



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT
AT MILIMANI
LAND CASE NO. 75 OF 2008

MARIA ROSITA CARDOZO suing through her appointed

Agent **MASAI MARA SOPA LODGE LTD.....PLAINTIFF**

=VERSUS=

ROBERT KIBAGENDI OTACHI.....1ST DEFENDANT

THE HONOURABLE ATTORNEY GENERAL.....2ND DEFENDANT

RULING

1. The first Defendant/Applicant filed a Notice of Motion dated 19th September 2017 in which he seeks stay of execution pending appeal. The applicant contends that a judgement was delivered in favour of the Plaintiff/Respondent in respect of LR No. Nairobi/Block 90/235. That he is dissatisfied with the said judgement and has already filed a Notice of Appeal against the decision. He therefore contends that if stay of execution is not granted, he will suffer substantial loss in case the property is sold or charged rendering his appeal nugatory.

2. The Respondent has opposed the first applicant's application based on grounds of opposition filed in Court on 23rd October 2017 and a replying affidavit sworn on 17th October and filed in Court on 23rd October 2017. The Respondent further relies on a supplementary affidavit sworn on 30th October 2017 and filed in Court on 31st October 2017. The Respondent contends that the first Defendant/Applicant has not met the threshold for grant of stay pending appeal. That there is no demonstration of substantial loss by the first Defendant/Applicant. The applicant is not occupying the suit property as he has a property which is adjacent to the suit property where his family lives.

3. The Respondent has attached a valuation report to the supplementary affidavit which shows that the suit property is valued at over Kshs.40,000,000/=. The Respondent states that if stay is to be granted, then the applicant has to deposit security of Kshs.40,000,000/=.

4. I have considered the applicant's application as well as the opposition to the same by the Respondent. I have also considered the oral submissions made by counsel for the parties herein during the hearing of the application. The provisions of Order 42 Rule 6(2) states that *no order for stay shall be granted unless the court is firstly satisfied that substantial loss may result to the applicant unless the order is made. Secondly that the application has been made without unreasonable delay and thirdly such security as the court orders for the due performance of the decree or order as may ultimately be binding on him has been given.*

5. In the instant case, judgement which is impugned was delivered on 31st August 2017. The application for stay was filed on 19th September 2017. The application was filed 19 days after the judgement was delivered. I therefore find that there was no delay in filing the application.

6. It has been held in a number of decisions from the higher courts that substantial loss is the cornerstone for consideration of whether or not to grant stay of execution pending. In **Kenya Shell Ltd Vs Benjamin Karuga Kibiru and another (1986) eKLR Platt Ag J A** had this to say regarding substantial loss:-

“ If there is no evidence of substantial loss to the defendant, it would be a rare case when an appeal would be rendered nugatory by some other event”.

7. In considering whether there has been demonstration of substantial loss a brief background of the case is necessary. The Respondent is an appointed agent of one Maria Rosita Cardozo who was a joint owner of the suit property with Victor Antony Cardozo. The latter died in 2004 and therefore Maria Rosita Cardozo remained the sole owner of the suit property. The suit property was registered in the name of Maria Rosita Cardozo and Victor Antony Cardozo in 1986. It was later discovered that the same property had another title registered in the name of the applicant in 1997. After a full trial the court found that the valid title is the one held by Maria Rosita Cardozo and Victor Antony Cardozo and ordered cancellation of the title held by the applicant which was given later.

8. There is affidavit evidence which was not controverted that there are no developments on the suit property. The applicant has his property which is adjacent to the suit property and that he is not in occupation of the same. Given this background, I do not see what substantial loss the applicant will suffer if stay of execution is not granted. The property has remained undeveloped since 1997 when he alleges to have acquired it. If his title is cancelled and he finally succeeds on appeal, the cancellation will be reversed. There will therefore be no loss suffered if stay is not granted.

9. There is no evidence that the plaintiff has tried to dispose of the suit property though they have title to the same which has never been cancelled or revoked. There is therefore no basis upon which the applicant can say that he is likely to lose the land if he succeeds in the appeal which he has preferred. The issue of security is considered if the court finds that the applicant is likely to suffer substantial loss. As the applicant has not demonstrated that he is likely to suffer substantial loss, I find that his application lacks merit. The same is hereby dismissed with costs to the Respondent.

It is so ordered.

Dated, Signed and delivered at Nairobi on this 27th day of November 2017.

E.O.OBAGA

JUDGE

In the presence of:-

M/s Olubala for Plaintiff

Mr Omagwa for Mr Oyugi for 1st defendant

Court Assistant: Hilda

E.O.OBAGA

JUDGE