



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENTAL AND LAND DIVISION

ELC CIVIL SUIT NO. 17 OF 2011

PENINAH NDEGE..... PLAINTIFF

VERSUS

JOSEPH NYANGAU BOGONKO1ST DEFENDANT

PENWEL N. NYAMWEA..... 2ND DEFENDANT

RULING

Coming up before me for determination are two applications namely the 1st Defendant's Notice of Motion dated 4th March 2015 (herein referred to as the "First Application") and the Plaintiff's Notice of Motion dated 30th November 2015 (herein referred to as the "Second Application").

In the First Application, the 1st Defendant seeks for orders of stay of execution of the Judgment delivered by the honorable Mr. Justice C.K. Kariuki on 20th February 2015 pending the hearing and determination of the Appeal. It is premised on the grounds appearing on its face together with the Supporting Affidavit of the 1st Defendant, Joseph Nyangau Bogonko, sworn on 4th March 2015. He averred that being dissatisfied with the Judgment delivered by Mr. Justice Kariuki on 20th February 2015, he filed an appeal against the said Judgment. He further averred that he has a meritorious and arguable appeal with high chances of success. He further averred that the Appeal would be rendered nugatory and he would suffer substantial loss should execution proceed. He averred that should he release the title deed over the suit property to the Plaintiff/Respondent and he eventually succeeds in the Appeal, he would suffer substantial loss since the Plaintiff would probably have disposed it off thereby irreparably, irredeemably and permanently defeating his rights and interests in the suit property. He stated further that the Plaintiff is a person of extremely meager means hence she required money to pay school fees and to cater for her daily expenses. He added that he was able and willing to give such security as the court may order for the due performance of the Decree or any other orders of the court. He also added that the First Application has been made diligently and without unreasonable delay.

The First Application is contested. The Plaintiff/Respondent, Penina Ndege, filed her Replying Affidavit filed on 18th May 2015 in which she averred that in fulfillment of the terms of the Judgment, she made a bankers cheque for Kshs. 300,000/- payable to the 1st Defendant which was sent to his advocates. She added that the said bankers cheque was returned to her advocates on the basis of this Application. She requested to be allowed to deposit the decretal sum in court and the 1st Defendant be ordered to deposit the title deed to the suit property in court. She added that no appeal has been filed and if the 1st Defendant is allowed to keep the title deed, he will not pursue the Appeal vigorously.

In the Second Application, the Plaintiff sought for an order allowing her to deposit a cheque in the sum of Kshs. 300,000/- in favour of the 1st Defendant in court and for the 1st Defendant to be ordered to deposit the title deed to the suit property in court. The Second Application is based on the grounds set out on its face together with the Plaintiff's Supporting Affidavit sworn on 30th November 2015.

The issue I am called upon to determine is whether or not to grant the 1st Defendant an order of stay of execution of the Judgment delivered in this suit by Mr. Justice Kariuki on 20th February 2015 pending the hearing and determination of the Appeal. The applicable law on this issue is **Order 42 rule 6(1) and (6)** of the **Civil Procedure Rules, 2010** which states as follows:

“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.”

Order 42 Rule 6(2) provides as follows:

“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.”

I think that the primary question I must ask is whether or not the 1st Defendant has in fact filed an Appeal in this matter which would form the basis for seeking orders of stay of execution. The Plaintiff has challenged the 1st Defendant on this point and there has been no response from the 1st Defendant. In the First Application, the 1st Defendant annexed an undated and unsigned “draft” memorandum of appeal which is not filed. Clearly, the 1st Defendant has not demonstrated to this court that he has indeed filed an Appeal against Justice Kariuki's Judgment. In those circumstances, the 1st Defendant has no basis to seek an order of stay of execution. That being my finding, the First Application is dismissed with costs to the Plaintiff. I order that the Plaintiff do proceed to execute the Judgment delivered by Justice Kariuki on 20th February 2015.

DELIVERED AND SIGNED AT NAIROBI THIS 28TH DAY OF OCTOBER 2016.

MARY M. GITUMBI

JUDGE