

O.XLI R.4 Stay of Execution pending appeal principles applicable

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CIVIL APPEAL NO.74 OF 2010

1. JOYCE M'KUURA
2.MUKOMAU M'KUURA

3.MOSES MUTHEE M'KUURA.....APPELLANTS

VERSUS

JUSTUS KABAYA.....RESPONDENTS

RULING

The application is a Chamber Summons application dated 11th August 2010. It has been brought under O.XLI rule 4 of CPR and S34A of CPA. It seeks a stay of execution be granted pending the hearing and determination of the appeal filed herein. The application is premised grounds cited on the face of the application as follows:-

“(a) that the Respondent has on 30th July, 2010 attempted to evict the Applicants from the suit Land and destroy their property;

(b) that the above said eviction is carried out pursuant to the ruling delivered on 7th July, 2010 in favour of the Plaintiff/respondent herein and against the Defendants/Applicants which was to set aside an ex-parte Judgment;

(c) That the Defendants having been aggrieved by the said Ruling, have already filed an Appeal and obtained copies of the proceedings and Ruling for purposes of filing a record of appeal;

(d) That the execution of Maua PMCC NO.87 OF 2005 is imminent and will render the intended appeal nugatory if the same is not stayed;

(e) That this Court will not resume its normal sitting until mid-September 2010;

The application is supported by an application shown by 1st Appellant of even date.

The application is opposed. The Respondent has sworn a replying affidavit. The gist of the affidavit is that the application should be dismissed because the applicants deliberately failed to attend the hearing of the case despite being served with a hearing notice. The Respondent deposes further that the applicants did not plead fraud in their defence nor did they counter claim and that they were too late to plead the same in the current application.

Mr. Rimita (Rtd Judge) urged the application on behalf of the applicants. He urged two points. One that the applicants were not served with the hearing notice and therefore the matter was heard ex-parte and judgment entered against them. Counsel urged application to set aside judgment was declined by lower court on grounds the magistrate who succeeded the case could not set aside his colleague's finding that there was proper service.

The second ground urged is that the applicants have good defence in that there has been a dispute about the numbering of the parcels of land the subject matter of the case. Counsel urged that if the application is

not granted the applicants stand to be evicted from their homes.

The Respondent was represented by Mr. Kirima. Counsel opposed the application and urged that the reason a similar application was declined by the lower court was because the lower court's judgment had already been executed and applicants evicted from the land.

The second point urged is that the affidavit in support of the application was defective because it was sworn by all three applicants and that O.XVIII r 5 provided that an affidavit had to be sworn in the first person.

In response to the challenge that the supporting affidavit was defective, Mr. Rimita submitted that O. XVIII r 5 does not state that an affidavit shall be drawn by one person.

I will begin with the issue of the Affidavit. O.XVIII rule 5 of CPR stipulates:

“Every Affidavit shall be drawn in the first person and divided into paragraphs numbered consecutively which shall be confirmed as nearly as may be to distinct portion of the subject”

I agree with Mr. Rimita. The rules say that an Affidavit shall be drawn in the first person, not in singular. There is a difference between the two and I believe that Mr. Kirima mistakenly thought that first person means the same thing as singular. It does not. First person emphasizes the need for the deponents to identify with the information given as opposed to be reporters of the information. Nothing turns on this point.

The Application was brought soon after execution of judgment was started and therefore it was brought within a reasonable time.

O.XLI rule 4 under which this Application is brought gives the court power to order stay of execution for “insufficient cause shown” under OXLI rule 4 (2) sets out conditions which must be met before stay is ordered. The rule provides as follows;

“(2) No order for stay of execution shall be made under sub-rule 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.”

The Applicant must show what loss he stands to suffer if the application is declined, and that the loss is substantial. The court has considered the surrounding circumstances of the case. The subject matter of the suit is land. The Applicant's complaint is he stands to be evicted from his land if stay is not granted. Most importantly the Applicant states that he has been condemned unheard as the case was heard exparte without due service of the hearing notice.

The prayers sought here are equitable in nature. They are also discretionary. I have considered that the applicant was never heard at the trial. He stands to loose his land on which he has lived and still lives before being heard. I think that loss of land can result in a substantial loss which cannot be remedied especially if it is where one has lived for a long time. I think that the result of an eviction cannot easily be remedied and as a result the appeal herein may be rendered nugatory.

It is a cardinal rule of natural justice that no one should be condemned unheard. For that reason the fact the judgment of the lower court has been executed, whether wholly or in part, is not a good reason to decline the order of stay of execution. If indeed there is an issue with the service, to decline the order sought before hearing the Appeal would be to countenance a wrong which started at the trial of the case. I think that the Applicant is deserving to be protected of such an eventuality.

Regarding security for the due performance of the decree Mr. Rimita for the Applicants left it with the court to decide. I have considered that the subject matter of this case is land which is under Adjudication. It is difficult to access the value of it. As to the costs in terms of execution, that cannot be a substantial sum as the prayers sought are a declaratory order and eviction.

Having given due consideration to this application I will grant the Application in the following terms;

1. An order of stay of execution of decree be and is hereby issued pending the hearing and determination of this appeal;
2. The Applicants shall deposit with this court Kshs.20,000/- being security for the due performance of the decree;
3. The costs of the Application shall abide the outcome of the Appeal.

Dated at Meru 3rd day of December 2010

LESIIT
JUDGE

3rd December 2010

Coram:

Lesiit J.....Judge
Kiriimi/Mwonjaru.....Court clerks
Mr. Rimita.....For Appellant
Mr. Kirima.....For Respondent

Judgment was read, signed and delivered in open court this 3rd December 2010.

LESIIT J.
JUDGE