



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL APPEAL NO. 21 OF 2010

FREDRICK KADIRIKI MWAMBERIAAPPELLANT

VERSUS

STEPHEN ZIRO AROME1ST RESPONDENT

JOHAH MWAMUMBA AROME2ND RESPONDENT

(Being an Appeal from the Judgment of HON. Andayi W F of 26th January 2010 in SRMCC Kaloleni Civil Case No. 25 of 2008)

RULING

1. The Senior Resident Magistrate's court Kaloleni on 26th January 2010 ordered by its judgment the appellant Fredrick Kadiriki Mwamberia to vacate parcel No Mbwaka/Maereni/694. Appellant being aggrieved by that judgment filed this present appeal on 15th February 2010.
2. It was not until 12th May 2015, that appellant filed the Notice of motion of even dated date, which application is the subject of this Ruling.
3. Appellant by that application seeks stay of execution of the lower court judgment pending the determination of this appeal. Appellants application is based on the grounds that respondent has applied to execute the lower court's judgment; and that appellant who is of advanced age will lose his place of abode that is MBWAKA MAERENI/89 if execution is not stayed.
4. The application is opposed by the respondents on the ground that the title to the parcel No MBWAKA/MAEREN/89 was sub-divided into two portion namely MBWAKA/MAERENI/689 registered in appellant's name and MBWAKA/MAEREN/694 registered in the name the respondent's deceased father. That accordingly following gazette notice No. 8615 of 28th October 2005 parcel No 89 ceased to exist. Respondents deponed that appellant was ordered on 26th January 2010 to give vacant possession of parcel No. 694 registered in respondent's deceased father by the lower court but that he has resisted that order.
5. Respondents submitted that appellant had lied in his affidavit when he deponed that he would lose his land if execution was not stayed. That he has his parcel of land No. 689 which he has refused to move to. Respondent cited the case **CALTEX OIL KENYA –V- TOO t/a KERICHO CALTEX SERVICE STAION (2005) eKLR** where the court stated:

“A Judgment –Debtor coming to court for indulgence under Order 20, Rule 11(2) of the Rules

must first and foremost show absolute good faith and that he is not merely seeking to delay the course of justice. Although the court will no doubt consider the Judgment-Debtor's personal hardship, nevertheless it will be mindful of the fact that the Decree-Holder is entitled to realize the fruits of his judgment, notwithstanding that in the eyes of the judgment-Debtor the decree-holder is rich and does not need the money as badly as the judgment-Debtor does."

6. Respondents also objected to the prayers sought in the application on the ground that appellant had delayed for 5 years to seek stay of execution. The judgment subject of this appeal was delivered in the lower court on 26th January 2010.

7. The appellant's explanation for failing to file his application for stay pending appeal without delay was, as he deponed in his affidavit in support, that:

"That the applicant filed this appeal in 2010, but the office file was lost and is yet to found..."

ANALYSIS

Appellant is expected to satisfy the court that he will suffer substantial loss if stay is not granted and should also satisfy the court that his application is filed without delay. That is what Order 42 Rule 6 (2) (a) and (b) provides. That Rule provides:

(2) No Order for stay of execution shall be made under subrule (1) unless-

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant

8. Appellant stated that he will suffer if he is evicted from the suit land. What the appellant failed to do when he filed his application, was to inform the court that if execution does proceed he will not be rendered homeless because he has a parcel of land which is registered in his name. Appellant in failing to inform the court of the alternative parcel of land available to him failed the test required when one approaches the court *ex parte*. Such a party is required to act with utmost good faith. In that regard I refer to the case **STANLEY KUBANIA M'EKABU & ANOTHER -V- JOSHUA MWITI M KABORO (2011) e KLR** where the court had this to say:

"At an ex parte stage, it is essential that a party should present all the facts before the court. When a party approaches court ex parte, he assumes a responsibility to act in utmost good faith and to make full disclosure of all material evidence. This was so stated in the case The Owners of the Motor Vessel (Lillians) vs. Caltex Oil (Kenya) Ltd Civil Appeal No 50 of 1989. The court of appeal in that case stated-

"It is axiomatic that in ex parte proceedings there should be full and frank disclosure to the court of facts known to the applicant, and that failure to make such disclosure may result in the discharge of any order made upon the ex parte application, even though the facts were such that, with full disclosure, an order would have been justified: See Reg. vs Kensington Income Tax Commissioners ex parte Princess Edmond de Polignac (1971) 1 KB 486. Examples of this principle are to be found in the case of ex parte injunctions, ex parte orders made for service of proceedings out of the jurisdiction under Order 11 of the Rules of the Supreme Court. In our judgment, exactly the same applies in the case of an ex parte application for the arrest of a ship where, as here, there has not been full disclosure of the material facts to the court."

9. On that ground that the appellant failed to make material disclosure when he approached this court, *ex parte*, on 12th May 2015 will lead to the order granted being discharged.

10 Further appellant's application will fail because of it being filed after inordinate and unexplained delay. It was not sufficient for appellant to depone that office file went missing. One is left wondering which office file went missing. If it is his advocate's file that went missing, unless he is an employee of his advocate's firm, he is unqualified to depone to that fact, and unless his deposition is from his own knowledge and if so he should have stated so. See Order 19 Rule 3 of the Civil Procedure Rules.

10. It is clear from the above discussion that appellant is one who does not deserve the exercise of the court's discretion in his favour to stay execution of the lower court's judgment. In view of that finding the appellant's Notice of Motion dated 12th May 2015 is dismissed with costs to the respondents and for the avoidance of doubt the stay of execution granted by this court on 12th May 2015 is hereby discharged and set aside.

Dated and delivered at Mombasa this 25th day of June 2015

MARY KASANGO

JUDGE

25.6.2015

Coram

Before Justice Kasango

C/Assistant – Kavuku

For Appellant:

For Respondent:

Court

Ruling delivered in their presence/absence in open court.

MARY KASANGO

JUDGE