REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 146 OF 2002

ROSE AUMA KHABEKO …… PLAINTIFF

VERSUS

PETER MWALIMU MIWA …….. DEFENDANT

RULING

Application dated 6th September 2002, is seeking mainly that there be a stay of execution of any decree, warrants or order that (may) result from the judgment delivered in or around the early week of June 2002 pending the hearing and final determination of the appeal. It is also seeking an order that costs of the application be in the cause. The grounds for the application are that the applicant has an arguable appeal; that the application is brought without delay and that should stay not be granted, the appeal, if successful would be rendered nugatory. It is supported by an affidavit sworn by the Applicant Rose Auma Khabeko and another affidavit sworn by her counsel Mr. Sangoro.

The Respondent opposed the application and filed Replying affidavit sworn by himself Peter Mwalimu Miwa.

It seems to me from the scanty records availed by both parties that the applicant claims to be the wife of one Henry Khabeko Ambetsa with whom they have eight children. They same Henry Khabeko Ambetsa was the owner of the suit premises without land. He is alleged to have sold the same premises to the Respondent here. The Applicant and her 8 children were living in the suit premises and were collecting rent from the other tenants in the same suit premises. After the alleged sale of the premises by her “husband” to the Respondent, she remained in the premises and refused to vacate the premises to the Respondent. The Respondent then sued for vacant possession of the suit premises in the subordinate court (At least I gather that from the opening remarks of the learned Magistrate’s judgment). The summons to enter appearance was issued and the Applicant was allegedly served. The applicant did not enter appearance and the court below proceeded with formal proof against the Applicant and judgment was entered as prayed on 6th day of June 2002. Apparently the Applicant applied to set aside that exparte judgment on grounds that she was not served with the summons to enter appearance. At the hearing of that application the applicant applied for and was allowed to cross examine the process server. She did so and he also applied through her counsel to give evidence to refute the allegations by the process server, but that was refused. At the end of it, the application to set aside that judgment was rejected by the court below and hence an appeal was filed to challenge that order refusing the application to set aside the exparte judgment and this application is now seeking that stay be granted

pending the hearing of that appeal. Order 41 Rule 4(2) states as follows:

"(2) No order for stay of execu tion shall be made under sub rule (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."

I am satisfied that this application brought to court on 6th September 2002 only seven days after the order appealed from was delivered, was brought to court without any unreasonable delay. The Applicant is living in the premises with her eight children, and it would appear that her alleged husband sold the same house against her wish. She says she has nowhere to go to with her children. She is strictly not a tenant in the house but is claiming that being a wife to the person who sold the house, she has an interest in the house. Whether that will be found to be legally tenable is another matter but I cannot say it is not a bonafide triable issue. As I have said the Applicant has not provided all evidence of what went on before the court below. I do not have for example any evidence that a draft defence was ever availed to the court below together with the application for setting aside. If it was ever there then the learned Magistrate should have considered it even if he was satisfied that the summons to enter appearance was served. Even if I assume it was not there, the facts of this case are such that the interest of the Appellant in the suit property should be ventilated through a proper hearing. However, I cannot ignore the interests of the Respondent who again may have been a bona fide purchaser without notice who has sunk his money into the investment and needs to enjoy some income from the same.

Although, the Applicant has not made any indication that she is ready to offer any security, I do agree with Mr. Gikandi that in the circumstances of this case, both parties must be taken care of so that by the time the appeal is heard no party will have suffered total loss.

I do feel as I have stated that the appeal to be preferred is arguable. I am also satisfied that the application is brought in good time and that the Respondent may also suffer loss for a long time while the appeal remains pending.

Doing the best I can in the circumstances and having nothing to guide me as to the current rent of the premises, but feeling that a figure of KSh.10,000/- suggested by Mr. Gikandi is on the higher side I do feel the Applicant should deposit every month with effect from 1st January 2003, KSh.3,000/- into an interest earning bank account in the joint names of the Advocates for the Applicant and the advocates for the Respondent and so long as she complies with the same, there shall be stay of execution of the decree and the orders of the learned Magistrate till the appeal is heard.

Before I end this Ruling; I want to comment on the way prayer 3 which was the main prayer in this application was worded. I have already reproduced it to an extent herein above. It seeks that there be a stay of execution of any decree, warrants, or order that (may) result from the judgement delivered in or around the early week of June 2002 pending the hearing and final determination of the appeal. Surely, could it have been so difficult for the learned Applicant's counsel to ascertain the date which was readily at the end of the judgment" I think the learned counsels have to be committed to their duties. If the Respondent counsel had raised this vagueness of the order sought, I would not have hesitated to strike out the application on that score for it is indeed vague and for no reason at all as the date of the judgment is so clear in the proceedings.

However, it was not raised and despite the lack of several documents, this particular aspect of the date of judgment became clear during submission and so I have only made this observation to enable the learned counsel to be on his guard in future. Because of all I have said above I will order half the cost of this application to the Respondent. Orders accordingly.

Dated and delivered at Mombasa this 18th Day of December 2002.

J.W. ONYANGO OTIENO

JUDGE