



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO.596 OF 2013**

**MICHAEL WANJIHIA ONESMUS** (Suing as the legal representative of the estate of  
**MARY WANJIKU KINUTHIA** .....**PLAINTIFF**

**VERSUS**

**FRANCIS KARANJA WAIHIGA** .....**DEFENDANT**

**RULING**

1. The application before me is that dated 20 April 2017 filed by the defendant. The principal prayer sought in the application is an order of stay of execution of the judgment delivered on 30 March 2017 pending an intended appeal to the Court of Appeal. A little background will shed some light on the sort of matter at hand and the nature of the judgment sought to be appealed against.

2. This suit was commenced by the respondent by way of a plaint which was filed on 15 December 2008. The case of the respondent was that as legal representative to the estate of Mary Wanjiku Kinuthia, he did enter into an agreement with the applicant on 22 December 2006, whereby he sold to the applicant a half an acre of the land parcel Nakuru Municipality/Block 4/114 at a consideration of Kshs. 6,000,000/=. It was agreed that the sum of Kshs. 2,000,000/= would be paid at the execution of the agreement, which sum was duly acknowledged, and that the balance would be paid on or before 31 March 2007. On the other hand, the respondent was to subdivide the land and avail the consent to transfer within 90 days, which was noted to be the completion date. Save for an additional sum of Kshs. 600,000/=:, the applicant did not pay any additional sum, nor did he confirm to the respondent that the balance was available. The respondent also did not subdivide the land nor obtain consent to transfer from the Commissioner of Land. Nevertheless, the applicant continued to be in possession of the property and is still in possession of the premises to date and for all this time, he has not been paying rent to the respondent. In his suit, the respondent asked for a declaration that the agreement of 22 December 2006 is null and void for breach by the applicant; an order of eviction; an order of demolition of structures put up by the applicant; mesne profits at the rate of Kshs. 60,000/= per month from 26 December 2006 to be increased at the rate of Kshs. 10% per annum; general damages for breach of contract; and costs of the suit. In his defence, the applicant pleaded that the plaintiff frustrated the agreement by not availing the title deed for purposes of obtaining the loan for the balance of the purchase price.

3. I heard the suit and delivered my judgment on 30 March 2017. I held that both parties were in breach of the agreement as the applicant did not avail the balance of the purchase price within the stipulated period, and neither did the respondent subdivide the suit land and obtain the consent of the Commissioner of Lands within the completion period. I also doubted whether the respondent had capacity to sell in the first instance as at the time of sale, the estate of Mary Wanjiku Kinuthia was still under administration as the

grant of letters of administration had not yet been confirmed and neither had the respondent obtained any authority from court to dispose of the property. I therefore nullified the agreement of sale. I considered that the applicant had deposited some money with the respondent of which he was entitled to a refund, but at the same time, he had continued being in possession of the premises without paying any rent. I therefore ordered that the amount of refund be offset from what I would consider to be the rent payable over the duration of time that he was in possession of the premises and after offsetting these, the result was that the applicant would owe the respondent a sum of Kshs. 1, 705,000/=. I ordered the applicant to pay this money within a period of 30 days, and also ordered him to give vacant possession within 90 days, but any continued possession after 30 days to attract rent in the sum of Kshs. 35,000/= per month.

4. Aggrieved by the judgment, the applicant filed a Notice of Appeal on 11 April 2017 well within the stipulated 14 days period. He then filed this application for stay pending appeal. He has pointed out that he was given 30 days to pay the sum of Kshs. 1, 705,000/= and 90 days to vacate the suit premises which orders he has stated, if effected, will require him to relocate his business to another site at great expense. He has stated in his supporting affidavit, that his business, which is situated at the suit premises, is his only source of livelihood and he stands to suffer great prejudice if he is not allowed an order of stay of execution. 5. He has averred that he has a strong and arguable appeal with high chances of success and that his appeal will be rendered nugatory if stay is not granted. He is ready to abide by any conditions or terms that this court may set.

6. The application is opposed by the respondent, who has filed a replying affidavit. He has deposed that the application is a last resort by the applicant to frustrate his enjoyment of the property. He is of the view that the applicant was given sufficient time to give vacant possession and that he is entitled to the fruits of the judgment. He has averred that the applicant has not tabled any material to demonstrate what substantial loss he stands to suffer if the decree is executed and that in any event a financial burden does not amount to substantial loss. He has averred that the applicant has not adduced before this court the specific particulars of the loss that he is likely to suffer. He has further deposed that the applicant has not demonstrated that he will not be allowed into the premises or compensated by damages if his appeal is successful.

7. I have considered the above alongside the written submissions of both M/s Munene Chege & Company, for the applicant, and M/s Mirugi Kariuki & Company for the respondent.

8. What I have before me is an application for stay of execution pending appeal and applications of this nature are governed by the provisions of Order 42 Rule 6 (2) which provides 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.*

9. It will be discerned from the above that the applicant needs to satisfy three things :-

*(i) That the application has been filed without unreasonable delay.*

*(ii) That the applicant stands to suffer substantial loss unless the order of stay of execution is made.*

*(iii) That the applicant is ready to offer such security as the court may order for the due performance of the decree or order that may ultimately become binding on him.*

10. I opt to start with the aspect of delay. The judgment herein was delivered on 30 March 2017 and this application was filed on 24 April 2017. I had given the applicant 30 days to pay the sum of Kshs. 1,

705,000/= and 90 days to vacate the premises and given that the applicant was still within these time frame, I do not think that it can be said that he is guilty of unreasonable delay.

The second issue is substantial loss. It has been said before that substantial loss is the cornerstone upon which an application for stay of execution pending appeal is anchored (See the case of *Kenya Shell Limited vs Benjamin Karuga Kigibu & Another (1982-1988) 1 KAR 1018*). The court needs to strive to protect the appellant, so that he does not end up having a paper judgment, in the event that his appeal is successful. But even then, the court also needs to balance the interests of the successful respondent for he is also entitled to the fruits of his judgment (See the case of *Port Reitz Maternity vs James Karanga Kabia, Civil Appeal No. 63 of 1997*).

11. There are three things, in my judgment of 30 March 2017, which required performance on the part of the applicant. The first is the payment of the sum of Kshs. 1, 705,000/= within 30 days; the second is to give vacant possession within 90 days of the judgment and the third is to restore the suit premises in the manner that it were when the applicant took possession. I believe that it is these three matters which the applicant wishes to have stayed pending the hearing of the appeal. I opt to start with this latter point of vacant possession.

12. In this application, the applicant has averred that he stands to suffer substantial loss if he has to give vacant possession pending the hearing of his appeal because his business is housed within the suit premises. He has stated that he will suffer immensely if he is forced to relocate his business from the suit premises. In essence, what the applicant wants is to keep possession of the suit premises while his appeal is pending.

13. I am not persuaded that the applicant is entitled to keep possession of the premises pending appeal. It will be recalled that in his plaint, the respondent had asked for vacant possession of the premises. In his defence, the applicant inter alia pleaded that it is the respondent who frustrated the agreement by not availing the title deed for purposes of obtaining a loan to pay the balance yet this was the basis of the agreement for sale. By his own admission, the agreement was frustrated by what he pleaded were acts of the respondent. He never filed any counterclaim for specific performance of the sale agreement. Now, without any pleading for specific performance, I do not see how the applicant can argue a case that he is entitled to have the suit premises transferred to him. If he cannot own the suit premises, then I wonder why he wants to continue being in occupation of the same pending appeal. It is for the above reasons that I am not persuaded that the applicant has made out a case to keep possession of the suit premises pending appeal.

14. The second aspect of performance is to restore the premises to the manner that it were at the time that the applicant came into possession. If am not persuaded that the applicant is entitled to remain in possession pending appeal, then this aspect of restoration of the premises cannot be stayed. I would probably have stayed the restoration of the premises if I was persuaded that the applicant has made out a case to stay in possession pending appeal, but since I am not so persuaded, as I have explained above, then I cannot grant an order staying the order to restore the premises.

15. The last aspect of the judgment relates to the payment of the sum of Kshs. 1, 705,000/= within 30 days. This part of the decree is a money decree. It is not always the case that in money decrees the payment of the same to the decree holder will amount to substantial loss on the part of the applicant as was held by the Court of Appeal in the case of *Kenya Shell vs Karuga* (supra). Nevertheless, I am not too sure of the status of the respondent and he has not deposed in his replying affidavit of his means and ability to refund this money if the same is paid to him. When he testified at the hearing of the main suit, he stated that he is a retired banker. I do not therefore think that he has demonstrated to me his ability to repay the sum of Kshs. 1, 705,000/= if the same is paid to him by the applicant. On this aspect of the decree, I think the best order to make is for the applicant to deposit this sum in a joint interest earning account, in the names of his advocate and that of the respondent. That in my view will constitute good security for the performance of the decree, in the event that he is unsuccessful in his appeal. If he is successful, then he will get back this money with interest and if unsuccessful, the respondent can get this money.

16. I think I have dealt with all aspects of this application and I now make the following final orders :-

(i) *I decline to order a stay of execution of the judgment in so far as it relates to possession of the premises and order the applicant, forthwith, and no later than 30 days of this judgment, to give vacant possession of the suit premises to the respondent and to also within 30 days of this judgment restore the premises to the state that the same were when he took possession of the same.*

(ii) *On the aspect of the decree which required the applicant to pay the sum of Kshs. 1, 705,000/= within 30 days, I do grant a stay of execution pending appeal, subject to the condition that the applicant makes available the said sum of Kshs. 1, 705,000/= within 30 days of today, and the same to be held in a joint interest earning account in the names of the Advocates for the applicant and the respondent. If the applicant does not make available this money within the 30 days as ordered, the order of stay will lapse and the respondent may proceed to execute the decree in full.*

(iii) *On costs of this application, the same to abide the outcome of the appeal.*

17. It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 27<sup>th</sup> day of September 2017.**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**

**In presence of : -**