



REPUBLIC OF KENYA
INTHEHIGH COURT OF KENYA
AT NAKURU
ENVIRONMENT AND LAND DIVISION
CIVIL SUIT NO. 222 OF 2013

DR. ANDREW ISOE OCHOKI.....PLAINTIFF/RESPONDNET

VERSUS

THOMAS RATEMO OIRA.....DEFENDANT/ APPLICANT

RULING

1. The parties herein entered into a contract of sale of **L.R No. Nakuru/Miti Mingi/ 38** for sum of ksh1,500,000/-. The plaintiff was the seller. He states to have signed all the requisite documents for transfer to the defendant, upon receiving 2 cheques written in his names by the defendant. The property was there after registered in the defendant's name.

2. However the cheques issue by the defendant were dishonored after the registration had sailed through. On **24th January, 2014** the plaintiff obtained orders of injunction restraining the defendant from having any dealings over the suit property, pending the hearing and determination of the suit.

3. The defendant being dissatisfied with those orders filed an application dated the 28th February, 2014 under certificate of urgency seeking the following orders;

i)

ii) THAT this honourable court be pleased to Grant an interim stay of execution of the ruling delivered on the 24th January 2014 pending the hearing and determination of this application.

iii) THAT this honourable court be pleased to grant a stay of execution of the ruling delivered on the 24th January 2014 pending the hearing and determination of the intended civil appeal in the court of appeal.

iv) THAT costs of this application be provided for.

4. The application is premised on the grounds on the face thereof and is supported by the affidavit by the defendant dated **28TH February, 2014**. He depones that he filed his notice of appeal on **29th January, 2014** challenging that ruling on grounds that the plaintiff who obtained the stay orders from this court intends to dispose off the suit property and has already assembled buyers who have visited the land severally with a view of purchasing the suit property.

5. He further depones that he has yet to file the record of appeal as the typed proceedings are yet to be availed to him; that if the orders sought are not granted, the appeal shall be rendered nugatory and he shall suffer irreparable harm, as the suit property is still registered in his name, especially if the plaintiff continues with the dealings therein.

6. The plaintiff filed a replying affidavit dated **21st March, 2014** denying having brought strangers in the suit property. It was his contention that the strangers talked about are his workers who were assisting in planting during the planting season. He states that being a medical doctor, he cannot work on the suit property otherwise than by employees. He adds that the application was baseless as the suit property was still registered in the name of the defendant and the main suit was still pending for determination. He urged the court to dismiss the application.

7. Directions were taken on **17th July, 2014** that the application be disposed of by way of written submissions. The defendant (applicant) filed his submissions on **30th July, 2014** while the plaintiff filed his on **7th August, 2014**.

8. In his submissions, the applicant stated that the court in making its ruling, had failed to consider that there was a contract of willing buyer, willing seller as admitted by the plaintiff in his affidavit; that the plaintiff had handed over his entire file including the transfers which enabled the registration to be effected in the name of the defendant. Further the court had also failed to consider that the suit property was in the process of being repossessed by the Government if the defendant ignored to pay the Government's outstanding loan in respect of the suit property. In addition he submitted that he was ready to deposit a security of 1,500,000/- in court pending the hearing and determination of the appeal already filed in Nakuru.

9. He further submitted that the plaintiff having transferred the entire land and documents in respect thereof, should not be allowed by the court to take possession of the suit property or even visit, as this would result in miscarriage of justice. Finally he submitted that the plaintiff ought to have demanded to be paid the purchase price before demanding back his property.

10. In reply, the plaintiff relied on **Order 42 Rule 6(2) of the Civil Procedure Rules, 2010**. He submitted that the defendant had not met the conditions for grant of stay of execution namely; he had failed to demonstrate the possibility of substantial loss and payment of security to be ordered by the court. He denied that the defendant was likely to suffer any loss as he was in possession of the title documents, thus making it impossible for the plaintiff to sell the suit property to any other person. In addition he stated that though he was seeking the cancellation of the title documents, that was an issue to be determined after a full trial.

11. On the issue of security, the plaintiff submitted that the defendant had not deponed in evidence his willingness to avail security; that this ought to have been done in affidavit on oath and not in his submissions. He however emphasized that his claim was not for the purchase price which would give the defendant basis for offering security hence the issue of security was misplaced.

12. He further submitted that probability of success of the appeal was an issue for the court of appeal to decide as this court had done its part. He relied on the cases of **Socfinal Company Limited Vs Nelphat Kimotho Muturi (2013) eKLR**.

13. I have considered the pleadings, submissions and authorities filed as well as the rival arguments of the parties herein.

14. Grant of orders of stay pending appeal has extensively been addressed by the courts. The applicant needs to demonstrate that he has fulfilled the following conditions discussed in the case of **Attorney General of The Republic Of Uganda V East African Law Society & Another [2013] eKLR**. They were listed as:-

a) *That substantial loss may result to the Applicant unless the order of stay is made;*

b) *That the application has been made without unreasonable delay; and*

c) *That security for costs has been given by the Applicant.*

15. The court has also held that the same conditions that the High Court considers, are the same that the court of appeal considers when a similar application is filed before that court. This was stated in the case of **Equity Bank Limited V West Link Mbo Limited** [2013] eKLR;- when the court stated,

"Rule 5(2) (b) is the counterpart of Rule 6(1) of Order 42 Civil Procedure Rules".

16. On the first condition of substantial loss, the court held in the case of **James Wangalwa & Another V Agnes Naliaka Cheseto** [2012] eKLR that, the fact that the process of execution had been put in motion, or was likely to be put in motion, by itself, did not amount to substantial loss. Even when execution had been levied and completed, that was to say, the attached properties have been sold, did not in itself amount to substantial loss under **Order 42 Rule 6** of the Civil Procedure Rules. This was so because execution is a lawful process.

17. Therefore it was the duty of the applicant to establish other factors which demonstrated that the execution would create a state of affairs that would irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. In the case of **Silverstein N. Chesoni** [2002] 1KLR 867, the court held that “ ***... 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.***”

18. In applying the above conditions to the current application, I am not convinced that there is any likelihood of loss occurring on the part of the defendant. I say so because the defendant has already transferred the suit property in his name and is in possession of the title documents. This bars the plaintiff from transferring the suit property to himself or another party as long as the title is not canceled and re-transferred back to the plaintiff. The plaintiff has also explained about the presence of the persons on the suit property and this is unlikely to affect the intended appeal herein.

19. On the condition that the application should be filed without unreasonable delay, the defendant has fulfilled this condition as he filed his application one month after the ruling was delivered.

20. On the condition of security, as submitted by counsel for the plaintiff, the court in the case of James Wangalwa (supra) held that the applicant has to show willingness to pay security, but it also clarified that the security was to be determined and set by the court as a condition. The defendant is only needed to plead willingness to abide by the conditions of the court.

21. In a nutshell, I find the application dated **28th February, 2014** without merit and dismiss it with costs.

Dated, signed and delivered at Nakuru this 10th day of December 2014

L NWAITHAKA

JUDGE

PRESENT

N/A for plaintiff

N /A for the defendant

Emmanuel Juma: Court Assistant

L NWAITHAKA

JUDGE