



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 63 OF 2012

CAROL CONSTRUCTION ENGINEERS LTD.....PLAINTIFF

VERSUS

NAOMI CHEPKORIR LANGAT.....DEFENDANT

RULING

(Application for stay pending appeal; Principles to be applied; stay granted subject to deposit of security).

1. The application before me is that dated 6 March 2015 filed by the defendant. It is an application brought under the provisions of Order 42 Rule 6 and seeks the following principle order:-

“That his honourable court be pleased to issue a stay of execution of the Ruling delivered on 19th February 2015, and any orders arising therefrom, pending the hearing and determination of the defendant’s appeal in the Court of Appeal against the whole of the said Ruling.”

2. The application is supported by the affidavit of the applicant and is opposed by the plaintiff/respondent. Before I go to these, I think it is important that I lay down a little background to this application. For ease of reference, I will at times refer to the parties as plaintiff and defendant.

3. This suit was commenced by way of an Originating Summons filed on 13 November 2012. In the Originating Summons, the plaintiff, a limited liability company, wanted a declaration that she is the registered and absolute owner of the land parcel Njoro/Ngata Block 2/130 measuring about 7.638 hectares. The plaintiff also wanted the defendant permanently restrained from the said land. Together with the suit, the plaintiff filed an application for injunction, which was dated 8 November 2012, to restrain the defendant from the said land pending hearing and determination of the suit. Interim orders were sought in the first instance and granted on 13 November 2012. There followed another application dated 15 January 2013, vide which the plaintiff complained that the defendant was in contempt of the interim restraining orders. That was an application for leave to commence contempt proceedings and the same was allowed. A formal application for contempt dated 22 January 2013 was filed. This was followed by another application filed by the plaintiff dated 20 March 2013, vide which the plaintiff sought orders that the defendant be summoned to show cause why she still continues to disobey the interim orders issued on 13 November 2012. The defendant replied to these applications by stating that she was on the suit property pursuant to orders obtained in her favour in the suit Nakuru CMCC No. 1857 of 2000 (Naomi Langat vs Kenya Commercial Bank & Another). Apparently, vide the said suit, she had orders of eviction in her favour which she claimed were still in force.

4. Faced with these applications, my predecessor, Honourable Justice Waithaka, directed that all the applications be heard together. She delivered a consolidated ruling on 11 February 2015. She was deeply disturbed by what she found out on perusal of the file Nakuru CMCC No. 1857 of 2000. Inter alia, she observed that the suit therein (where Naomi Langat, the defendant herein, was plaintiff) had been dismissed on 23 May 2011. Despite the dismissal, Naomi Langat still managed to obtain eviction orders against one Martha Moraa Mayieka, who had purchased the suit land in a public auction. It is the same Martha Moraa Mayieka who later transferred the suit land to the plaintiff company, Carol Construction Engineers Ltd. In her ruling, the learned judge, found the proceedings in Nakuru CMCC No. 1857 of 2000 to have been irregular and nullified the orders of eviction issued therein. She spared the defendant from punishment for contempt, as she was acting on orders of court, albeit irregularly issued. (I am not actually too sure if the defendant was fully held to have been in contempt). On the injunction, she allowed it and ordered that the defendant do cede possession to the plaintiff.

5. Aggrieved by this ruling, the defendant filed a Notice of Appeal, followed by the present application. The application is founded upon the grounds inter alia that the defendant being dissatisfied with the whole decision and ruling delivered on 19 February 2015, has exercised her inalienable and constitutional right of appeal by lodging and serving a Notice of Appeal under Rule 75 of the Court of Appeal Rules. It is also averred that she stands to suffer substantial loss if the ruling is executed. In the supporting affidavit, the defendant has averred that once she became aware of the ruling, she moved promptly to file a Notice of Appeal and apply for proceedings. She has averred that the plaintiff has descended on the suit land and is keen to evict her unless restrained.

6. The plaintiff filed grounds of opposition to oppose the motion. In the grounds of opposition, the plaintiff argued inter alia that the defendant cannot be heard on the application as she is already in contempt. The issue of whether or not the defendant may be heard was argued as a preliminary objection and vide a ruling that I delivered on 19 January 2016, I held that the defendant may be heard. It is after this, that the plaintiff filed a replying affidavit sworn by one Jeremiah Mayieka, the Managing Director of the plaintiff company. He has averred that the plaintiff is the registered proprietor of the suit land and has annexed the title deed. The property was purchased by public auction by one Martha Moraa Mayieka who later transferred it as a gift to the plaintiff company. He deposed that the defendant has never been the registered owner of the property. It is further stated that the defendant illegally obtained eviction orders in the suit Nakuru CMCC No.1857 of 2000 and has pointed at the findings of the learned judge in her ruling. He has deposed that the defendant has not demonstrated that she stands to suffer substantial loss as she does not reside on the property. He has deposed that it is actually the plaintiff who has suffered loss as it has been deprived of money from sales of water from a borehole in the suit property in the sum of Kshs. 109, 500,000/=. It is his view that in the unlikely event that the stay is granted, then the defendant needs to deposit security in the sum of Kshs.142,500,000/= the value of the property in accordance with an annexed valuation report.

7. Both counsels filed written submission which I have considered and I also gave leeway for some oral submissions.

8. Mr. Karanja Mbugua for the defendant/applicant, argued that the defendant is dissatisfied with the ruling and has exercised her right to appeal. He submitted that if the orders issued on 19 February 2015, are executed, the defendant will be evicted from the suit land and will be subjected to untold suffering and will be the one who will in fact suffer the loss of Kshs.142,500,000/=. On security for the grant of the order of stay, he submitted that the plaintiff obtained the land as a gift and therefore there is no necessity to offer any security. Nevertheless, he submitted that the defendant is willing to offer any security as may be ordered by court but not the sum of Kshs. 142, 500,000/=.

9. Mr. Kagucia on the other hand went to lengths as to the background of the suit and the manner in which the defendant seized possession of the land. On the three requirements set out in Order 42 Rule 6, Mr. Kagucia submitted that the defendant has not demonstrated any substantial loss. He submitted that it is in fact the plaintiff who stands to suffer substantial loss. He submitted that if the court is going to grant stay, then security in the sum of Kshs. 142, 500,000/= should be given. He further submitted that so far, no appeal has been instituted by the applicant. He wondered how far leeway may be given to give a

hearing to a party who has been held to have forged an eviction order. He was of the view that the case calls for an unusual demand on the court as it tests the administration of justice. He asked that the court asserts its dignity.

10. I have considered the application. What is before me is an application for stay pending appeal. What the defendant intends to appeal from is the order of 19 February 2015 which inter alia held that she had irregularly obtained occupation of the suit land using an unlawful court order that was illegally obtained from the Chief Magistrate's Court. It is this holding that she wants to appeal against, and it is perfectly within her rights to do so. Given this position, I hesitate to go into the merits or not of the findings of the court. I do not want at this stage to state whether the defendant obtained the eviction order illegally which were the findings of my predecessor, for that is exactly what the defendant wishes to appeal.

11. I opt to stand guided by the provisions of Order 42 Rule 6 which provide for the conditions for stay pending appeal. The said provision is drawn as follows: -

Stay in case of appeal [Order 42, rule 6.]

(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(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.

(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.

12. It will be seen from a reading of Order 42 Rule 6 (2), that three conditions stand out. First, the applicant needs to demonstrate that she stands to suffer substantial loss if the application is denied; secondly, the application needs to have been made without unreasonable delay, and finally, the applicant needs to furnish security.

13. I do not think that it can be claimed that this application has been filed after any unreasonable delay. I am actually of the view that it was filed promptly. That leaves me with the question of substantial loss

and security.

14. It has not been denied that the applicant has never been proprietor of the suit land. Even at the moment she does not hold title to the land. Prior to the land being sold to Martha Moraa Mayieka, she was not the title holder. She came into possession of the land after a court issued her with eviction orders. Given the fact that she has never been proprietor of the land, I wonder what substantial loss she stands to suffer if she stays out of the land for the duration of the appeal.

15. Be as it may, even if I am to hold that she does stand to suffer substantial loss by not making use of the suit property for the duration of the appeal, the element of security does come in. The valuation report has placed the value of the property at Kshs. 142,500,000/=. It should however be noted that the appeal is on an interlocutory order giving possession, but is not an appeal after a full judgment which may have declared the plaintiff the owner of the suit property. What the respondent stands to suffer as loss, is the denial of the right to use the property for the duration of the appeal. The land, will not be "lost" so to say, solely because the applicant is granted possession. At paragraph 14 of the replying affidavit, it was deposed that the plaintiff is being deprived of income from water sales. This was computed at Kshs. 109,500,000/=. This has not been disputed by the defendant. I think it is this amount, Kshs.109,500,000/= which should be deposited as security and not the sum of Kshs.142,500,000/= which is the full value of the property.

16. The upshot of the above is that I am prepared to allow the application for stay of execution pending appeal, subject to the defendant/applicant depositing in court the sum of Kshs.109,500,000/= within 14 days. In the alternative, the applicant can provide proof, within 14 days, that this sum is available for deposit in a joint interest earning account and upon such proof, the said sum may be so deposited in a joint interest earning account. If within 14 days, the defendant/applicant does not do any of the above, she must forthwith cede possession of the whole of the suit land to the plaintiff and must keep away for the duration of the appeal and /or the duration of this suit.

17. The costs of this application shall be costs in the intended appeal, and if none is filed, the costs will be in the cause herein.

18. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 23nd day of March , 2016.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT AT NAKURU

In presence of :-

Mr Kagucia for the plaintiff/respondent

Mr Karanja Mbugua for the defendant/applicant

Court Assistant : Janet

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT AT NAKURU