



232/2014

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL CASE NO. 65 'B' OF 2012

KIVISU KIMWELEAPPELLANT/APPLICANT

VERSUS

BENJAMINI MULEI MUSAKIDEFENDANT/RESPONDENT

RULING

1. The application dated **14th January, 2014** is brought pursuant to the provisions of **Order 22 rule 22(1), Order, 44 rules, 1,2, and 3** of the **Civil Procedure Rules 2010; Section 63(c)** of the **Civil Procedure Act**. The applicant seeks stay, variation and/or review of orders of eviction issued by the **Senior Principal Magistrate, Kitui** on the **18th April, 2013** and all other consequential orders pending hearing and determination of the appeal.
2. The application is premised on grounds that eviction orders were issued in **CMCC No. 197 of 2003** following a judgment delivered on the **8th May, 2012**. The applicant has preferred an appeal challenging the decision thereof. Fresh notices of eviction have been issued. Having established a home on the land in dispute for the last 50 years the applicant has no place to go and the respondent is using the court process to perpetuate an injustice. The respondent filed a succession Cause and failed to disclose interest of a purchaser. The applicant was denied a chance of ventilating her defence as her advocate was absent hence needs a chance to defend herself. Being a senior citizen of advanced age with grown-up children and spouses residing on the parcel of land, the eviction will subject them to hardship.
3. The application is supported by an affidavit deposed by **Kivisu Kimwele** the applicant where she states that the case proceeded in the absence of her counsel therefore she was not able to prosecute her defence and counterclaim. As a result judgment was entered against her and eviction orders granted. She engaged another counsel to institute an application to set aside the *ex parte* judgment entered and also filed the appeal. She was however served with a notice to vacate the suit property. If orders sought are not granted the applicant and her family will be rendered destitute. The respondent opposed the application.
4. It was the submission of counsel for the applicant, **Mr. Muema** that she was denied evidence in the Lower Court because of non-payment of costs. They filed an application to set aside the judgment entered which remained pending until the fresh notice of eviction was issued that is why it took the applicant one year prior to filing the instant application for stay. The respondent, the son of the original seller of land concealed the existence of the Succession Cause which results into her acquiring ownership of the land.
5. In a response thereto, counsel for the respondent **Mr. Muithya** stated that the appellant was

mischievous because she filed the appeal but failed to serve the respondent with the Memorandum of Appeal. The respondent came to see the Memorandum of Appeal when he accompanied the bailiff to the *locus quo*. There was inordinate delay in bringing the application. No explanation had been given why the applicant did not prosecute the application filed in the Lower Court. Counsel further stated that the applicant was given an opportunity to defend herself but she failed to do so. The appeal was incompetent.

6. Ideally, this application should have been brought under **Order 42 rules 6 of the Civil Procedure Rules**. Under the aforesaid order, the court has discretion to grant an order of stay of execution if substantial loss may result to the applicant and the application ought to have been made without unreasonable delay. In the case of **Mukoma versus Abuoga** it was held thus:-

“the granting of a stay of execution in the High Court is governed by... the question to be decided being whether substantial loss may result unless the stay is granted, whether the application is made without delay and whether the applicant has given security”.

7. Judgment in the case was delivered on the **8th May, 2012**. An appeal was filed by the applicant, who was aggrieved on **8th June, 2012**. This was within the time frame given within which she could appeal. Per what has been stated the appeal was not served upon the respondent. It is however admitted that an application for setting aside the judgment entered was filed which stands undecided to-date. This has been explained that the applicant stayed for **1½ years** prior to filing the instant application as the other application was pending in court. Having been served with fresh eviction orders she moved the court. In the case of **Butt versus Rent Restriction Tribunal [1982] KLR 47 Madan, J A** held thus:-

“It is the discretion of the Court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal if successful being nugatory. Per Better L.J. in Wilson versus Church [No. 2] 12 CH D (1879) 454 at Pg . 459”.

8. Looking at the peculiar circumstances of this case, it is stated that the applicant was ordered to proceed with the case in the absence of her advocate. The High Court may wish to interrogate whether due process was followed in the circumstances. She also had a counter-claim against the respondent. The question that may need to be answered could be whether the court could have reached a contrary decision had she been heard. In the circumstances, I am persuaded that she may be having an arguable appeal. Regarding the issue whether she will suffer substantial loss if orders sought are not granted. It is obvious she is to be evicted from a parcel of land she has occupied for what she alleges to be more than **50 years**. The husband allegedly having been a purchaser for value. If she is evicted prior to the hearing of the appeal, definitely she will suffer substantial loss. In the premises justice would call upon me to grant the orders sought.
9. However, taking into consideration the length of delay taken prior to having this application heard, the applicant having failed to demonstrate that she made any effort of having the application in the Lower Court heard and/or serve the Memorandum of Appeal filed on the respondents, she must furnish some security. In the premises, I grant the order sought on condition that she deposits **Kshs. 100,000/=** in court to secure the appeal within **one (1) month**. In default execution to issue. Costs of the application shall be in the appeal.

DATED, SIGNED and DELIVERED at MACHAKOS this 3RD day of APRIL, 2014.

L.N. MUTENDE

JUDGE