REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT OF KENYA AT NYERI

CIVIL CASE NO.727 OF 2014

JOSEPH KINGSLEY KARURI MAINA…….....…….PLAINTIFF

VERSUS

HOUSING FINANCE COMPANY OF KENYA…….....……1ST DEFENDANT

GETRUDE KAMANTHE MUNGUTI…….....….2ND DEFENDANT

RULING

Introduction

1. The plaintiff **Joseph Kingsley Karuri Maina,** filed the notice of motion dated **4th September, 2014** seeking *to inter alia*, stay the execution of the judgment and decree made by this court on **21st February, 2014** pending the hearing of an appeal he filed against the said judgment and decree of the court to wit, **Nyeri Court of Appeal Civil Appeal No.17 of 2014**. The plaintiff also seeks an order of temporary injunction to restrain the defendants from selling, alienating, disposing of, transferring or in any other way dealing with the parcel of land known as **Aguthi/Gatitu/1828** pending the hearing and determination of the appeal herein.

2. The application is premised on the grounds that the plaintiff has an arguable appeal; that the appeal has a high probability of success; that unless the orders sought are granted, the plaintiff will suffer irreparable loss and damage. It is pointed out that the 1st defendant has already taxed its bill of costs which it has threatened to execute against the plaintiff and that the plaintiff has been and is still in occupation of the suit property. The plaintiff contends that the defendants will not suffer any prejudice if the orders sought are granted.

3. The application is supported by the affidavit of the plaintiff sworn on **4th September, 2014**. In that affidavit, the plaintiff has reiterated the grounds on the face of the application and annexed a notice of appeal filed on **25th February, 2014** (marked as **JKK-1**) and a notice of hearing of the appeal dated **7th August, 2014** (marked **JKK-2**).

4. In reply, the 2nd defendant filed the replying affidavit sworn on **22nd September, 2014** in which he has deposed that the plaintiff (applicant) has not met the conditions for grant of stay pending appeal; that the application is misconceived and an abuse of the court process; that the appeal is frivolous and lacking in merits; that the applicant has not in any way demonstrated how he will suffer substantial or irreparable loss if the orders sought are denied and that there was inordinate delay in bringing the application (brought seven months after the judgment and decree sought to be stayed was delivered). Further that there is no evidence that the plaintiff had instructed the firm of Muhoho and Co. Advocates to prosecute

the application and that the firm failed to file the application as contended in the plaintiff's supporting affidavit.

5. The 2nd defendant further contends that he was never served with the notice of appeal herein but points out that he was served with the record of appeal on **11th May, 2014.**

6. Concerning the averment in the plaintiff's supporting affidavit to the effect that the appeal was listed for hearing on **9th July, 2014,** the 2nd defendant blames the plaintiff for having applied for adjournment on that date on grounds that he wanted to amend his memorandum of appeal.

7. Arguing that the plaintiff has not come to this court with clean hands and is guilty of none disclosure of material facts, the 2nd defendant contends that the plaintiff is out to delay the appeal to his detriment.

8. Contrary to the plaintiff's contention that the defendants will not suffer any prejudice if the orders sought are granted, the 2nd defendant has deposed that she stands to suffer irreparable loss as she will continue being deprived use of the suit property yet she is the beneficial owner.

9. Despite the appeal herein, the 2nd defendant contends that he should be allowed to take possession of the suit property because she has been denied possession of the same since 1997.

10. The 2nd defendant has also pointed out that the plaintiff has not offered any security for costs.

11. In view of the foregoing the 2nd defendant urges the court to dismiss the application with costs to him.

12. The application was disposed of by way of written submissions.

Submissions by plaintiff (applicant)

13. In the submissions filed on behalf of the plaintiff, it is pointed out that the 1st defendant (respondent) did not file any response to the application and that prayers 1, 2, 4 and 6 are spent; that only prayers 3 and 5 are being pursued.

14. With regard to those prayers to wit, the prayer for stay pending appeal and injunction pending appeal, reference is made to the celebrated case of **Giella vs. Cassman Brown Ltd** (1973) E.A 358 and reiterated that the plaintiff's appeal has high chances of success. In this regard it is submitted unless the injunction sought is granted, the defendants may dispose of the suit property to a third party to his great prejudice. It is further submitted that the plaintiff has a valid interest in the suit property, being the one in possession.

15. Concerning the contention that there was inordinate delay in filing the current application, it is submitted that the delay has been properly explained. In this respect, it is reiterated that the delay was occasioned by the plaintiff's previous advocate.

16. In support of the plaintiff's case reference is made to the case of **Fredrick Wambari Chege** vs. **James Karume Wanjema & 2 others Nairobi Court of Appeal Civil Appeal No. 338 of 2004 (2005) e KLR** where the Court of Appeal held:-

"The purpose of an injunction pending appeal is to preserve the status quo pending appeal. Although the jurisdiction of the court is discretionary, it would however, be wrong to grant an injunction pending appeal where the intended appeal is frivolous or where the refusal of an order of injunction would not render the intended appeal nugatory or where the order of injunction could inflict greater hardship than it would avoid."

17. Further reference is made to the case **of Beatrice Mumbe Ndwiga** v. **David Muimi Mwinzi, Machakos High Court No. 203 of 2007** where **Lenaola J**., quoted with approval a passage in the judgment of **Meggary J**., in the case of **Erinford Properties Ltd vs. Chesire County Council (1974)**

All E.R 448 thus:-

There may, of course, be many cases where it would be wrong to grant an injunction pending appeal, as where any appeal would be frivolous, or to grant injunction would inflict greater hardship than it would avoid, and so on. But subject to that, the principle to be observed is to be found in the leading judgment of Cotton LJ in the case of Wilson vs. Church (No.2)(1), where, speaking of an appeal from the Court of Appeal to the House of Lords he said, when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal if successful, is not rendered nugatory. That was the principle that Pennycuick J., applied in the Orion case (2) and although the cases had not been cited to me, it was on that principle, and not because I felt any real doubts about my judgment, that I granted counsel for the plaintiff the limited injunction pending appeal that he sought. This is not a case in which damages seem to me to be a suitable alternative."

Submissions by 1st defendant

18. In the submissions filed on behalf of the 1st defendant, it is pointed out that the plaintiff has failed to annex to the application the memorandum of appeal and submitted that without the memorandum of appeal, it cannot be said that the plaintiff's appeal has high chances of success. Further that the plaintiff has not demonstrated what loss, if any, he is going to suffer unless the orders sought are granted. In this regard it is pointed out that the plaintiff's claim against the 1st defendant is in respect of the taxed costs of Kshs.168, 980/- and submitted that the plaintiff has not shown what irremediable loss he would suffer if it is allowed to execute in respect of the said costs.

19. Concerning the prayer for injunction, it is submitted that the appeal has very little chances of success as the plaintiff has not furnished any evidence in support of his plea for an injunction. As for sufficiency of damages as compensation for the plaintiff, it is submitted that if the 1st defendant is allowed to execute, the only loss that the plaintiff would suffer is monetary and that such loss can be compensated by award of damages.

20. The plaintiff is also said to have failed to lead any evidence to prove that the balance of convenience tilts in his favour.

21. In view of the foregoing, the court is urged to dismiss the application and if it is inclined to allow the application, to order the plaintiff to furnish security for due performance of the orders that may ultimately issue against him.

Submissions by the 2nd defendant

22. On behalf of the 2nd defendant, it is submitted that the application is not sustainable for the following reasons:-

(i) The application is said to be fatally defective as the same was brought under the wrong provisions of the law-Order 50 Rule 1 and 4 as opposed to Order 42 Rule 6 and Order 40 of the Civil procedure Rules which deals with stay pending appeal and temporary injunctions;

(ii) The delay of over 7 years has not been adequately explained. There is no proof that the plaintiff had instructed the firm of Muhoho & Company Advocates as alleged. It is contended the plaintiff filed the appeal after realizing that the 1st defendant had filed its party and party bill of costs against him;

(iii) The Plaintiff has not demonstrated a *prima facie* case to warrant granting of the injunction sought;

(iv) That the plaintiff has not demonstrated the damage or loss he is likely to suffer if the orders

sought are not granted; and

(v) That by the time the 2nd defendant bought the suit property it had already been converted into a commodity for purchase by all and sundry as the plaintiff had defaulted in his obligations to the 1st defendant.

In support of that contention reference is made to the case of **Shimmers Plaza** vs. **National Bank Ltd** (2009) e KLR where the Court of Appeal held:-

"It must be realized that when a property is charged to secure a loan, it is converted into a commodity for sale available for purchase by all and sundry, if there is failure to pay the charge debt or loan and no sentimental value or attachment to the mortgaged property however great would operate against the exercise of the statutory power of sale by the mortgagee."

23. It is reiterated that the 2nd defendant bought the suit property after it had been converted into property for sale available for purchase by all, through public auction on **15th April, 1997** following exercise of statutory power of sale by the 1st defendant. Further that the 2nd defendant has been denied enjoyment of the suit property by the plaintiff from the time he bought it.

24. It is further submitted that the plaintiff has not demonstrated how the appeal will be rendered nugatory if the orders sought are denied.

25. The plaintiff is also said to be unworthy of an equitable remedy because of his conduct. In this regard the delay of over seven months is said to deny him the equitable remedy of a temporary injunction.

26. The plaintiff is also accused of having failed to provide security for due performance of any orders or decree that may ultimately issue against him.

In support of the order for security, reference is made to the case of **Kenya Commercial Bank Ltd** v. **Sun City Properties Ltd & 50 others**(2012) e KLR where **Mabeya J**., stated:-

"In an application for stay, there are always two competing interests that must be considered. These are that a successful litigant should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted right of appeal should be safeguarded from his appeal being rendered nugatory. These two competing interests should be balanced. In a bid to balance the two competing interests, the courts usually make an order for suitable security for due performance of the decree as the parties wait for outcome of the appeal. I do not see why the same should not be applicable in this case."

27. Reiterating that the plaintiff has not made any offer for security; counsel for 2nd defendant has urged this court to dismiss the application with costs in order to bring the long standing litigation to an end.

Stay pending appeal to the Court of appeal; Law applicable

28. The granting of stay of execution pending appeal by the High Court is governed by **Order 42 Rule 6** of the Civil Procedure Rules. It is grantable at the discretion of the court on sufficient cause being established by the applicant. Sufficient cause being a technical as well as legal requirement will depend entirely on the Applicant satisfying the court that:

a) Substantial loss may result to the applicant unless the order is made,

b) The application has been made without unreasonable delay, and

c) Such security as the court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.

29. These conditions are the essence of **Order 42 Rule 6** of the Civil Procedure Rules. The conditions share an inextricable bond such that the absence of one will affect the exercise of the discretion of the court in granting stay of execution. In this regard see the case of **Mukuma V Abuoga** (1988)KLR 645 where the Court of Appeal reinforced that position. It held:-

"…the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."

30. In the case of **Halai & Another v Thorton & Turpin (1963) Ltd** [1990] KLR 365 the Court of Appeal **(Gicheru JA, Chesoni & Cockar Ag. JA)** held:-

"The High Court's discretion to order a stay of execution of its order or decree is fettered by three conditions. Firstly the applicant must establish a sufficient cause, secondly the court must be satisfied that substantial loss would ensue from a refusal to grant stay and thirdly the applicant must furnish security. The application must of course be made without unreasonable delay.

In addition the issue of whether the intended appeal will be rendered nugatory is critical as was held in the case of **Hassan Guyo Wakalo v Straman East Africa Ltd** [2013]eKLR as follows:-

"In addition, the Applicant must prove that if the orders sought are not granted and his Appeal eventually succeeds, then the same shall have been rendered nugatory. These twin principles go hand in hand and failure to prove one dislodges the other"

Analysis and determination

31. As pointed out above, the application herein has been challenged on among other grounds, the ground that it is bad in law. The said contention is premised on the fact that, whereas it seeks stay under provisions of **Order 42 Rule 6** and a temporary injunction under **Order 40** of the Civil Procedure Rules, the applicant has not cited those provisions of the law in support of his application.

32. Concerning that failure, I invoke the provisions of **Article 159** of Constitution of Kenya and **Section 1A** and **3A** of the Civil Procedure Act and declare the application not to be fatally defective.

33. Turning to the principles enumerated herein above concerning stay pending appeal and in particular;

(a) Substantial loss

34. It is not in dispute that the plaintiff is the registered owner of the suit property. It is also not in dispute that the plaintiff is and has been in occupation of the suit property. That being the case, in as far as the case against the 2nd defendant is concerned; I find that the plaintiff has satisfied the first condition for grant of an order for stay. As far as the case against the 1st defendant is concerned, I hold the view that as its rights are tied to the case being appealed from, the execution of those costs should also abide the costs of the appeal.

(b) Delay in filing the application

35. As pointed out in the submissions by the respondents, there was a delay of over seven months before the plaintiff lodged the application herein. Although that delay is blamed on the plaintiff's previous advocates, the plaintiff has not annexed any evidence of the allegation that he had instructed his advocates who allegedly failed to act on her instruction. Without any plausible explanation of the delay in filing the application I am inclined to be persuaded by the 1st defendant's submissions that the plaintiff was awaken from his slumber by its taxed bill costs.

(c) Security

36. It is also not in dispute that the plaintiff has not offered any security for satisfaction of such decree as

may ultimately issue against him. However, that failure does not preclude the court from making the necessary order as to cost.

What order should the court make?

37. Having found that the plaintiff has satisfied the first condition for grant of an order for stay, I am inclined to preserve the status quo pending appeal.

38. However, the plaintiff having offered no security for costs I assess the same at Kshs.250,000/= and order that the plaintiff provide security for costs at the assessed amount within 30 days from the date hereof.

39. The order for stay granted on **10th September, 2014** is extended for 30 days.

40. Failure by the plaintiff to observe the conditions of stay herein will lead to an automatic lapse of the stay of execution.

41. The plaintiff will pay for costs of this application.

Dated, signed and delivered in open court at Nyeri this 11th day of March 2015.

L N WAITHAKA

JUDGE

In the presence of:

Mr. Kinango holding brief for Ms Ouko for the plaintiff/applicant

Ms Shirika holding brief for Mr. Cheruiyot for the 1st defendant

Mr. Ochieng holding brief for Mr. Mbaluka for the 2nd defendant

Lydiah – Court Assistant