



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ELC CASE NO.779 OF 2015
[Formerly Civil Suit No.143 of 2004]

ZAINUL VELJI.....PLAINTIFF

VERSUS

ERI LIMITEDDEFENDANT

RULING

1. **Eri Limited**, the Defendant, vide notice of motion brought under **Section 3A** of the Civil Procedure Act and **Order 42 Rule 6** of the Civil Procedure Rules dated 28th July 2016, seeks for stay of proceedings in **Kisumu H.C.C.143 of 2004** pending the hearing and determination of the appeal on the ruling of 27th April 2016. The application is based on seven grounds on the face of the notice of motion and is supported by the affidavit of Rasik Lavji Sanghrajka, a director of the Defendant, sworn on the 28th July 2016.

2. The application is opposed by **Zainul Velji**, the Plaintiff, through the grounds of opposition dated 7th September 2016.

3. The application came up for hearing on the 30th March 2017 when Mr. Achura and Mr. Otieno, learned counsel for the Defendant and Plaintiff respectively, made their oral submissions summarized as follows;

A: DEFENDANT’S COUNSEL’S SUBMISSIONS;

- That the Defendant has filed Kisumu C.A.C.A No.57 of 2016 on the court’s ruling of 27th April 2016 as confirmed in the annexed memorandum of appeal.
- That if stay orders are not granted, the appeal will be rendered nugatory. The learned counsel referred to the case of **National Bank of Kenya Limited & another –V- Geoffrey Wahome Mwotia** [2016] eKLR, where the Court of Appeal granted an application brought under **Rule 5(2) (b)** of the Court of Appeal Rules on being satisfied that the Applicants had demonstrated that they had an arguable appeal. That the appeal was not frivolous and if the stay was not granted and the appeal was successful would it be rendered nugatory.
- That **Article 40 (6)** of the Constitution allows the cancellation of titles to land that were irregularly obtained.
- That the Plaintiff is in possession of the property and will therefore not suffer any prejudice if the application is granted. The learned counsel referred to the two cases in their list of authorities dated 29th March 2017. The cases are **Family Bank Limited –V- Martin Kimeu & Another** [2016] eKLR and **The National Bank of Kenya case** [supra].
- That what the Defendant is seeking is not stay of execution but stay of proceedings relating to the

suit property pending the hearing and determination of the appeal.

B: PLAINTIFF'S COUNSEL'S SUBMISSIONS:

- That the Defendant has not shown that the formal proof they seek to stay emanates from the order subject matter of the appeal.
- That the ruling of 27th April 2016, which is the subject matter of the appeal, was on the notice of motion dated 29th January 2013. That the ruling dismissed the application and does not contain any positive orders that can be stayed.
- That the formal proof proceedings that the Defendant seeks to stay was ordered on the 1st August 2011 when their defence was truck out. That there is no appeal preferred on the ruling or order of 1st August 2011 that required the Defendant to vacate the suit property and that they complied with it on the 28th December 2012.
- That the notice of appeal in respect of the ruling of 27th April 2016 cannot be the basis of staying the orders of 1st August 2011 which have never been appealed against. The learned counsel referred to the following decided cases; **Nairobi City Council –V- Rosley** [2002] 2 EA 487 (CAK), **David Thiongo V- Market Family Emporium** NAIROBI CAC App. No.47 of 2007 (UR 38/2007) **Giant Holdings Limited –V- Kenya Airports Authority** [2010] eKLR, **Venture Capital & Credit Ltd –V-Consolidated Bank of Kenya Ltd Nairobi** CA C.App.No.349 of 2003 (174/03 UR) and **ABN AMRO BANK N.V. –V- Monde Foods Limited** CA C. App.No.15 of 2002 (UR 11/02).
- That submission by the learned counsel for the Defendant are on principles of stay under the Court of Appeal **Rule 5(2) (b)** which do not apply to this court. That the principles for stay under **Order 42** of Civil Procedure Rules that apply to this court are different. They include substantial loss and the Defendant has not shown what substantial loss he is likely to suffer if stay order is not granted. That secondly, the Defendant should show that the application for stay was filed without delay. That the current application was filed after about three months from the date of the ruling of 27th April 2016 and the delay has not been explained. That the Defendant counsel had participated in fixing a date for formal proof on 22nd January 2013 yet the Defendant now want to stay the formal proof proceedings. That the formal proof proceedings hearing date of 12th September 2016 was fixed on the 2nd June 2016 and hearing notice served as confirmed in the affidavit of service filed on the 7th September 2016.
- That **Article 40(6)** of the Constitution is not relevant in this application as the Plaintiff has a right to enjoy the fruits of the judgment of 1st August 2011 by being allowed to prosecute the prayer on mesne profits that has been outstanding for the last several years.
- That should the order made after formal proof proceedings be against the Defendant, they will have recourse in an appeal.

4. The issues for the court's determination are as follows

a) Whether the Defendant has satisfied the requirements of **Order 42 Rule 6** of Civil Procedure Rules.

b) Who pays the costs.

5. The court has carefully considered the grounds on the notice of motion, the affidavit evidence, the grounds of opposition, the ruling of 27th April 2016, submissions by both counsel and come to the following determination;

a) That the Defendant has filed **Kisumu C.A.C.A No 57 of 2016** as confirmed by the memorandum of Appeal dated 7th July 2016 that is annexed to the supporting affidavit. That the said memorandum specifically shows that the appeal is in respect of this court's ruling of 27th April 2016.

b) That the court's ruling of 27th April 2016 dismissed with costs the Defendant's notice dated 29th January 2013 which had

among others sought for review of the judgment in Kisumu H.C. Constitutional **Petition No.4 of 2012**, quashing of the Defendant eviction from Kisumu Municipality/Block 3/92 and costs.

c) That as correctly submitted by the learned counsel for the Plaintiff, the order in the ruling of 27th April 2016 did not give or confer on any of the parties herein any benefit that can be stayed pending the preferred appeal. [See **Venture Capital & Credit Ltd –V- Consolidated Bank of Kenya Ltd** [Supra].

d) That the only positive element of the order of 27th April 2016 is the Defendant to pay the costs of the application. The Defendant has not shown what substantial loss they are likely to suffer, if the Plaintiff was to file a bill of costs for taxation and seek to execute.

e) That the court in its ruling of 1st August 2011 at paragraph 6 ordered as follows;

“ 6. The plaintiff is at liberty to fix the matter for formal proof with regard to prayer (b) and (c) with the participation of the Defendant if they so wish. Notice of such formal proof has to be served on them.”

That prayer (b) and (c) of the Plaintiff's claim vide the plaint dated 8th October 2004, and filed in court on the 14th October 2004 is for general damages for trespass and mesne profits from 1st January 2004 to date of judgment respectively.

f) That the counsel for the Plaintiff has submitted that no appeal has been preferred on the court orders of 1st August 2011 and that those orders cannot be stayed through the notice of motion that seeks to stay the ruling of 27th April 2016. The court concurs with that position and finds that the notice of motion has no merit.

g) That the Defendant did not offer any explanation why they waited for about three months from 27th April 2016 to file the notice of motion dated 28th July 2016 for stay. There was delay in moving the court for the stay order.

6. That having come to the determination set out above, the court finds the Defendant's notice of motion dated and filed on the 28th July 2016 is without merit and is dismissed with costs.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 22ND DAY OF JUNE 2017

In presence of;

Plaintiff Absent

Defendant Absent

Counsel Mr. Otieno for the Plaintiff

M/S Alieta for Adura for Defendant.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

22/6/2017

22/6/2017

S.M. Kibunja judge

Oyugi Assistant

Parties absent

M/S Alieta for Plaintiff/Respondent

Defendant/Applicant

Order: Ruling dated and delivered in open court on presence of Mr. Otieno for the Plaintiff and M/A Alieta for Achura for the Defendant.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

22/6/2017