



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC APPEAL NO. 189 OF 2014

MINUDI OKEMBA LORE.....PLAINTIFF

=VERSUS=

LUCY WANGUI GACHARUA.....DEFENDANT

R U L I N G

Introduction:

1. On 28th November 2014, this court allowed the Plaintiff's Application for injunction pending the hearing of the suit.
2. The Defendant has filed an Application dated 3rd December 2014 seeking for the following orders:

(a) Upon inter partes hearing there be such stay pending hearing and determination of the intended appeal.

(b) The Plaintiff's employees, servants or agents now stationed inside and outside the suit property do vacate and the status ante existing as at 28th November 2014 be maintained.

(c) The Honourable court be pleased to give further or other directions as it may deem fit to grant

(f) Costs be provided for.

The Defendant's/Applicant's case:

3. The Defendant/Applicant has deponed that she has lived in the suit premises for over ten years; that the suit property is part of her matrimonial property and that the same was fraudulently transferred to the Plaintiff.
4. It is the Applicant's deposition that unless the orders being sought are granted, she will suffer substantial loss and that the appeal will be rendered nugatory.

The Plaintiff's/Respondent's case:

5. The Plaintiff/Respondent deponed that the Application does not meet the requirements of Order 42 of the Civil Procedure Rules; that this court is fuctus officio and that the arguments by the

- Applicant can only be ventilated in the Court of Appeal.
6. It is the Plaintiff's deposition that the current Application is meant to frustrate the Plaintiff from enjoying his property rights and that the Defendant has not offered any security as a precondition.

Submissions:

7. Mr. Mouko, counsel for the Defendant/Applicant submitted that the current Application, together with the Notice of Appeal, were filed timeously.
8. Counsel submitted that the Applicant has an arguable appeal and should be given a chance to pursue the said appeal; that the effects of the order of this court is to evict the Applicant and that if the Applicant is evicted, her appeal will be rendered nugatory.
9. Counsel submitted on how the Plaintiff attempted to evict the Defendant a day after the delivery of the Judgment herein despite there being a stay order and how the Plaintiff's security guards have continued to inconvenience the Defendant.
10. Counsel submitted that the Applicant has always been in occupation of the house; that if the stay is not granted it means the Applicant will be evicted and that this court can order for security for the due performance of the decree.
11. Mr. Kilonzo, counsel for the Plaintiff/Respondent submitted that the Applicant has failed to satisfy the conditions of Order 42 Rule (6)(2) of the Civil Procedure Rules for the grant of the orders of stay of execution; that the Application by the Applicant is an ingenious way of reviewing the Ruling of this Court and that the arguments raised by the Defendant should be raised in the Court of Appeal.
12. Counsel submitted that the suit property is not a matrimonial house. Counsel submitted that even if evicted, the Applicant will not suffer any substantial loss and that the house belongs to the Respondent.
13. The Plaintiff's counsel submitted that in any event, the Defendant/Applicant has not offered security for the due performance of the decree or order.

Analysis and findings:

14. This court may give a stay of execution of its orders pending the hearing and determination of an appeal
15. The law governing the grant of the stay of execution of an order by the trial court is provided for under Order 42 Rule 6 (2) of the Civil Procedure Rules. The said order reads as follows:-

“ No order of stay of execution shall be made under sub rule (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.

16. The Applicant has argued that the suit property is her matrimonial home and that because she has been staying in the suit property for almost ten years, she will suffer substantial loss.
17. In my Ruling of 28th November 2014, at paragraphs 39 and 40, I held as follows:

“Although the Defendant claims that the suit property is her matrimonial house, paragraph 14 of her Supporting Affidavit in support of the Originating Summons in HCCC No. 8 of 2012 shows the contrary. According to the paragraph, the only property she acquired with the respondent during the subsistence of the marriage is Gede/Kirepwe “B” 1/168....”

18. The Applicant's “matrimonial house” therefore is Gede/Kirepwa “B” 1/168 in which she can move in. The fact that a party has been ordered by the court to move out of a suit property cannot in itself amount to “substantial loss” especially in a situation where he or she has an alternative house and where there is no evidence that the house on the suit property will be wasted or

demolished. In the case of **CHARLES WAHOME GETHI VS ANGELA WAIRIMU GETHI (NAIROBI CIVIL APPEAL NO. 302 OF 2007)** it was held as follows:

“It is not enough for the applicants to say that they live or reside on the suit land and that they will suffer substantial loss. The Applicants must go further and show the substantial loss that the Applicants stand to suffer if the Respondent execute the decree in this suit against them”.

- 19.The Applicant has not shown the substantial loss she shall suffer in the event the Respondent takes possession of the house that he purchased pending the hearing of the appeal.
- 20.In exercising its discretion whether to grant or refuse an application for stay, the court ought to consider the special circumstance of the case and the unique requirements (See Bult Vs Rent Restriction Tribunal (1982) KLR 417).
- 21.The special circumstances of this case are that the Respondent purchased the suit property in a public auction and should be allowed to take possession of the same while awaiting the outcome of the appeal and not the other way round.
- 22.Although the Application was filed without unreasonable delay, the Applicant has not offered any security for the due performance of the order.
- 23.I say so because the suit property is not registered in the name of the Applicant. It is the Plaintiff who purchased the suit property in a public auction. Consequently, the Applicant should have offered security in compliance with Order 42 Rule 6 (2) of the Civil Procedure Rules.
- 24.For those reasons, I dismiss the Defendant's/Applicant's Application dated 3rd December 2014 with costs.

Dated and delivered in Malindi this **20th** day of **February**, 2015.

O. A. Angote

Judge