



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NUMBER 311 OF 2001

ERASTUS CHOMBA)

GRACE WANGARE CHOMBA)

MARY WANGARI CHOMBA)..... APPELLANTS/RESPONDENTS

VERSUS

DAVID KARIUKI GITHIGA)

JEREMIAH KINUTHIA MUHUGU)

MICHAEL KURIA)

THOMAS WANDERI)

W.OLWENY T/A OLWENY & ASSOCIATES)RESPONDENTS/APPLICANTS

RULING

1. This is a ruling on the defendants’ application dated 11th October, 2018. It seeks to dismiss the application dated 28th February, 2018 for want of prosecution; in the alternative, the orders of stay of execution issued on 26th February, 2018 be discharged.

2. Grounds on the face of the application:-

1. The defendants/applicants are decree holders pursuant to judgment delivered on 5th September, 2012.
2. That the plaintiffs/respondents being dissatisfied with the said judgment filed an appeal and subsequently, stay orders were issued pending hearing of the substantive notice of motion filed on 6th September 2012.
3. That it is more than 6 years now and the respondents have not executed the application; that the stay orders lapsed on 12th September, 2012, as they were not extended.
4. That the notice of motion dated 28th February, 2018 seeks to extend the interim orders.
5. That on two occasions the respondents have failed to comply with court directions to file submissions.
6. That the applicants have been prejudiced by respondents’ failure to prosecute the application as they are unable to execute the decree due to stay orders.

3. The application is supported by affidavit sworn by the second defendant/applicant. He restated grounds on the face of the application.

4. In response to the application, the plaintiffs/respondents filed replying affidavit sworn by the 2nd respondent on 9th March, 2019. She averred that proceedings of the application for stay has been hampered by numerous applications filed by the defendants. She averred that the submissions on the application were filed on 21st October, 2014 and the fairest way of dealing with the application is to order the same to

proceed expeditiously and not vacate the orders as vacation of the orders will expose the plaintiffs to great loss as 2nd and 3rd plaintiffs are in occupation of the land and the 1st plaintiff was buried in one of the parcels in dispute.

5. She further averred that the advocate previously represented them and filed the application ceased acting on their behalf. That they are not able to explain why their previous advocates Githui & Company Advocates failed to file submissions. 2nd plaintiff added that they have now instructed the firm of Mugambi and Company Advocates to pursue the intended appeal. That the intended appeal raises serious grounds and justice would demand that it be heard.

6. She further averred that the defendants had no counterclaim and nor orders were granted in their favour. That the defendant stand to suffer no prejudice if the application dated 26th February 2018 and the one dated 12th September 2012 are heard on merit.

7. On perusal of the court file, I note that, the plaintiffs filed application dated 12th September, 2012 on even date. The application seeks stay of execution of decree passed on 5th September, 2012. It sought to restrain the defendants from entering, resurveying, subdividing and or in any other way dealings in parcels listed in paragraph 2 of Notice of Motion dated 12th September, 2012 of the applicants; parcels which are separately registered in the names of the plaintiffs; in the alternative, status quo be maintained pending hearing and determination of appeal. On 12th September, 2019, the court ordered status quo to be maintained following application filed the same day under certificate of urgency.

8. From record, the last time interim orders were extended was on 22nd March, 2016. On the same day parties were granted 30 days to take a date for directions on hearing of applications pending. The next time this matter was before court was on 15th January, 2018. Interim orders were not reinstated or extended.

9. The plaintiff later filed this application. Directions on filing of written submissions were given on 7th June, 2018 for highlighting on 17th July, 2018. On 17th July, 2017 the applicant was granted 7 days to file submissions. On 11th March, 2018 counsels on record for parties herein orally submitted on this application.

10. Ms Nancy Njoroge for the applicant restated prayers in this application and grounds on the face of the application. She submitted that the applicant has not been served with Notice of Appeal contrary to plaintiffs' argument that they had filed on 12th September, 2012. She submitted that interim orders were not extended.

11. She further submitted that Ndimu farmers have been prejudiced by issuance of interim order and delay in this matter as title deeds cannot be issued. She submitted that contrary to blame by respondent on respondent that they have filed numerous applications while the applicant has filed only this application. She submitted that there is laxity on part of the plaintiff in prosecuting the application dated 28th February 2019 and urged court to dismiss it.

RESPONDENTS SUBMISSIONS

12. Mr. Mugambi for the plaintiffs/respondents relied on replying affidavit dated 9th March, 2019 in response to the application. Averments have been captured above. He submitted that the applicant stand to suffer no prejudice if the application is allowed to proceed. He submitted that Ndimu farmers are not a party to this suit and cannot be said to suffer prejudice.

ANALYSIS AND DETERMINATION

13. From record, it is evident that interim orders were not extended from 23rd March, 2016. Interim stay of execution was granted on 26th February, 2018 upon filing plaintiffs filing application dated 28th February, 2018. I have not seen extension of the orders. On perusal of the file, I have not seen appeal filed against judgment delivered by **Justice Kimaru** on 5th September, 2012.

14. Counsel for the plaintiff never responded to contention by defendant's counsel to the effect that that no appeal has been filed. Judgment herein was delivered over 6 years ago. Stay orders were granted pending appeal, which appeal the plaintiffs has failed to demonstrate that they filed.

15. The plaintiff has also failed to explain reason for delay in prosecuting application for stay of execution. It appears that upon getting stay orders, the plaintiff got comfortable and lost interest in either filing appeal or moving the court on application pending appeal.

16. In view of unexplained delay, I find that plaintiffs do not deserve grant of extension of interim orders earlier granted. Justice demand that there has be an end to litigation.

In the event that the plaintiffs are desirous in filing or prosecution an appeal, they have an option of seeking stay in the Court of Appeal.

FINAL ORDERS

1. Application dated 28th February, 2019 is hereby dismissed.
2. Interim orders of stay issued on 26th February, 2018 are hereby discharged.

3. Costs of this application to the applicants/defendants.

Judgment Dated, signed and delivered at Nakuru this 25th day of April, 2019.

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:-

SCHOLA/JARED COURT ASSISTANTS

M/S MUCHIRI COUNSEL FOR APPELLANT

N/A COUNSEL FOR RESPONDENT