



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 16 OF 2016

JANE WAHITO GATIBIRI.....APPELLANT/RESPONDENT

VERSUS

STEPHEN MAINA NYAMBURA.....RESPONDENT/APPLICANT

RULING

Introduction

1. This is a ruling on the application dated 12th November 2019 under **Order 22 Rule 6 of the Civil Procedure Rules and Section 1A, 1B & 3A of the Civil Procedure Act** seeking eviction orders against the appellant/respondent from Stall No. 317 pursuant to judgment entered on 7th June 2019 and that the said orders be effected by M/s Hippo General Merchants Auctioneers.
2. In opposition to the application, the respondent filed a replying affidavit dated 31st May 2021 and filed in court on 2nd June 2021.

The Applicant's Case

3. It is the applicant's case that Stall No. 37 belongs to him. The respondent had filed a suit claiming proprietary rights which suit upon appeal was dismissed with costs on 7th June 2019.
4. The applicant contends that despite the respondent being informed of the judgment, she has refused to move out of the said stall thus violating the applicant's right to enjoy his property for a long period until the court gave judgment in his favour.
5. The applicant prays for enforcement of the orders of this honourable court by way of eviction.

The Respondent's Case

6. It is the respondent's case that after the appeal herein was dismissed on 7th June 2019, she filed a Notice of Appeal on 17th June 2019. Shortly after, she contends that she fell ill and was in and out of hospital and thus was not in a position to prosecute the appeal.
7. The respondent contends that failure to prosecute the appeal and to defend the applicant's application herein is through no fault of her own. She thus prays that the court suspend the ruling scheduled for 24th June 2021 and allow her time to prosecute her appeal.
8. Parties elected not to put in written submissions.

Issues for determination

9. After careful analysis, we humbly submit that the main issue for determination is:
 - a) Whether this application is properly before the court. If so, whether the applicant has made out a case for the grant of an eviction order.
10. The rights of the parties as to proprietorship were determined in CMCC No. 333 of 2011. The court entered judgement in favour of the applicant herein against the respondent. The respondent filed this appeal which was found to have no merit and was dismissed on 7th June 2019.
11. The applicant then filed an application dated 7th November 2019 for stay pending appeal to the Court of Appeal. The application was never prosecuted and there is no evidence that the intended appeal was ever filed. The respondent only filed a notice of appeal.

12. It is my considered view that this appeal court ended its noble task of hearing and determining the appeal upon delivery of judgement. The judgment of the Senior Resident Magistrate in CMCC No. 333 of 2011 was accordingly upheld on appeal.

13. This file was kept alive by the respondent's application for stay which has not been prosecuted for almost three years to date. This application ought to have been dismissed for want of prosecution by the court under order 17 of the Civil Procedure Rules. The applicant herein had the option to apply for orders for its dismissal.

14. As for this application dated 12/11/2019, I am of the view that this appeal court became *funtus officio* upon delivery of its judgement. Having dismissed the appeal, the applicant ought to have filed an application for enforcement of judgement in Nyeri CMCC No. 333 of 2011 but not in this appeal file

15. Furthermore, this court has no jurisdiction to issue the orders sought. Such jurisdiction has lies with the trial court which is possessed of the powers to enforce its judgement.

16. Consequently, I find this application incompetent and there is no need of going into the merits of this application.

17. In the interests of justice, the application for stay dated 7th November 2019 is accordingly dismissed by the court on its own motion and this file closed.

18. I hereby strike out this application for being incompetent.

19. Each party to meet their own costs.

20. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 24TH DAY OF JUNE 2021.

F. MUCHEMI

JUDGE

Ruling delivered through video link this 24th day of June 2021