



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC APPEAL NO. 15 OF 2019

NOOR SAIDAPPELLANT/RESPONDENT

VERSUS

MARY MWAWASI MANGARESPONDENT/APPLICANT

RULING

(Application for stay of execution pending appeal; principles to be applied in an application for stay pending appeal; applicant having sued the respondent to stop the respondent from interfering with her possession of a house; judgment entered for the applicant in the Magistrate's Court but reversed on appeal; applicant filing a notice to appeal to the Court of Appeal; applicant arguing that she stands to suffer substantial loss if she is evicted and the respondent deals with the property; court satisfied that she stands to suffer substantial loss; security; there having been judgment for the respondent for rent in separate proceedings before the Rent Restriction Tribunal; court directing that an estimate of the accrued rent and other charges be deposited as security)

1. The application before me is the one dated 5 October 2021 filed by the respondent to this appeal. She seeks stay of execution of the judgment delivered on 30 September 2021 pending the hearing of an appeal that she has preferred to the Court of Appeal.

2. A brief background of this case is as follows:-

3. The original suit was filed on 29 August 2000 by the applicant in the Magistrate's court at Mombasa seeking to restrain the appellant (respondent in this application) from interfering with her possession of a Swahili type house No. 598 on Plot No. 21 Section XXX Chaani, Mombasa West (hereinafter, the 'suit house'). The basis of the applicant's case was that the late husband of the respondent had sold the suit house to her through a sale agreement entered into on 16 August 1985. The respondent's defence was that the suit house was never sold to the applicant and that the sale agreement had been proved to be a forgery through a criminal case where the applicant had been charged with forgery. The respondent's position was that the applicant was her tenant. Within the suit, she did demonstrate that she had earlier sought redress against the applicant, as her tenant, in the Rent Restriction Tribunal in the case No. 377 of 1996. The case was concluded on 31 October 1996 in favour of the respondent with the applicant being ordered to pay accumulated rent of Kshs. 87,200/= or she be evicted from the premises. This money was not paid and an order for her eviction was issued. The applicant however retained possession of the suit house after she obtained orders of injunction upon filing suit at the Magistrate's court.

4. After the case was heard, the Magistrate entered judgment in favour of the applicant inter alia on the reasoning that the respondent did not prove ownership of the suit house. Aggrieved by this judgment, the respondent filed this appeal. I heard the appeal and delivered judgment on 30 September 2021 vide which I overturned the decision of the trial Magistrate. I held inter alia that judgment could not have properly been entered for the applicant as the sale agreement had been demonstrated in the criminal case against her to be a forgery. The other basis for my decision was that the issue of tenancy between the applicant and respondent had been settled at the Rent Restriction Tribunal with the Tribunal holding that the applicant was a tenant of the respondent and that she owed rent. No appeal was ever filed against this finding and it was not for the trial Magistrate to reverse the said decision. Since the tribunal had already issued an order of eviction against the applicant, I gave the applicant 14 days to vacate the suit house and in default she be forcefully evicted. The applicant appears not to be satisfied with this decision and she has filed a Notice of Appeal giving indication that she intends to challenge these findings in the Court of Appeal. Through this application, she seeks to stay the judgment pending the hearing and determination of the appeal.

5. The application is premised on the grounds that this court gave the applicant 14 days to vacate the suit premises; that the applicant has filed a Notice of Appeal against the said judgment; that the respondent will not suffer prejudice if a stay of execution is granted; and that it is in the interests of justice that there be a stay of execution of the judgment.

6. The application is supported by the applicant's affidavit. She has deposed inter alia that if the orders sought are not granted she will be evicted from the suit house and she will suffer loss and damage if the intended appeal succeeds.

7. The appellant has filed a replying affidavit to oppose the motion. She has deposed that the applicant has occupied the suit house without payment of rent since 1996, about 25 years now. She has deposed that she has suffered great prejudice as she has been denied the right to use the premises or earn income from it. She deposed that this appeal arose from SRMCC No. 3901 of 2000, which suit was filed over 21 years ago and all this while, the applicant has illegally maintained possession of the suit house to her detriment. Lastly, she deposed that any further delay in enjoying the fruits of her judgment would further pile up the misery which she has suffered at the behest of the applicant.

8. I directed that the application be dispensed with through written submissions. I have seen the submissions of both Mr. Obara, learned counsel for the applicant, and Ms. N.A. Ali, learned counsel for the respondent.

9. In his submissions, Mr. Obara submitted that the applicant stands to suffer substantial loss as she and her family have lived in the suit house for 24 years and consider it their home. He submitted that if an order of stay is not granted the applicant will be evicted and the respondent will be at liberty to deal with the house as she wishes which can include bringing down the house or selling it. He submitted that if this happens and the applicant succeeds on appeal, she will have no house to go into and will suffer both monetary and psychological loss. On offer of security, he submitted that his client is ready to abide by any reasonable conditions, though he pointed out that the court has discretion not to demand any security, for at times security can have the effect of stopping the applicant in his tracks if the same is stringent. He submitted that though the respondent argues that the applicant has been in the house for very long without paying rent, this was due to the grant of the order of injunction which the respondent did not appeal against, and he argued that it would be unfair to punish the applicant for an order issued by the court. Counsel relied on the case of *HE vs SM, High Court at Kakamega, Civil Appeal No. 20 of 2020*.

10. On her part, Ms. Ali submitted that there is no appeal before court because all that has been lodged is a Notice of Appeal which is merely an intention to appeal that may or may not be followed through. She thought that on that basis alone, this application is misconceived. She referred me to Order 42 Rule 6 and on the issue of substantial loss referred me to various authorities. She submitted that substantial loss is not synonymous with a loss that one suffers as a consequence of the judgment being executed but is an additional potential loss that must be proved, which, when considered against the rights of a successful litigant to the fruits of the judgment, would move the court to be satisfied that the loss will outweigh the right to the fruits of the judgment. She thought that eviction by itself cannot be equated to substantial loss because this order stems from the judgment. She referred me to the case of *ANM vs VN (2021) Eklr*. On the issue of security, she pointed out that at the Rent Restriction Tribunal, her client sought judgment for rent arrears of Kshs. 87,200/= and mesne profits of Kshs. 800/= per month from 1 September 1996. She calculated that to 25 years and 4 months thus totaling Kshs. 243,200/=. She submitted that should stay be granted, then the same be on condition that the sum of Kshs. 330,400/= be deposited in a joint interest earning account, and thereafter, Kshs. 800/= every month be deposited into that account until the appeal is concluded.

11. I have considered the application. It is one for stay pending appeal. The principles upon which the court assesses such an application are laid down in Order 42 Rule 6 which provides as follows :-

“(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.”

12. It will be seen that the above provisions are couched in mandatory terms and three conditions must thus be satisfied before an applicant succeeds on an application for stay pending appeal. First, the court must be satisfied that substantial loss will be occasioned to the applicant unless the order of stay is made. Secondly, the application for stay pending appeal must be made without unreasonable delay; and finally, there must be security for the due performance of the decree.

13. Before I go to these, there is the argument of Ms. Ali, learned counsel for the respondent, that no appeal has been filed and thus no order for stay should issue. Ms. Ali referred me to Rule 83 of the Court of Appeal Rules which provides that if a party fails to lodge his appeal after filing the Notice of Appeal, such appeal shall be deemed as withdrawn. I think the reference to the Court of Appeal Rules is improper in the circumstances of this case because Order 42 Rule 4 provides as follows :-

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.

14. From the above, it will be seen that for purposes of an application for stay pending appeal to the Court of Appeal, an appeal is deemed filed when Notice of Appeal has been given. One has been filed and it is therefore immaterial, for the subject at hand, that no formal appeal has been filed. I will thus entertain the application.

15. I have already set out the three elements required in Order 42 Rule 6. I opt to start with the issue of delay. Judgment was delivered on 30 September 2021, and this application was filed on 5 October 2021. There is therefore no unreasonable delay in the filing of this application and this was indeed conceded by Ms. Ali in her submissions.

16. The critical issues arising in this application are whether the applicant stands to suffer substantial loss if the order of stay is not granted and the question of security. The applicant has of course argued that if she is evicted and the respondent deals with the property, and she subsequently succeeds on appeal, she may find no house to return to. I am persuaded that if this happens then the applicant may suffer substantial loss. However, I think this is one case where the circumstances demand for security to be presented. There is indeed judgment in favour of the respondent for vacant possession of the house and pending rent which judgment was delivered at the Rent Restriction Tribunal. There is no appeal against that judgment. The applicant has only continued remaining in possession because of an order of injunction issued by the Magistrate's court. I think Ms. Ali is right in demanding that the applicant presents as security, the amount that her client has lost as

rent for the duration of time that the applicant has been in possession. There was already judgment in favour of the respondent for the rent claimed. This was subjected to execution. At the time of execution, which was May 2000, the amount had risen to Kshs. 130,450/=. I have seen this from a warrant of attachment annexed by the applicant to support an application for stay of that judgment. The warrant was however executed and I have seen an auctioneer's bill of Kshs. 38,000/= through a letter dated 16 August 2000. It follows that, at the latest, from May 2000, the applicant has not been paying any rent to the respondent. To December 2021, this will amount to Kshs. 197,600 (Kshs. 800 x 247 months). If you add this to Kshs. 130,450 and the auctioneer's bill, the total is Kshs. 366,050/=. We of course cannot tell how long the appeal will take but let us just assume that it will take a year. If the applicant fails on appeal, the respondent will have lost a further Kshs. 9,600/=. I will thus add this to the sum of Kshs. 366,050/= to come up with the sum of Kshs. 375,650/=. I will round off this money to Kshs. 400,000/= because consideration has not been made to interest or to the costs of this case which I awarded to the respondent. I think this sum of Kshs 400,000/= would be a fair sum to be deposited by the applicant as security. If she succeeds on appeal, this money will be returned to her. If she fails, then this sum to be released to the respondent without prejudice to any right of the respondent to further claims of mesne profits or costs.

17. I will order that this amount of Kshs. 400,000/= be proved to be available by the applicant through her counsel, within 30 days from today, and upon proof, be deposited in a joint interest earning account of both counsel for the applicant and the respondent. If there is no proof of the availability of the money for deposit within the 30 days then there will be no stay of the judgment herein and the same may be executed by the respondent.

18. In the event that the monies above are made available as directed, the costs of this application to abide the costs of the appeal. If the funds will not be made available, then the applicant will shoulder the costs of this application.

19. Orders accordingly.

DATED AND DELIVERED THIS 19TH DAY OF JANUARY 2022.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA