



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

CIVIL CASE NO. 83 OF 2011

JOYCE IRENE ATIENO OKEYO.....PLAINTIFF

VERSUS

MICHAEL GEORGE OKEYO..... 1ST DEFENDANT

THOMAS JOSEPH OKEYO.....2ND DEFENDANT

MARGARET AWUOR ORIARO.....3RD DEFENDANT

CHIEF LANDS REGISTRAR.....4TH DEFENDANT

ATTORNEY GENERAL.....5TH DEFENDANT

RULING

I had set out the facts of this case in my ruling of 29th January 2016. The Plaintiff brought this suit on 1st March 2011. On 11th April 2011, the plaintiff amended the plaint. In her amended plaint dated 1st April 2011, the Plaintiff sought among others the following reliefs against the defendants; a permanent injunction to restrain the 1st and 2nd defendants from selling, advertising for sale, transferring and/or dealing in any manner with all that parcel of land known as LR. No. Nairobi/Block 72/700, Onyonka Langata, the cancellation of the name of the 3rd defendant from the register of the said parcel of land as the owner thereof and the replacement thereof with the name of the plaintiff and, general damages.

In the amended plaint, the Plaintiff averred as follows. At all material times, she was the wife of the 1st defendant. While their marriage was still subsisting, the 1st defendant inherited another wife. The 1st defendant lived with his inherited wife at Kileleshwa in Nairobi while the plaintiff lived alone at Onyonka Estate, Langata, Nairobi on house No. A122 situated on L.R. No. 72/700 (“**the suit property**”). The suit property was at all material times registered in the name of the 1st defendant. Without her knowledge or consent, the 1st defendant transferred the suit property fraudulently to the 2nd defendant who in turn transferred the same to the 3rd defendant so as to conceal the fraud and to put the property out of her reach.

The Plaintiff averred further that the suit property is her matrimonial home and that the 3rd defendant knew or ought to have known of this fact. The plaintiff averred that the suit property was transferred to the 2nd defendant by the 1st defendant and subsequently by the 2nd defendant to the 3rd defendant while she was in occupation thereof. The plaintiff averred that the transfer of the suit property by the 1st

defendant to the 2nd defendant and subsequently to the 3rd defendant was carried out fraudulently and in bad faith with a view to deny her, her rights over the property and to render her homeless.

All the defendants entered appearance but only the 3rd defendant filed a statement of defence and counter-claim. In her defence, the 3rd defendant averred that she is the absolute registered owner of the suit property and that the plaintiff's occupation of the suit property is illegal. The 3rd defendant denied that she was the 2nd wife of the 1st defendant and contended that she purchased the suit property in good faith for valuable consideration from the 2nd defendant. The 3rd defendant denied that she was a party to any fraud or collusion in relation to the sale of suit property. The 3rd defendant averred that as the registered owner of the suit property, she is entitled to enjoy all rights associated with such ownership.

In her counter-claim, the 3rd defendant averred that she purchased the suit property from the 2nd defendant at a consideration of Kshs.8,500,000/= part of which she obtained from Barclays Bank of Kenya Ltd. as a loan. The 3rd defendant averred that after paying the purchase price, the suit property was transferred to her on 19th January 2011 after all necessary consents for such transfer had been obtained. The 3rd defendant averred that as at the time she purchased the suit property from the 2nd defendant, there was no encumbrance registered against the title of the property. The 3rd defendant averred that the plaintiff is a trespasser on the suit property with no proprietary interest thereon of any nature. The 3rd defendant averred that the plaintiff's continued occupation of the suit property had subjected her to loss of rental income from the suit property at the rate of Kshs.54,000/= per month. In her counter-claim, the 3rd defendant sought judgment against the plaintiff for; a declaration that the 3rd defendant is the sole owner of the suit property, vacant possession of the suit property, a permanent injunction restraining the plaintiff from entering the suit property, mesne profits at the rate of Kshs.54,000/= per month from January 2011 until vacant possession is given to the plaintiff, special damages in the sum of Kshs.200,000/= and general damages.

On 9th July 2012, the 3rd Defendant filed an application by way of Notice of Motion dated 6th July 2012 seeking among others an order for the eviction of the plaintiff from the suit property, a temporary injunction restraining the plaintiff from entering the suit property until the hearing and determination of this suit, a sum of Kshs.972,000/= as rent arrears upto June, 2012 and further rent from July, 2012 at the rate of Kshs.54,000/= until the hearing and determination of the suit. In the alternative, the defendant sought an order for security in the sum of Kshs.8,500,000/= to be deposited by the Plaintiff in an interest earning account to be held in the joint names of the Plaintiff's and the 3rd defendant's advocates and an order that the Plaintiff do account for the rental income earned from the servant quarter on the suit property and to pay the income found due to her. The 3rd defendant's application was heard before Nyamweya J. In her ruling dated 23rd October 2013, Nyamweya J. ordered the Plaintiff to deposit a sum of Kshs.1,000,000/= as security for costs in default of which the 3rd defendant was at liberty to apply for her eviction from the suit property.

The Plaintiff did not deposit the security that was ordered by the court. Following the Plaintiff's default as aforesaid, the 3rd defendant filed an application by way of Notice of Motion dated 2nd July, 2014 in which she sought the following orders:-

- I. That summary judgment be entered against the Plaintiff as prayed in the 3rd defendant's amended Defence and counter-claim dated 19th November, 2012.
- II. That the Plaintiff be evicted from the suit property.
- III. That the Plaintiff be compelled by way of a mandatory injunction to give vacant possession of the suit property to the IV. That a permanent injunction be issued restraining the Plaintiff from interfering or in any way dealing with the suit property.
- V. That the O.C.S Langata Police Station be directed to enforce the orders issued herein.

VI. That the costs of this application and the entire suit be awarded to the defendant.

The 3rd defendant's application was brought on the following grounds; the 3rd defendant is the registered owner of the suit property having purchased the same from the 2nd defendant at a consideration of Kshs.8,500,000/-, the 3rd defendant has not taken possession of the suit property because the plaintiff who is in occupation thereof has refused to vacate the same and that, the plaintiff's occupation of the suit property is without any lawful justification. The application was not opposed by the Plaintiff.

In a ruling delivered on 29th January 2016, I entered summary judgment for the 3rd defendant against the Plaintiff and ordered the Plaintiff to vacate and hand over possession of the suit property to the 3rd defendant within sixty (60) days from the date of service upon her of a copy of the decree extracted from the judgment. I gave liberty to the 3rd defendant to apply to court for the forceful eviction of the Plaintiff from the property in the event that she failed to vacate the suit property within the period that was fixed by the court.

The Plaintiff was dissatisfied with the decision of this court and filed a notice of her intention to appeal against the same to the Court of Appeal on 1st February 2016. The Plaintiff did not however seek a stay of execution of the said judgment. The Plaintiff having failed to vacate the suit property within the time that was fixed by the court, the 3rd defendant moved the court on 2nd August 2016 seeking an order for the forceful eviction of the Plaintiff from the suit property. The 3rd defendant's application was certified as urgent and fixed for hearing on 1st September 2016. Upon being served with the application, the Plaintiff also brought an application on 18th August 2016 seeking a stay of execution of the judgment that was delivered in favour of the 3rd defendant on 29th January 2016 pending appeal against the same. This is the application which is the subject of this ruling.

In her application for stay of execution dated 25th May 2016 but filed on 18th August 2016, the Plaintiff contended that the judgment entered in favour of the 3rd defendant on 29th January 2016 directed that she be evicted from the suit property. The Plaintiff contended that she had appealed against the said judgment and that her appeal which has high chances of success would be rendered nugatory if the stay sought is not granted. The Plaintiff's application was opposed by the 3rd defendant through a replying affidavit sworn on 30th August 2016. The 3rd defendant contended that the Plaintiff's application is frivolous and an abuse of the process of the court. The 3rd defendant contended that the application coming 8 months after the judgment sought to be stayed was an afterthought meant only to delay the recovery of the suit property from the Plaintiff. The 3rd defendant contended that the Plaintiff had not placed any material before the court in proof of her allegation that she had filed an appeal against the court's judgment made on 29th January 2016.

The Plaintiff's application was argued orally before me on 1st September 2016. I have considered the Plaintiff's application together with the affidavit filed in support thereof. I have also considered the affidavit of the 3rd defendant that was filed in opposition to the application and the submissions by the respective advocates for the parties. Order 42 Rule 6(1) of the Civil Procedure Rules gives this court power to stay execution of a decree of this court pending appeal. Order 42 Rule 6(2) provides for conditions that must be met before an order for stay of execution is granted. The rule bars the court from making an order for stay of execution unless it is satisfied that the applicant would suffer substantial loss if the stay is not granted, and that the application for stay has been made without unreasonable delay. In addition, the applicant must furnish such security as the court may order for the due performance of the decree in the event of that the appeal fails. I am satisfied from the material before me that the Plaintiff stands to suffer substantial loss unless the stay sought is granted. The decree sought to be stayed is for possession of the suit property which is occupied by the Plaintiff. If the stay sought is not granted, the Plaintiff risks being evicted from the suit property before her intended appeal is heard. Apart from showing the likelihood of substantial loss being suffered, the Plaintiff also had a duty to demonstrate that the application was brought without unreasonable delay and that she was ready and willing to furnish any security that the court may order for the satisfaction of the decree.

It is on record that the Plaintiff was ordered by Nyamweya J. on 23rd October 2013 more than 3 years ago to furnish security for the costs of the 3rd defendant in the sum of Ksh.1,000,000/=. The Plaintiff has to date not made the payment. From her conduct, the Plaintiff is not likely to furnish security as a condition for the stay sought. The 3rd defendant purchased the suit property on 22nd November 2010. For the last 5 years, the 3rd defendant has not taken possession of the suit property which she acquired through a loan she obtained from a bank. For the entire period, the Plaintiff has remained in occupation of the property free of charge. There is no doubt that the 3rd defendant has incurred losses and will continue to incur loss if the 3rd defendant continues to occupy the suit property. Justice demands that the 3rd defendant be secured against these losses even as the Plaintiff pursues her undoubted right of appeal. On whether the application has been brought timeously, that is not the case. The application was brought after a lapse of over 7 months from the date of the order sought to be stayed. No explanation was given for this inordinate delay in bringing the application.

Although the application was brought after unreasonable delay a fact which should disentitle the Plaintiff to the order sought, I am inclined to allow the application but conditionally. The Notice of Motion application dated 25th May 2016 is therefore allowed on the following terms;

1. The order of this court made on 29th January 2016 is stayed for a period of eight(8)months to enable the Plaintiff file and prosecute the intended appeal to the Court of Appeal.
2. The stay is granted on condition that the Plaintiff deposits in court within thirty (30) days from the date hereof the sum of Kenya Shillings One Million(Kshs.1,000,000/=)as security for costs in accordance with the order that was made by Nyamweya J. on 23rd October 2013 and additional sum of Kenya Shillings One Million(Kshs.1,000,000/=) as security for the due performance of the decree that was issued herein on 29th January 2016 making a total of Kenya Shillings Two Million(Kshs.2,000,000/=).
3. In the event that the Plaintiff fails to comply with the conditions set out in paragraph 2 above on the due date, the stay granted herein shall stand discharged automatically without any further reference to the court and the 3rd defendant shall be at liberty execute the decree issued in her favour herein on 29th January 2016. In that regard, the Deputy Registrar shall on application for execution made by the 3rd defendant issue warrants for the Plaintiff's forceful eviction from the suit property without any further reference to the court.
4. The costs of the application shall be in the cause.

Delivered and Signed at Nairobi this 4th day of November, 2016

S. OKONG'O

JUDGE

In the presence of

N/A for the Plaintiff

N/A for the 3rdDefendant

Kajuju Court Assistant