



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

HIGH COURT CIVIL CASE NO. 2982 OF 1995

AMINA ABDUL KADIR HAWA.....PLAINTIFF

VERSUS

RABINDER NATH ANAND.....1ST DEFENDANT

KANTA ANAND.....2ND DEFENDANT

RULING

The Applications

The 2nd Defendant's Application

There are two applications before this court for determination. The first application is a Notice of Motion by the 2nd Defendant dated 21st January 2013 seeking orders that the Plaintiff be directed to execute and deliver to the 2nd Defendant a notice of withdrawal of the caveat lodged on 11th April 1995 on LR No. 209/7755/7 (hereinafter referred to as "the suit property"). Further, that in the event that the same is not executed and delivered to the 2nd Defendant as so ordered, the said notice of withdrawal of the caveat be executed by the Deputy Registrar of the High Court.

The grounds for the 2nd Defendant's application are found in the said Notice of Motion and in the supporting affidavit sworn on 21st January 2013 by the 2nd Defendant. In summary, the grounds are that the dispute herein about the Plaintiff's entitlement to the suit property was determined in a judgment delivered on 21st September 2012, and that the 2nd Defendant in compliance with the said judgment has paid the entire decretal sum and costs to the Plaintiff. In addition, that the Plaintiff's counsel accepted the said sums and promised to execute and deliver the notice of withdrawal of caveat lodged on the suit property by the Plaintiff. However, that the Plaintiff and/or her Advocate have refused to execute and deliver the said notice of withdrawal of caveat despite several reminders. The 2nd Defendant attached correspondence between his and the Plaintiff's Advocates in this regard, including that forwarding the cheques in payment of the sums averred to.

The Plaintiff did not file any response to the 2nd Defendant's Notice of Motion.

The Plaintiff's Application

The second application is a Notice of Motion by the Plaintiff dated 24th September 2013, seeking a stay of proceedings pending the hearing and determination of the Plaintiff's application for leave to appeal out of time, and the appeal thereto. The grounds for the application are stated on its face and in the supporting

affidavit sworn on 24th September 2014 by Abdul Kadir Hawa the Plaintiff's husband. These are that the Plaintiff being dissatisfied with the judgment delivered herein on 21st September 2012 instructed her then Advocates on record to file a Notice of Appeal, which they did not do, and that by the time the Plaintiff had changed Advocates the time to file a Notice of Appeal had expired.

Further, that they have applied for and have not been supplied with a copy of the typed proceedings required to file their application for leave to file the Notice of Appeal out of time in the Court of Appeal. The Plaintiff contends that the Defendant's instant application shall have the effect of discharging the caveat registered by the Plaintiff, and that the Defendants shall be at liberty to alienate the suit property thus rendering her appeal nugatory.

The 2nd Defendant filed Grounds of Opposition dated 2nd October 2013 and a Replying affidavit he swore on the same date in opposition to the Plaintiff's Notice of Motion. The 2nd Defendant averred that the judgment herein was delivered on 21st September 2012 in the presence of the Plaintiff's counsel, and that a change of the Plaintiff's Advocates was not effected until 26th February 2013 when a consent was filed in court. Further, that there is no evidence at all that the Plaintiff instructed her Advocates to file a Notice of Appeal against the judgment delivered herein; of any application for leave to file a Notice of Appeal out of time; or of any communication from the Registrar of the Court of Appeal refusing to accept the Plaintiff's application for leave on the basis of the absent proceedings.

The 2nd Defendant further stated that the Plaintiff has no justification to continue encumbering the suit property, having received the decretal sum and costs, and any intended appeal would not be rendered nugatory as the Plaintiff's claim in her Plaint filed herein contained a prayer for damages in breach of contract in lieu of specific performance.

The Submissions

The parties were directed to file written submissions on both Notices of Motion. The Plaintiff did not file any submissions. The 2nd Defendant's counsel filed submissions dated 2nd October 2013 wherein he argued that the Plaintiff's application for stay of proceedings was incompetent as Order 42 Rule 6 of the Civil Procedure Rules only enable stay of proceedings with respect to a decree or order appealed from, and no notice of appeal has been filed against the judgment of 21st September 2012. The counsel relied on the holding in **John N. Liboyi vs Board of Governors St John College, (2009) e KLR** in this respect.

It was further argued that the Plaintiff had not met the requirements for a stay of proceedings under Order 42 Rule 6(2) as firstly, the request for stay has been made over 12 months from the date of the judgment, which delay is unexplained, unreasonable and inordinate. Secondly that the Plaintiff had not demonstrated what substantial loss she would suffer if the stay is not granted as her claim included a claim for damages and she has been paid the full decretal sum and costs. Lastly, that the Plaintiff has not given any security for the due performance of the decree. The counsel submitted that the stay of proceedings is likely to occasion more hardship to the 2nd Defendant who has already paid the decretal sum and costs. He relied on the decisions in **Scott vs Kago & 2 Others, (1987) KLR 503** and **Silverstein vs Chesoni, (2002) KLR 1** in this respect.

On the application for removal of the caveat, the counsel for the 2nd Defendant submitted that an agreement was reached between the Plaintiff and 2nd Defendant through their respective Advocate for satisfaction of the judgment delivered herein, and that the Plaintiff's Advocate had authority to bind the Plaintiff in this respect. Further, that the Plaintiff having accepted the satisfaction of the judgment, there can be no reason to warrant the maintenance of the caveat. The counsel relied on the Court of Appeal decision in **Jackson (Mugo) Wanderi & 6 Others vs Public Trustee & 9 Others (2009) e KLR**, and the High Court decisions in **Juma vs Khaunya & Another (2004) KLR 492** and **Mary Magiri vs John Kaburu Magiri (2007) e KLR** for this position. The counsel also submitted that the Plaintiff's conduct amounted to approbation and reprobation which was held to be unconscionable in **Sonko vs Patel (1955) EACA 23** and **Behan & Okero Advocates vs National Bank of Kenya (2007) e KLR**.

The Issues and Determination

I have carefully considered the pleadings filed and submissions made by the Plaintiff and 2nd Defendant. The issues for determination are two, firstly whether the proceedings herein should be stayed pending the filing by the Plaintiff of an application to file a Notice of Appeal out of time, and secondly, whether the caveat lodged by the Plaintiff against the suit property on 11th April 1995 should be withdrawn.

On Stay of Proceedings

On the issue of the stay of proceedings the Plaintiff relied on the provisions of Order 46 Rule 6 of the Civil Procedure Rules, and sections 1A, 1B and 3A of the Civil Procedure Act. I note that Order 46 of the Civil Procedure Rules related to arbitration and alternative dispute resolution proceedings and is thereby not applicable to the Plaintiff's application. I agree with the 2nd Defendant's submissions that the applicable provision is Order 42 Rule 6 (1)-(4) of the Civil Procedure Rules which provides as follows:

“(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...”

I concur with the 2nd Defendant's submissions that the provisions of Order 42 Rule 6 of the Civil Procedure Rules are only applicable once a Notice of Appeal has been filed under the rules of the Court of Appeal, as is stated in Order 42 Rule 6(4) of the Civil Procedure Rules. It is thus this Court's finding that as no such Notice has been filed herein, the application by the Plaintiff is premature. This court cannot therefore grant the orders sought by the Plaintiff as they are premised on the speculation as to whether the Plaintiff will or will not file an Appeal against the judgment delivered herein. The Plaintiff's Notice of Motion dated 24th September 2013 is accordingly denied. The Plaintiff shall meet the costs of the said Notice of Motion.

On the Withdrawal of the Caveat

On the second issue as to the withdrawal of the caveat lodged by the Plaintiff as against the suit property, the applicable law is section 73 of the Land Registration Act of 2012 (Act No 3 of 2012) which provides that a caution may be withdrawn by the cautioner or removed by order of the court or, by order of the Registrar. Section 2 of the Act defines a caution to include a caveat. The exercise of the court's power in

this regard must be undertaken with the provisions of section 71 of the Act in mind, which section provides for the circumstances when a caveat may be lodged and therefore subsist as follows:

“A person who—

(a) claims the right, whether contractual or otherwise, to obtain an interest in any land, lease or charge, capable of creation by an instrument registrable under this Act;

(b) is entitled to a licence; or

(c) has presented a bankruptcy petition against the proprietor of any registered land, lease or charge,

may lodge a caution with the Registrar forbidding the registration of dispositions of the land, lease or charge concerned and the making of entries affecting the land lease or charge.”

The question to be answered therefore is whether any of the above circumstances obtain and still apply to the Plaintiff, and whether she is therefore still entitled to have the caveat lodged. I note in this regard and on perusal of the court record that the Caveat was lodged by the Plaintiff on 11th April 1995 upon her claim that she had a purchaser's interest arising from a sale agreement entered into with the Defendants dated 28/3/95. I have perused the judgment delivered herein on 21st September 2012, and note that the Court declined to exercise its discretion to grant specific performance of the said sale agreement, and instead ordered a refund of deposit paid by the Plaintiff of Kshs 400,000/= with interest at court rates from the date of filing of suit until payment in full, and awarded general damages of Kshs 300,000/= to the Plaintiff with interest at court rates from the date of judgment until payment in full and costs of the suit to the Plaintiff.

I have also perused the correspondence between the Plaintiffs and 2nd Defendant's Advocates that was attached to the 2nd Defendant's supporting affidavit sworn on 21st January 2013. The 2nd Defendant's Advocates in a letter to the Plaintiff's Advocate dated 4th October 2012 computed the sums due as general and special damages with interest thereon at Kshs 1,517,500/= and costs at Kshs 175,362/=. The 2nd Defendant's Advocate in letters dated 5th October 2012 and 22nd October 2012 enclosed the cheques for the said amounts to the Plaintiff's Advocate. The 2nd Defendant's counsel in addition requested in all the said letters for the notice of withdrawal of the caveat lodged against the suit property. Copies of the said cheques were also enclosed.

The Plaintiff Advocate replied in an email dated October 2012 accepting the cheques on account, and in a letter dated 19th November 2012 stated that the offer for costs was unacceptable and that he would be drawing up a Bill of Costs. He also indicated in the said correspondence that he had informed his client of the removal of the caveat.

It is my finding that from the judgment delivered herein, the Plaintiff's interest in the suit property was finally and substantially determined, and the Plaintiff is yet to file an appeal against the said judgment. Further, the 2nd Defendant has taken the steps to ensure that the Plaintiff's judgment for damages is satisfied. The only outstanding issue appears to be that of costs which are disputed by the Plaintiff's Advocate then on record. The procedure for the recovery of costs is laid down in the Advocates Act and Civil Procedure Act and does not involve or affect the Plaintiff's and/or 2nd Defendant's interests in the suit property. The Plaintiff cannot in the circumstances outlined hereinabove, continue to claim a purchaser's interest or any other interest in the suit property.

The 2nd Defendant's Notice of Motion is therefore allowed for the above reasons, and it is accordingly ordered as follows;

1. The Plaintiff be and is hereby directed to execute and deliver to the 2nd Defendant a Notice of

Withdrawal of the caveat lodged on 11th April, 1995 on the property known as L.R. No. 209/7755/7 within thirty (30) days of service upon her f this order.

2. In the event of default by the Plaintiff, the said Notice of Withdrawal of the caveat lodged on 11th April, 1995 on the property known as L.R. No. 209/7755/7 be executed by the Deputy Registrar of the Environment and Land Court at Nairobi.
3. The 2nd Defendant shall serve the orders herein upon the Plaintiff and relevant Land Registrar within seven (7) days of the date of this ruling.
4. The 2nd Defendant shall meet the costs his Notice of Motion dated 21st January 2013.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____22nd____ day of

____January____, 2014.

P. NYAMWEYA

JUDGE