



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT

AT MILIMANI

CIVIL APPEAL NO. 82 OF 2015

JACOB MURIUNGI MUREA.....APPELLANT

=VERSUS=

SALOME NJOKI NJUGUNA.....RESPONDENT

RULING

1. This is a Ruling in respect of a Notice of Motion dated **2nd November 2015**, which seeks the following reliefs:-

1. Spent

2. Spent

3. Spent

4. Spent

5. Spent

6. That a temporary injunction be issued restraining the respondent by herself her agents or servants or whomsoever from selling, leasing, charging, offering for sale or in any way dealing with the property known as Nairobi/Block 134/771 pending hearing and determination of this appeal.

7. That there be a stay of execution of the judgement and decree given on 23rd October 2015 in Nairobi CMCC No. 4036 of 2009 between Jacob Muriungi Murea and Salome Njoki Njuguna pending the hearing and determination of this appeal.

8. That costs to be provided.

2. The appellant/Applicant was a tenant on LR No. Nairobi/Block 134/177 (suit premises) since 1998. On 5th June the applicant entered into a sale agreement in which the applicant agreed to purchase the suit premises at a consideration of kshs.1,375,000/=. It was a term of the agreement that the applicant was to pay a deposit of Kshs.275, 000/= on execution of the agreement.

3. It was also a term of the agreement that if the Respondent failed to give completion documents to the

applicant within 30 days, the applicant was to discontinue payment of monthly rent. The Respondent did not provide completion documents within the agreed period. The applicant discontinued payment of rent as per the agreement.

4. The applicant's advocate wrote to the respondent giving her 21 days to complete the transaction. This notice did not elicit any response. A reminder was done but could also not help. The respondent later wrote to the applicant indicating that she had rescinded the agreement and that she was to refund the deposit made by the applicant.

5. The Respondent did not refund the deposit as promised. She instead sent auctioneers to distress for rent. This prompted the applicants to file Nairobi CMCC No. 4036 of 2009. (**Jacob Muiriungi Murea Vs Salome Njoki Njuguna**) in which he sought among other prayers specific performance of the contract by transfer of the suit premises to the applicant after the balance of the purchase price is paid.

6. The case was fully heard by Rachel Ngetich Chief Magistrate. In a judgement delivered on 23rd October 2015, the trial Magistrate held that though the Respondent was in breach of the terms of the sale agreement, she was entitled to change her mind not to sell the suit premises. She proceeded to order refund of the deposit made by the applicant with interest at court rates. She further ordered that the Respondent was entitled to rent up to the time of the judgement.

7. The applicant being aggrieved with the decision of the trial court preferred an appeal to this court. He now seeks stay of execution of the decree pending appeal and an injunction to restrain the Respondent from interfering with the suit premises. The applicant is still in the suit premises based on the court's order of maintenance of status quo.

8. The applicant contends that he has been a tenant of the Respondent since 1998 until he decided to purchase the suit premises which process was not completed due to the frustration by the Respondent. He contends that if stay of execution is not granted and an injunction issued, the appeal will be rendered nugatory.

9. I have gone through the court file but I cannot see any replying affidavit in opposition to the applicant's notice of motion. What is however evident from the proceedings in the file is that on 18th November 2015, the Respondent was ordered to file a replying affidavit by the end of business on that day. It would appear that the respondent never complied with that directive. The Respondent has however filed submissions in opposition to the applicant's Notice of Motion. In these submissions the Respondent has indicated that she opposed the applicant's application based on a Replying Affidavit sworn on 17th November 2015, in which she averred that the application is frivolous, an abuse of the court process and devoid of merit.

10. The Respondent contends that the applicant was duly informed of the Respondent's inability to proceed with the transaction hence the termination. That the applicant had time to look for an alternative house but he did not do so and that the value of the house has now gone up. That the applicant delayed in prosecuting his case in the lower court. That the applicant had filed an appeal being Nairobi Civil Appeal no. 646 of 2009 which appeal was dismissed on 13th December 2013.

11. This is basically 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) of the Civil Procedure Rules***. These conditions are:-

i. The application must be brought without unreasonable delay.

ii. There must be demonstration that the applicant will suffer substantial loss should stay not be granted.

iii. There has to be security for the due performance of such decree or order as may ultimately be

bidding on the applicant.

This being an appeal to this court from the lower court, the court has also to consider whether the appeal is arguable.

12. In the instant case, the judgement being appealed against was delivered on 23rd October 2015. The present application was filed on 2nd November 2015. This is a period of 9 days after the judgement. I find that the application was brought promptly.

13. In deciding whether the applicant has demonstrated that he will suffer substantial loss, I must say at the outset that there is no mathematical formula of determining what substantial loss is. Each case has to depend on its peculiar circumstances. In the instant case, the applicant had been a tenant of the Respondent with effect from 1998. Eight years later he developed interest of purchasing the suit premises which was up for sale by the Respondent. An agreement was made and terms stipulated therein.

14. The applicant made a deposit but the Respondent later decided to change her mind. The Respondent later, started harassing the applicant by sending auctioneers to levy distress for rent. When he filed a suit, the trial court held that though the Respondent was in breach of the agreement, she was entitled to change her mind. The applicant was ordered to pay rent for the entire period notwithstanding the clear terms of the agreement. Clearly the applicant has shown that he has an arguable appeal.

15. The applicant took a loan to purchase the suit premises. He had developed sentimental attachment to the house where he had lived with his family close to two decades. No two properties can be alike. He may not get a similar house in the same locality where he has been used to. This to me is demonstration that he will suffer substantial loss should stay not be granted. I have already said herein above that he has an arguable case and an arguable case is not one which will necessarily succeed.

16. The applicant having demonstrated that he has an arguable appeal, it follows that the prayer for injunction must succeed. This is because if the Court only granted stay without an order of injunction in the terms proposed , it will defeat the appeal which will be rendered nugatory should the Respondent decide to dispose the suit premises before the appeal is heard and determined.

17. For the reasons given herein above, I find that the applicant's application is well merited. The same is allowed in terms of prayer **(6),(7)** and **(8)**. The applicant shall deposit **Kshs. 150,000/=** as security for costs within 45 days from the date of this judgement failing which the orders of injunction and stay shall lapse automatically.

It is so ordered.

Dated, Signed and Delivered at **Nairobi** this **4th** day of **April 2017**.

E.O .OBAGA

JUDGE

In the Presence of :-

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E.O .OBAGA

JUDGE