



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

Misc. Civil Application No. 67 Of 2011

MUSA LICHUNGU APPLICANT

VERSUS

MAMUSABU ARAP SITIENI..... RESPONDENT

RULING

This is a Notice of Motion dated 31st October, 2011 brought by Musa Lichungu under **Section 79G** of the Civil Procedure Act (Cap. 21). It was filed on his behalf by Amasakha & Co. advocates. The applicant has listed six prayers, some of which have been spent as follows -

1. (spent)
2. (spent)
3. **That leave be granted to the applicant to file an intended appeal against the ruling/order delivered in Kakamega CMCC No. 140/90 in respect of the applicant's application to set aside the ex-parte judgment delivered therein.**
4. **That the draft appeal annexed hereto be deemed duly filed and admitted out of time upon payment of the requisite filing fees.**
5. **That upon admitting the appeal out of time as stated in prayer 4 above, a further order be made staying execution of the judgment/decree in Kakamega CMCC No. 140/90 pending the hearing and final determination of the said appeal.**
6. **That an order be made that costs of this application abide the outcome of the said appeal.**

The application has grounds on the Notice of Motion and was filed with a supporting affidavit sworn by the applicant on 3/10/11.

The application is opposed. A replying affidavit sworn by Mamusabu Arap Sitienei, the respondent was filed on 25/4/12.

At the hearing of the application, Mr. Amasakha for the applicant and Mr. Elung'ata for the respondent relied on the documents filed.

Having considered the application and perused all the documents filed, I observe that a number of rulings were made in this matter culminating in a ruling delivered by **Kimaru, J.** on 25/10/11 in Kakamega Civil Case No. 178/10. In that ruling, the learned Judge dismissed a suit filed for a declaration of ownership through adverse possession, after the original suit in Kakamega CMCC No. 140/90 had been determined.

The applicant, who was the defendant in Kakamega CMCC No. 140/90, has now come through the present application asking for the orders listed above.

In my view and in the interest of substantive justice as envisaged under **Article 159 (2) (d)** of the Constitution of Kenya 2010, the applicant should be granted leave to appeal. Though he took a long time to show interest to appeal, this being a land matter the justice of the case requires that he be granted an opportunity to canvass his position substantively in court. I will thus grant him leave to appeal.

Prayers 4 and 5 of the application will not be granted. The applicant will have to file his own appeal after this decision. In addition, stay of execution cannot be granted as the applicant has taken inordinately long to make this application. He has not satisfied the requirements for grant of stay under Order 42 rule 6 (1) and (2) of the Civil Procedure Rules. In particular he has not given an explanation for the delay. This court is not currently sure what the position of execution of the decree is. I will not grant orders in vain.

Consequently, I grant leave to the applicant to appeal out of time against the order/ruling delivered in Kakamega CMCC No. 140/99 in respect of the applicant's application to set aside the ex-parte judgment delivered therein. The applicant will file the appeal within 14 days from today. The prayer for stay of execution of the judgment or decree is declined. The applicant will pay the costs of this application to the respondent, in view of the particular circumstances and facts of this matter.

It is so ordered.

Dated and delivered at Kakamega this 3rd day of April, 2014

George Dulu

J U D G E