the required period.
3. The Plaintiff filed a suit against the defendant seeking to enforce the contract. In a judgement delivered on 16th May 2016, Justice Njoroge ordered that the balance of the purchase price was to be deposited in a reputable bank in the joint names of the advocate for the plaintiff and the defendant. Upon such deposit, the defendant was to release all completion documents necessary to transfer the property to the plaintiff. The funds deposited were to be released to the defendant upon transfer of the property into the name of the Plaintiff.
4. The defendant's advocate did not co-operate in opening the joint account as per the judgement of the Court. This prompted the plaintiff to file a Notice of Motion dated 9th June 2016, in which among other prayers seeks variation of the Judgement to direct that the balance of the purchase price be deposited in court and fix the date of compliance with the resultant orders to be within 30 days. The Plaintiff further seeks orders that the Deputy Registrar be directed to sign transfer forms on behalf of the defendant.
5. The Defendant's advocates were served with the Plaintiff's Notice of Motion dated 9th June 2016, the defendant moved to court and filed a Notice of Motion dated 28th June 2016, in which it seeks stay of execution pending appeal.
6. I will first deal with the Plaintiff's application dated 9th June 2016. This application is expressed to be brought under the provisions of Sections **80,95 98 63(e)** and **3A** of the **Civil Procedure Act** as well as Sections 59 of the Interpretation and General Provisions Act **and Order 50 Rule 6, Order 51 Rule 1 and Order 45 Rules 1 and 2 of the Civil Procedure Rules**.

7. This application was filed on the basis that the time given for compliance in respect of deposit of the balance of the purchase price was 15th June 2016, and that the defendant's advocate had filed a Notice of Appeal and that this therefore meant that the defendant was intent on pursuing its appeal rather than comply with the decree as passed by the court.

8. The Plaintiff's application is opposed through a Replying Affidavit sworn on 28th June 2016, in which the defendant contends that there were no timelines given in the judgement delivered by the court. That the Plaintiff was aware of the filing of a Notice of appeal and the prayers sought cannot be granted.

9. I have carefully gone through the Plaintiff's application as well as the opposition thereto by the defendant. It is clear from the supporting affidavit sworn by the Plaintiff's director (paragraph 13) that as at the time the application was filed, the plaintiff had not read the judgement to see what was granted or there was a deliberate attempt to mislead the court into granting the orders.

10. The judgement is clear that there were no timelines given and one cannot understand where the plaintiff got the alleged deadline of 15th June 2016 for compliance. What the Plaintiff is seeking to do is to amend the judgement which is not possible. The grounds upon which a judgement can be amended are set out in section 99 of the Civil Procedure Act and none of those grounds have been shown here.

11. The Plaintiff is also coming under Section 80 of the Civil Procedure Act which deals with review of an order or decree. This section is clear that review can only be entertained where no appeal has been preferred. In the instant case, a Notice of appeal against the judgement was filed by the defendant on 30th May 2016. As per the provisions of the Civil Procedure Rules, an appeal is deemed to be filed to the court of Appeal if Notice of appeal has been lodged in accordance with the court of Appeal Rules. The option of review is therefore not open to the Plaintiff.

12. As there were no timelines given for depositing the balance of the purchase price, it is not open for the plaintiff to move to extend time under Section 95 of the Civil Procedure Act for a non-existent period of time.

13. The Defendant has moved to exercise its right of appeal and it cannot be said that it has refused to comply with the Court Orders as to invoke the provisions of section 98 of the Civil Procedure Act. I therefore find that the Plaintiff's Notice of Motion dated 9th June 2016, lacks merit. The same is hereby dismissed with costs to the defendant.

14. I now turn to the defendant's Notice of Motion dated 28th June 2016. This is an application for stay of execution pending appeal. The Court's discretion to grant stay is fettered by the conditions set out in **Order 42 Rule 6(2)**. The conditions are:-

i. The application must be brought without unreasonable delay

ii. There has to be demonstration that the applicant will suffer substantial loss should orders of stay be declined.

iii. There has to be such security given as the court orders for the due performance of the decree as may ultimately be binding upon the applicant.

15. In the instant case the judgement being appealed against was delivered, on 16th May 2016. This application was made on 28th June 2016. There is evidence that the judgement was delivered at Meru. It took some time for the file to be brought to Nairobi. I therefore do not find that the application was filed late in the circumstances. It was actually promptly filed given the circumstances.

16. The defendant contends that the plaintiff is likely to execute the judgment any time and this will render the appeal nugatory. It is clear that the Plaintiff had started moving the Court with a view to starting the process of execution. This is demonstrated by the application dated 9th June 2016 filed by the

Plaintiff. Though this application has just been dismissed, it is clear that the plaintiff is keen on executing the Judgement. What has held back the plaintiff from executing the judgement is that the way the judgement is, it cannot be executed without the co-operation of the defendant or through orders of court sought in a proper way not in the manner in which the plaintiff moved the court vide its dismissed application.

17. The decree was for the transfer of the suit property to the plaintiff. If this property is transferred to the plaintiff before the appeal by the defendant is heard, this may render the appeal nugatory. One may not even know what the plaintiff may decide to do with it once it is in its name. I therefore find that there will be substantial loss suffered if the suit property is allowed to change into the plaintiffs name before the appeal is heard.

18. The property had not been transferred to the Plaintiff. In the case of **Kenjap Motors Ltd Vs Isaac Kuto (2016) eKLR** where the Court cited the case of **Butt Vs the Rent Restriction Tribunal [1982] KLR 417**, it was and held that;-

“ 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 considered that another , which in his own opinion will be a better remedy, will become available to the applicant at the conclusion of the proceedings”.

19. In the case of **Rhoda Mukoma Vs John Abuoga Civil Application No.95 of 1987 (1988) KLR**, the Court of Appeal had this to say :-

“Where a party is exercising his undoubted right of appeal, the court ought to see that the appeal is not rendered nugatory by preserving the status quo until the appeal is heard”.

20. There is indeed need to preserve the suit property until this appeal is heard. To this extent I find that the applicant has demonstrated that it will suffer substantial loss. The property has to be preserved. The Defendant having demonstrated that there is likelihood of suffering substantial loss, I will allow stay of execution pending appeal on condition that the defendant deposits in Court Kshs.1,500,000/= (One million five hundred thousand) as security for costs within 30 days from the date hereof failing which the stay shall automatically lapse. The defendant shall have costs of this application. For avoidance of doubt, the defendant shall also have costs for the Plaintiff's application which has already been dismissed herein above.

It is so ordered.

Dated, Signed and Delivered this at **Nairobi** this **5th** day of **April 2017**

E.O .OBAGA

JUDGE

In the presence of ;-

M/s Biwott for Plaintiff Present

M/s Cheroben for Mr Kariu for Defendant

Court Assistant : Hilda

E.O .OBAGA

JUDGE