



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 275 OF 2014

(Formerly NYERI HCC NO. 24 OF 2011 (OS))

JOSEPH GACHANJA GITUTO.....APPLICANT

-VERSUS-

GIDEON MWANGI CHEGE.....RESPONDENT

RULING

1. The notice of motion dated **10th June 2016**, brought under **Order 41 Rule 1** of the Civil Procedure Rules, seeks to set aside and/or review the order made on 7th April, 2015 allowing the respondent's application for stay of execution of the orders granted on 20th June, 2014 in favour of the applicant.
2. The application is premised on the grounds that while making its order for stay, the court held that the application for stay was not defended yet the applicant had filed grounds of opposition; that failure of the applicant's advocate to attend court for hearing of the application for stay was not intentional (the advocate is said to have been unwell) and that the applicant got to know about the order of stay when he presented mutation forms to the Deputy Registrar of this Court in execution of the decree issued in his favour on 13th November, 2014.
3. The application is supported by the affidavits of the applicant's advocate, Andrew Kariuki, sworn on **10th June, 2016** (supporting affidavit) and on 23rd **October, 2017**, further affidavit.
4. Vide the further affidavit filed on **31st October, 2017**, it is deposed that the orders sought to be set aside have since lost basis as the suit/appeal on which the order of stay was premised has since been dismissed.
5. The application is opposed on the grounds that no satisfactory reason or reasons have been given for setting aside or reviewing the order of stay; that there has been inordinate delay in bringing the application; that the respondent has appealed the decision made in ELC No. 13 of 2015; that allowing the application will render the appeal nugatory as the subject matter of the appeal would cease to exist and that the applicant will not suffer any prejudice if the orders sought are not granted as he is still in occupation of the suit property.
6. When the matter came up for hearing, the parties relied on the pleadings filed and the documents annexed to the affidavits sworn in support of the averments contained in the pleadings.

Analysis and determination

7. As pointed out above, the applicant seeks to set aside and or review the order of stay issued in favour of the respondent on 7th April, 2015 on the grounds set out herein above.
8. I have carefully read and considered the reasons given in support and opposition to the application.
9. Whilst I agree with the respondent that there was unexplained inordinate delay in bringing the application, I note that the appeals on which the application for stay was premised have since been heard and determined. The outcome of those appeals was not favourable to the respondent. In that regard, see the documents marked **AK-2** and **AK-3** in the affidavit sworn in support of the Application. Also see the document marked **AK-2** in the further affidavit sworn in support of the application.
10. Concerning the respondent's contention that he has filed an appeal against the decision made in Nyeri ELC No. 13 of 2015 and that

granting the orders will render the appeal nugatory, it is noteworthy that the orders sought to be set aside were issued on the basis of the circumstances that existed at the time, to wit, there were pending appeals on which the application was hinged. Those circumstances have since changed in that the appeals on which the application for stay of execution was hinged have been dismissed.

11. Even though the respondent has preferred an appeal against the decision made in one of the appeals in respect of which the order of stay was issued, there being no application for stay for consideration by this court based on the changed circumstances of the case, I am of the view that the respondent cannot continue enjoying the orders of stay in the changed circumstances.

12. If the respondent wants an order of stay based on the appeal filed after his appeal to this court was dismissed, he should move the court for appropriate orders.

13. The upshot of the foregoing is that the applicant has made up a case for setting aside the orders of stay issued on the 7th day of May, 2015 together with all the consequential orders which orders together with all the consequential orders.

14. Costs are awarded to the applicant.

Dated, Signed and Delivered in open court at Nyeri this 24th day of April, 2018.

L N WAITHAKA

JUDGE

Coram:

Ms. Wanjera h/b for Andrew Kariuki for the plaintiff

Joseph Gachanja – applicant

N/A for the defendant

Court assistant - Esther