



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**LAND CASE NO. 43 OF 2007**

**JOHN KUNDU KHISA:.....PLAINTIFF**

**VERSUS**

**KENNEDY KHISA KUNDU:.....DEFENDANT**

**R U L I N G**

**BACKGROUND**

1. The applicant is a son of the respondent. The respondent filed a suit against the applicant in 2007 in which he sought orders of eviction and permanent injunction against the applicant. The respondent contended that he was owner of plot No.50 at Sikhendu Market (suit land) and that the applicant had forcefully moved in and had refused to move out. Four months after filing the suit, the respondent filed an application seeking mandatory injunction ordering removal of the applicant from the suit land. The applicant who had been duly served with the application neither filed grounds of opposition or replying affidavit. The application proceeded ex-parte and a ruling delivered on 11.2.2009 allowing the same.

2. The applicant filed an application seeking to set aside the ex-parte proceedings resulting in grant of mandatory injunction for his removal from the suit land. This application was struck out in a ruling delivered on 8.12.2011. On 17.5.2012, the applicant filed an application seeking review and setting aside of the orders of 8.12.2011. This application was heard and dismissed in a ruling delivered on 22.8.2013.

**APPLICATION FOR DETERMINATION**

3. The applicant filed a notice of motion dated 3.7.2015 in which he sought the following orders:-

(i) That the honorable court be pleased to certify the application urgent and the same be heard ex-parte in the first instance due to its nature.

(ii) That the honorable court be pleased to grant stay of execution of a decree purported to have been giving on 30.1.2015 pending the hearing of the application inter-parties.

(iii) That the honorable court be pleased to grant a stay of execution of the decree given on 30.1.2015 pending the hearing and determination of the intended appeal to the court of appeal.

(iv) That the honorable court be pleased to grant stay of execution of the court's orders given on 21.1.2009 pending the hearing and determination of the intended appeal to the court of Appeal.

(v) That the costs to abide the intended appeal.

4. The application is expressed to be brought under the provisions of Order 53 Rule 1 and Order 42 Rule (1) 6 of the Civil Procedure Rules and section 1, 1A & B and 3A of the civil Procedure Act as well as Article 159 of the constitution of Kenya. The applicant contends that there was no decree or order of court issued on 30.1.2015. That no notice to show cause was served upon the applicant. That he has filed a notice of appeal to the court of Appeal.

5. The applicant further contends that the appeal filed raises arguable grounds with high chances of success and that if the stay is not granted, he will suffer loss and that he has attachment to the land having buried his wife on it. He finally contends that the appeal will be rendered nugatory should stay be rejected.

6. The respondent opposed the application through a replying affidavit sworn on 4.9.2015 in which he contends that the applicant is out to deny him the fruits of an order he was granted by the court. That the decree complained of contains typographical errors which cannot form basis for the applicant refusing to comply with the court order. He contends that the notice of appeal was filed way back in 2013 and that the applicant has never bothered to prosecute it and that in any case, there is no appeal filed as no memorandum of appeal has been exhibited.

7. I have considered the applicant's application as well as the opposition thereto by the respondent. The applicant is seeking inter alia stay of execution of a decree given on 30.1.2015. There was no decree given on 30.1.2015. What the applicant is referring to as a decree given on 30.1.2015 is actually one which was given on 11.2.2009. A mistake occurred when the respondent came to extract the decree from the order given on 11.2.2009. The decree was wrongly dated as having been given on 30.1.2015 when it ought have shown that it was given on 11.2.2009. The applicant was aware about the mistake but he nevertheless went a head to seek to stay a non existent decree. To this extent, I find that the prayer seeking to stay the same is misconceived and cannot be granted as to do so will be giving orders in vain.

8. The applicant is also seeking stay of execution of the orders given on 21.1.2009. There was no order given on 21.1.2009. What happened on 21.1.2009 is that Justice Ombija heard the application for mandatory injunction and reserved the ruling which was to be delivered on notice. The reserved ruling was delivered on 11.2.2009. There is therefore no order given on 21.1.2009 which can be stayed as to do so will be giving orders in vain.

9. The applicant contends that he has preferred an appeal to the court of Appeal. The said appeal is against this court's ruling of 22.8.2013. Order 42 rule 6 gives conditions upon which stay of execution can be granted. First the application for stay must be made without unreasonable delay. Secondly, the applicant must demonstrate that he will suffer substantial loss should stay not be granted. Thirdly there must be such security as will bind the applicant on the decree.

10. The ruling being appealed against was delivered on 22.8.2013. The current application was filed on 3.7.2015. This is a period of about two years from the date of ruling. I find that the delay in bringing the application is unreasonable in the circumstances.

11. On the issue of substantial loss, the applicant has not demonstrated what loss he will suffer if stay is not granted. The mandatory injunction order was given on 11.2.2009. The same has never been executed and no appeal was preferred against the same. The appeal is not against the said order but against, the ruling of 22.8.2013 which declined to review and set aside the orders of 8.12.2011. I do not see what loss the applicant will suffer if stay is not granted. The applicant is guilty of laches and does not deserve any exercise of discretion from the court. For the above reasons, I find that the applicant's application lacks merits. The same is hereby dismissed with costs to the respondent.

It is so ordered.

Dated, signed, and delivered at Kitale on this 25th day of February, 2016.

**E. OBAGA**

**JUDGE**

In the presence of:-

Mr. Karani for the Plaintiff/Respondent and Defendant/Applicant.

Court Assistant - Winnie.

**E. OBAGA**

**JUDGE**

25/2/2016