



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO. 46 OF 2011

WORBURN ESTATE LTD.....PLAINTIFF/APPLICANT

=VERSUS=

MARGARET BASHFORTH.....DEFENDANT/RESPONDENT

R U L I N G

Introduction

1. On 17th October 2014, I committed the Plaintiff's directors, Elly Esposito and Franco Esposito to jail for a period of 30 days for being in contempt of the Judgment of this court.
2. The Plaintiff's/Applicant's directors have now filed an application dated 17th October, 2014 seeking for the following orders:

(a) That upon inter partes hearing, there be a stay of execution of the ruling and order of the 17th day of October 2014 pending the lodging, hearing and determination of the intended appeal against the said Ruling.

(b) THAT costs of the application be provided for.

The Plaintiff's/Applicant's case:

3. The Plaintiff's directors' application is premised on the grounds that the Plaintiff has lodged an appeal against the Ruling of this court of 17th October, 2014; that the applicant stands to suffer substantial loss and damage if the orders sought are not granted and that the applicant is willing to abide by such orders as to security as the court may order.
4. The Plaintiff's director has deponed that the Defendant has continued to pay service charge as ordered by the court and that the Plaintiff has allowed the Defendant unhindered access to her apartment.

The Defendant's/Respondent's case:

5. In her reply, the Respondent deponed that the issues raised in the Application can only be heard and determined by the Court of Appeal and that it is only the Court of Appeal which can entertain this application.

Submissions:

6. According to the Plaintiff's counsel, the Plaintiff herein has an arguable appeal and unless the orders of stay are granted, then the intended appeal shall be rendered nugatory. Counsel relied on numerous authorities to buttress his argument.
7. In great detail, counsel took the court through the Judgment that gave rise to the application for contempt and why his clients believe that they did not disobey the said Judgment.
8. According to the Plaintiff's counsel, the Plaintiff allowed the Defendant in the premises and has been receiving the service charge from the Defendant as ordered by the court.
9. The Plaintiff's counsel further submitted that the Defendant did not move the court in accordance with the law when she filed her application for contempt and that in any event the provisions of Part 81 of the Rules of England were not followed by the Defendant.
10. In her submissions, the Respondent reiterated the depositions in her Replying Affidavit.

Analysis and findings:

11. I have avoided to go into the details of the Plaintiff's oral submissions on why he believes that he has an arguable appeal because it is not in the province of this court to make such a determination.
12. It is only the Court of Appeal, while dealing with an application before it for a stay of execution or an injunction pending appeal under Rule 5 (2) (b) of the Court of Appeal Rules that is required to determine whether the intended appeal has chances of success and whether the appeal will be rendered nugatory if the orders of stay are not granted.
13. Any attempt by this court to make a determination as to whether the intended appeal by the Plaintiff is arguable or not will be tantamount to the court sitting on its own appeal, which is unacceptable.
14. The law that donates to this court the mandate to grant orders of stay of execution pending appeal is provided for by the provisions of Order 42 Rule 6(2) of the Civil Procedure Rules.
15. Under that Rule, the trial court can only grant to an applicant an order for stay of execution pending the hearing of an appeal if the court is satisfied that substantial loss may result to the applicant unless the order is made and if the application has been made without unreasonable delay. The court, in certain circumstances may order for the deposit of security for the due performance of the decree.
16. The Plaintiff's directors are supposed to serve a jail for a period of 30 days pursuant to my Ruling of 17th October 2014.
17. The Plaintiff has filed a notice of appeal to challenge the said Ruling. In the event the Court of Appeal agrees with the Plaintiff's arguments and overturns the Ruling of this court, then the Plaintiff's directors will not have to serve the said jail term.
18. It therefore follows that unless the orders of this court of 17th October 2014 are stayed, then by the time the intended appeal is heard and determined, the Plaintiff's directors would have served the said jail term and suffered substantial loss that cannot be reversed.
19. I am therefore satisfied that the Plaintiff's directors will suffer substantial loss if they serve their jail term before the appeal can be heard unless the order of stay of execution of my orders of 17th October 2014 pending appeal is granted.
20. The Applicant filed the Application within reasonable time and an order of security is not required in this instance. In the circumstances, the appropriate order to make is to stay my Ruling committing the Applicant's directors to jail pending the hearing of the intended appeal.
21. I shall however decline to order that the orders of 17th October 2014 are a nullity and should be set aside ex debito justitiae as argued by the Plaintiff's counsel. This court made those orders based on the evidence that was placed before it and the law. It is only the Court of Appeal that can either confirm or set aside the said orders.
22. For those reasons, I allow the Plaintiff's application dated 17th October 2014 as prayed.

Dated and delivered in Malindi this **28th** day of **November**, 2014.

O. A. Angote

Judge

