



REPUBLIC OF KENYA

IN THE ELC COURT OF KENYA

AT MERU

ELC CASE NO.112 OF 2002

PETER MBAABU AYUB

(acting on behalf of the deceased AYUB MARAMBII).....PLAINTIFF/APPLICANT

VERSUS

JOHN NDEGWA

KENNETH MUGAMBI GITUMA

(Acting on behalf of deceased Josephine Wangui Muchai)

JOSPHINE WANGUI MUCHAI.....1ST and 2ndDEFENDANT/RESPONDENT

LAO AND ATTORNEY GENERAL.....3RD DEFENDANT/RESPONDENT

RULING.

1. Before me is a Notice of Motion Application filed in court on 20th November 2018 and brought pursuant to the provisions of section 42 Rule 6 of the Civil Procedure Rules CAP 21 of the Laws of Kenya and Sections 3(a) & 63 (e) CAP 21 & Article 159 (2) (d) of the Constitution of Kenya and all other enabling provisions of the law. The Applicant seeks an order of inhibition to inhibit land parcel numbers Nyambene/Irungu III/1359 and 315 pending the hearing and determination of the application inter-partes and pending the Appeal.

2. The application is premised on the grounds inter alia that since delivery of the judgment herein, the Applicant has filed a Notice of Appeal and was in the process of preparing the Record of Appeal. Further, Applicant avers that it was the plaintiff who had been in occupation of the suit land since time immemorial and thus equity will dictate that they remain in occupation until the appeal herein is heard and determined since the intended inhibition would prevent transfer and by large interference with occupation.

3. The Applicant’s case is that he was aggrieved by a judgment delivered on 31/10/2018 and has since filed a Notice of Appeal and that the Respondents were now in the process of executing the decree/judgment, since several parties had visited the suit property with a view of buying the same and that the instant application had been brought without inordinate delay.

4. When the matter came up for hearing on 20th November 2018, the court directed the Respondent to file and serve their response to the application within 14 days. As at the time of writing this ruling, none of the Respondents had filed a response to the application though the 2nd defendant had attempted to do so via a replying affidavit filed in court on 4th February 2019. The said affidavit was however undated and the same was not commissioned by a Commissioner of Oaths as by law required.

5. I have carefully considered this application. The Applicant is essentially seeking an order of inhibition to inhibit land parcel numbers Nyambene/Irungu/III/1359 and 315 pending the hearing of the application interpartes and a further confirmation of the prayer until the intended appeal is heard and determined.

6. It is not lost on this court that the instant application is premised on what the Applicant referred to as Section 42 Rule 6 of the Civil Procedure Act CAP 21 of the Laws of Kenya. This court is of the considered opinion that the Applicant is referring to Order 42 Rule 6 of the Civil Procedure Rules which deals with stay of execution.

7. The same provides as follows:

“ 6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside”

8. What the Applicant is essentially seeking is an order of stay of execution of the judgment delivered on 12th October 2018. It is not in dispute that the plaintiff had instituted this suit via an amended plaint dated 20th May 2016, seeking inter alia an order of declaration to the effect that the suit property Nyambene/Irungu/III/1359 formerly Urungu III, 315 and 1359 is property owned by the plaintiff which suit was dismissed with costs on 12th October 2018.

9. There is nothing which the Court has ordered to be done or to refrain from being done. In **Western College of Arts and Applied Sciences v Oranga & Others (1976-80) 1 KLR**, the Court of Appeal for East Africa stated in respect of stay of execution, as follows:

“But what is there to be executed under the judgment, the subject of the intended appeal. The High Court has merely dismissed the suit with costs. Any execution can only be in respect of costs. In Wilson v Church the High Court had ordered the trustees of a church to make a payment out of that fund. In the instant case the High Court has not ordered any parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court Judgment for this Court.....”.

10. More recently the Court of Appeal in **Kenya Commercial Bank Limited v Tamarind Meadows Limited & 7 Ors [2016] eKLR**, stated as follows;

“In Kanwal Sarjit Singh Dhiman v. Keshavji Juvraj Shah [2008] eKLR, the Court of Appeal, while dealing with a similar application for stay of a negative order, held as follows:

“The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December, 2006. The order of 18th December, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only (see Western College of Arts & Applied Sciences vs. Oranga & Others [1976] KLR 63 at page 66 paragraph C).”

11. Taking into totality all the circumstances in this case, and in light of the fact that the court merely dismissed the plaintiff's suit with costs. It is my considered opinion that there is no positive order capable of being stayed and as such there is nothing to stay.

12. Accordingly, the Applicant's application filed on 20th November 2018 is dismissed in its entirety with costs to the Respondents.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 20TH MARCH, 2019 IN THE PRESENCE OF:-

C/A: Kananu

Ojiambo holding brief for Otieno for 1st and 2nd respondent

Applicant

HON. LUCY. N. MBUGUA

ELC JUDGE