



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MALINDI

ELC CASE NO. 140 OF 2013

CECILIA KADZO EMMANUEL

CECILIA KADZO EMMANUEL (Suing as the Administrator of

JONATHAN M. KARISA (DECEASED).....PLAINTIFF

VERSUS

MIRIAM CHEA MUNGAI.....DEFENDANT

RULING

1. By her Notice of Motion application dated 4th December 2009, Cecilia Kadzo Emmanuel suing as the Administrator of Jonathan M. Karisa (the Plaintiff/Applicant) prays for an order staying the execution of Judgment/decree herein pending the hearing and determination of an Appeal preferred to the Court of Appeal.

2. The application which is supported by the Plaintiff's affidavit is based on the grounds: -

a) That the Applicant has filed a Notice of Appeal against the Judgment of 29th October 2019;

b) That the Defendant/Decree-holder will at any time commence execution of the Judgment which will mean demolishing what was left of the Applicant's structure and render the hearing of the Appeal nugatory and an exercise in futility;

c) That it is necessary to stay execution of the Judgment for the interest of justice to give the Applicant an opportunity to have her day in the Court of Appeal; and

d) That the Defendant will not be prejudiced because she is in occupation (of) a portion of the land in dispute.

3. The application is opposed. In her Replying Affidavit sworn and filed herein on 18th December 2019, Miriam Chea Mungai (the Defendant) avers that the application is devoid of merit as no plausible reason has been offered to the Court to warrant a stay of execution. The Defendant further avers that the application has been filed after an unexplained inordinate delay of 41 days after the Judgment was delivered and terms the same an extension of the long journey of the personal vendetta and harassment by the Plaintiff for the past nine years.

4. The Defendant further avers that contrary to her assertions, the Plaintiff does not live on the suit properties as her house was long demolished and the Plaintiff has her parcel of land elsewhere being Plot No. 490 within Kibarani Kibaoni Bayamagonzi (KKB) Scheme.

5. I have perused and considered the Plaintiff's application and the response thereto by the Defendant. I have also perused and considered the rival submissions and authorities as placed before me by the Learned Advocates for the parties.

6. Order 42 Rule 6 of the Civil Procedure Rules under which the application is brought sets out the prerequisites that must be met before the Court can exercise its discretion to order a stay of execution. In that respect, the Court must be satisfied that: -

a) Substantial loss may result to the applicant unless the order is made;

b) The application has been made without unreasonable delay; and

c) Such security as the Court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the Applicant.

7. The Judgment sought to be stayed was delivered herein on 24th October 2019. This application was therefore filed some 40 days later. While the Defendant has attacked the application as having been filed after an inordinate delay, I have considered the circumstances herein and did not consider the delay inordinate.

8. The main thrust of the application is that the Plaintiff's remaining structures on the suit property risk being demolished and that she stands to be evicted by the Defendant in execution of the Judgment. A perusal of the said Judgment reveals that the Plaintiff's parcel of land abutts that of the Defendant. It was also clear from a perusal of a Report prepared by the District Surveyor that part of the Plaintiff's house and her cow shed fall within the Defendant's parcel of land.

9. From the material placed before me, I was not persuaded that the removal of a section of the house and the cowshed would constitute substantial loss to the Plaintiff. I did not hear the Plaintiff to be stating that the Defendant intends to sell or dispose of the portion of her land to which the Plaintiff's house and cowshed have encroached.

10. As was stated in James ***Wangalwa & Another –vs- Agnes Naliaka Cheseto (2012) eKLR: -***

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the Civil Procedure Rules. This is so because execution is a lawful process.”

11. In the premises herein and taking into account the totality of the circumstances before me, I agree with the Defendant that the scales of justice militate against an order stopping the Defendant from accessing and using the suit property. Accordingly, the Motion dated 4th December 2019 is hereby dismissed with costs to the Defendant/Decree-holder.

Dated, signed and delivered at Malindi this 29th day of January, 2021.

J.O. OLOLA

JUDGE