



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU

CIVIL SUIT NO. 134 OF 2003

CATHERINE KAWIRA.....PLAINTIFF/RESPONDENT

VERSUS

MURUNGI KIRIGIA.....DEFENDANT/APPLICANT

RULING

[1] By a Notice of Motion Application filed in court on 16th May 2016, the Applicant seeks the following orders:

1.spent
2. **That there be orders of stay of eviction issued on 10th May 2016 against the Applicant/Defendant from Land Parcel Numbers Igoji/Kiangua/2037 and Igoji/Kiangua 2038 pending inter partes hearing of this application and final determination or whatsoever.**
3. **That there be cost in the application.**

[2] The application is supported Supporting Affidavit and a Further Supporting Affidavit sworn by the Applicant on 16th May 2016 and 12th February 2017, respectively. The Applicant argued that he has filed an appeal against the decision of the court. But his major arguments seem to be two. First, he claims that he was never served with the application which resulted into orders issued on 10th May 2016. He alleged that he only received information on 13th May 2016 that the OCS Nkubu Police Station had gone to his home with eviction orders issued on 10th May 2016. Two, the Applicant stated that he is an old man of advanced age. And that the suit land is the only place he has known as home and where he has lived with his family for over 40 years. Therefore, any eviction from the suit land will occasion him psychologically injury and irreparable damage. He, thus, prays for order of stay.

[3] The Respondent opposed the application through a Replying Affidavit filed in court on 5th June 2016. She deposed inter alia that she is a holder a judgment against the defendant which was delivered on 9th July 2009. The said judgment has been executed and the suit land has been distributed to her and two other persons. She averred further that the defendant had filed an application dated 16th June 2010, for stay of execution of the decree herein which application was dismissed on 18th May 2011. Contrary to the assertions by the Applicant, the Respondent stated that his advocates were served with the application dated 18th May 2011 and after service of the said application the Applicant filed a Replying Affidavit sworn by him on 7th June 2012 and Grounds of Opposition dated 27th October 2014. One other thing; the Respondent contended that this application has been overtaken by events in that the court's orders of 18th April 2016 had been executed and the Applicant was duly evicted from the suit lands.

DETERMINATION

[4] Upon careful consideration of this application and the rival submissions by the parties, I am of this orientation. The Applicant is seeking orders of stay of orders issued on 10th May 2016 for his eviction from Land Parcel Numbers Igoji/Kiangua 2038 and 2037. The two major reasons given by him are; (1) that he was never been served with the application which resulted into eviction orders issued on 10th May 2016; and (2) he will suffer irreparable damage if stay is not granted.

Service of application

[5] I turn to the record. Contrary to the Applicant's assertion, the record shows that the Application dated 18th May 2011 was served on Ndubi O' Ndubi and Associates Advocates for the Respondent. The Respondent even filed a Replying Affidavit to the said application on 7th day of June 2012. On 8th October 2014, in the presence of J. G. Gitonga for the Plaintiff and Mr. Kaimenyi holding brief for Mr. Ndubi for the Defendant, the court (Makau J) gave directions that the application dated 18th May 2011 shall be determined by way of written submissions. Pursuant to these directions, the Plaintiff through her legal counsel filed submissions on 27th October 2014. The Respondent also filed submissions to the said application on 30th October 2014 through his legal counsel. The Respondent in his Replying Affidavit on opposing the said application contending inter alia that:-

“the honourable court should dismiss the application for eviction as the Respondent/Defendant had an arguable appeal which was not frivolous and that the intended eviction will render the appeal nugatory as the respondent will be evicted from the suit property.”

Further, the court in its ruling of 18th April 2016, in issuing the eviction order rendered itself inter alia thus:

“the defendant opposed the application and filed written submission. His major point of opposition is that the plaintiff did not plead for eviction of the defendant for the suit land or that he has been in lawful occupation thereto. He submitted therefore, that eviction is an afterthought, a move that is misconceived, misplaced and in law, an abuse of court process and should be resisted by this court.....”

Consequently and in light of the foregoing the defendant/Applicant cannot be heard to say that he was not served with or he was not aware of the application dated 18th May 2011 which resulted into his eviction. Those arguments fail completely as they are made in bad faith in the hope that the court may be confused into thinking that this is a case of non-service of pleadings.

[6] The second argument presented by the Applicant is that he will suffer irreparable damage if he is evicted from the suit land which he claims to have been his only home and that of his family for 40 years. He also stated that he is an old man and that eviction would cause him psychological damage. I note that the Respondent has stated and that the Applicant has been evicted already. The Applicant confirmed this to court and paragraph 4 of his Further Supporting Affidavit is on point on this fact. Again, the decree in this matter has been fully executed and the suit land transferred to her and two other persons.

As a matter of law, stay of execution seeks to prevent something from happening and is not in the nature of mandatory injunction. The decree herein has been fully executed and eviction has taken place. Therefore, stay of execution is helpless and as such a court of law should never issue orders in vain. In any case, there is absolutely nothing which may impel the court to issue an order to restore the Applicant into possession and occupation of the suit land especially given the fact that he was found by the court to have acquired these lands in breach of trust in which he was the trustee. Such order would help the Applicant to steal a match from the Respondent.

There is no irreparable damage which will occur if stay is not granted. Thus, the best interest of justice

herein requires that I reject and I hereby reject the application dated 16th May 2016 with costs to the Respondent. It is so ordered.

Dated, signed and delivered in open court at Meru this 27th day of April 2017

F. GIKONYO

JUDGE

In the presence of:

Kariuki for Gitonga for plaintiff.

Murungi Kingia -defendant present

F. GIKONYO

JUDGE