



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELC MISC APPLICATION NO. E020 OF 2020

AGNES MBITHE NDUBA.....APPLICANT

=VERSUS=

NORAH WANZA.....RESPONDENT

RULING

1. This is a Ruling in respect of a notice of motion dated 27th July 2020 in which the Applicant seeks extension of time to file appeal to this court and for stay of execution of a Judgement delivered on 30th April 2020 as well as an injunction restraining the Respondent from interfering with Plot No. 223 Kayole Spring Valley Squatters Resettlement Scheme (suit property).
2. The Applicant contends that the Judgement, herein was delivered without the parties being informed about its delivery and that as at the time she came to learn of the Judgement, the 30 days for filing appeal had expired. The Applicant contends that she purchased the suit property in 2001 after which she developed it and has been in occupation for over 18 years.
3. The Applicant is apprehensive that if stay of execution is not granted, her buildings will be demolished in execution of the decree and the intended appeal will be rendered nugatory. It is on this basis that she prays for the orders in the notice of motion.
4. The Respondent has opposed the Applicant's application based on a replying affidavit sworn on 30th September 2020. The Respondent contends that Judgement was sent to the Advocates for the parties through e-mail and that the Applicant should not claim that she was not aware of the Judgement. The Respondent argues that this application is meant to deny her from enjoying the fruits of the Judgement which was obtained after five years from the date the case was filed.
5. I have carefully considered the Applicant's application as well as the opposition to the same by the Respondent. I have also considered the submissions filed by the parties. The issues which emerge for determination are firstly whether there should be extension of time for filing an appeal. Secondly, whether stay of execution can be granted. Thirdly, whether an injunction can be granted to preserve the suit property.
6. On the first issue, I have looked at the judgement of the lower court which was annexed to the supporting affidavit of the Applicant. The Judgement was delivered on 30th April 2020 in the absence of the parties. Though the Respondent contends that the Judgement was transmitted to the parties via e-mail, there is no evidence that that was the case. There are numerous decisions from the courts on what is to be considered when dealing with applications for extension of time. Some of the factors to be considered are the length of delay, the reason for the delay, the chances of the appeal succeeding and the degree of prejudice to the Respondent if extension is granted.
7. In the instant case, the Judgement was delivered on 30th April 2020. This application was filed in July 2020. The delay in filing was close to three months. This delay has been explained. There was no communication as to the delivery of the same. This court takes judicial notice of the fact that the Judgment was delivered at the height of the scare of Covid 19 which was ravaging the entire world.
8. The Applicant has stated that she purchased the suit property in 2001 and has been in possession for over 18 years. This has not been controverted by the Respondent. The Respondent purchased the suit property in 2009. This shows that the Applicant has an arguable appeal. It is not the Respondent who is in possession and therefore any prejudice which she may suffer if any is negligible. I therefore find that this is a proper case for extension of time to file appeal.
9. On the second issue, the Applicant is seeking stay of execution of the Judgement. What happened herein is that the Applicant's counter-claim was dismissed. There is therefore nothing to stay. The lower court gave a negative order in that there is nothing to execute except for costs. There is therefore nothing capable of being stayed in as far as the dismissed counter-claims is concerned.
10. In as far as the Respondent's claim which was allowed, I notice from prayer (a) that the Applicant was restrained from occupying the suit

property. If the Respondent was to move and execute this Judgement, it will lead to eviction of the Applicant. If this were to happen, the buildings which she has put up will be demolished and this will occasion substantial loss. I therefore find that there is need to stay the execution of the Judgement.

11. On the third issue, the Applicant is seeking for injunction. Order 42 Rule 6 (6) provides as follows: -

“Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with”.

12. A reading of order 42 Rule 6(6) shows that a court to which an appeal is being preferred can grant an injunction where the procedure for filing appeals from a subordinate court have been complied with. In the instant case, the procedures for filing an appeal to this court from the lower court have not been complied with. It therefore follows that no injunction can be granted.

13. All in all, I allow extension of time to file appeal by 14 days. I grant stay of execution of the decree from the lower court until the filing, hearing and determination of the intended appeal. The Applicant shall deposit in court security for costs in the sum of Kshs.100,000/= within 60 days failing which the stay shall automatically lapse without any recourse to the court.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 25TH DAY OF FEBRUARY 2021.

E.O.OBAGA

JUDGE

In the Virtual presence of:-

Mr Kimathi for Mr Muli for Applicants

Court Assistant: John

E.O.OBAGA

JUDGE