



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC MISC APPLICATION NO. 27 OF 2020

KAMAKEN PATIANY SAIDIMU.....PLAINTIFF/ RESPONDENT

AND

SALAU OLE MURANKE PARMUAT.....DEFENDANT/APPLICANT

RULING

What is before Court for determination is the Applicant's Notice of Motion Applications dated the 8th September, 2020 and 14th September, 2020. In the Notice of Motion dated the 14th September, 2020 the Applicant seeks the following orders:

1. Spent
2. Pending hearing and determination of this Application inter partes, this Honourable Court be pleased to stay the judgement delivered on 9th September, 2020 in CMCC ELC Case No. 190 of 2018 and stay any execution emanating from the said judgement.
3. The costs of this Application be provided for by the Plaintiff/Respondent.

The application is premised on the grounds on the face of it and the supporting affidavit of the Applicant SALAU OLE MURANKE where he explains that on 9th September, 2020, a judgement was delivered in favour of the Respondent by Hon. Irene Kahuya in CMCC ELC Case No. 190 of 2018. He contends that the Court ordered that the Court Bailiff oversee the eviction process which will see him evicted from his land which he has occupied for thirty (30) years. He claims the trial court barred him from being heard on merits by issuing a judgement date on 22nd July, 2020 despite the Defendant having complied with directions of the court issued on 11th March, 2020. He insists the Court violated his constitutional right under Article 27(2) and 80 of the Constitution. Further, that his Defence raised triable issues. He reiterates that the Respondent will not suffer any real or perceived prejudice if the judgement is stayed.

The Respondent opposed the application and filed Grounds of Opposition where he contended that the application is misconceived, bad in law, frivolous and incompetent. He proceeded to give highlights of the proceedings in the lower court. He referred to the Press Statement issued by the National Council for Administration of Justice dated the 15th March, 2020 in respect to Administrative and Contingency Management Plan to Mitigate COVID 19 in Kenya's Justice System. He insisted that the Applicant was well represented by and when the date for delivery of judgement was reserved for 9th September, 2020. Further, the application is merely calculated to cause a delay in this matter and deny the Respondent the ultimate enjoyment of fruits of his entitlement.

The Applications were canvassed by way of written submissions.

Analysis and Determination

Upon consideration of the two instant Notice of Motion applications including the Grounds of Opposition and rivalling submissions, the only issue for determination is whether there should be a stay of the judgement delivered on 9th September, 2020 in CMCC ELC Case No. 190 of 2018 and any execution emanating therefrom.

In his submissions, the applicant reiterated his claim and relied on the decisions of **Standard Chartered Financial Services Limited & 2 others V Manchester Outfitters (Suiting Division) Limited (Now known as King Woollen Mills Limited & 2 others (2016) eKLR; James Kanyiita & Another V Marios Philotas Ghikas & Another (2016) eKLR and Nicholas Salat V IEBC CA (Application) No. 228 of 2013.**

The Respondent in his submissions contended that there are no subsisting substantive prayers/ or orders for determination on the face of the

application dated the 14th September, 2020. To buttress his averments, he relied on the decisions of **Daniel Kariuki Kamau V Hannah Wanjiru Kamau & 8 Others (2018) eKLR** and **Daniel Otieno Migore V South Nyanza Sugar Co. Ltd (2018) eKLR**. He further submitted that the delay in compliance with the orders of court issued on 11th March, 2020 by the Applicant is inordinate and therefore inexcusable. He relied on the decision of **Joseph Ouma Onditi V Jane Kisaka Mungau (2018) eKLR**; **Utalii Transport Company Ltd & 3 Others V NIC Bank Ltd & Another (2014) eKLR**. Further that the legal threshold for grant of the orders sought in the application has been reached. To support this argument, he relied on the case of **Abraham Lenaula Lenkeu V Charles Katekeyo Nkaru (2016) eKLR**.

Order 42 Rule 6 of the Civil Procedure Rules stipulates thus; ‘**No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside. (2) No order for stay of execution shall be made under sub-rule (1) 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. (3) Notwithstanding anything contained in sub-rule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application. (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given. (5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling. (6) Notwithstanding anything contained in sub-rule (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.’**

In the case of **Independent Electoral and Boundaries Commission & Another v Stephne Mutinda Mule & 3 Others (2014) eKLR** in reference to the Nigerian Case of **Adetoun Oladeji(NIG) LTF vs Nigerian Breweries PLC SC 91/2002** the court stated that:

“It is now a very trite principle of law that parties are bound by their pleading and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issues and must be disregarded”

Further, in the case of **Daniel Kariuki Kamau V Hannah Wanjiru Kamau & 8 others (2018) eKLR** the Court noted as follows: ‘**I am afraid the Applicant did not seek for any orders which may be granted. His only substantive prayer was for the grant of an interlocutory injunction pending the hearing and determination of this application. That order was granted at the time when the application was certified urgent. It was to be in force pending the hearing and determination of the application. Once the application is heard and determined, that order will have served its purpose and there will be nothing more to be done..... The application should have included a prayer for an injunction pending the hearing and determination of the petition for the grant of letters of administration intestate. But such injunction was not applied for, and the court cannot grant an order which is not prayed for.’**

While in the case of **Butt V Rent Restriction Tribunal [1982] KLR 417** the Court of Appeal provided direction on how a Court should proceed to exercise its discretion in instances where a party seeks a stay of execution and stated thus:’

“1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.

3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.’

In the current scenario the Applicant seeks a stay of execution of the judgement pending determination of the instant application. The Applicant has not indicated whether he has lodged an appeal or not. The Applicant contends that his right to fair trial was infringed upon by the lower Court when it proceeded to enter judgement without considering his Defence. The Respondent admits that the Court failed to consider the Applicant’s Defence including witness statements but insists the Applicant failed to adhere to certain conditions the court had set. Insofar as the Applicant failed to adhere to the timelines but noting it was during the COVID Pandemic, I opine that the grounds raised herein are good grounds for appeal. Be that as it may, there are no subsisting substantive prayers or orders for determination on the face of the instant application dated the 14th September, 2020.

I note Order 42 Rule 6 of the Civil Procedure Rules does not favour the Applicant as it provides instances where stay can be granted pending an intended Appeal. In this instance the Applicant is yet to file an Appeal and has only sought for stay of the judgement and any consequential order emanating therefrom. Insofar as the Applicant has raised pertinent and triable issues in respect to the proceedings in the lower court but based on the standards set in the above cited decisions while applying them to the circumstances at hand, I find that the Applicant has not met the threshold set for stay of execution as no

Appeal has been preferred ever since the Judgement was delivered. It is my considered view that the Application as it stands is not properly crafted as once the same is heard and determined, the order issued herein will have served its purpose. Further, the Applicant should have included a prayer for stay pending hearing and determination of the intended Appeal. As a Court my hands are tied as I cannot grant an order which the Applicant never sought for.

It is against the foregoing that I find the Applicant's Notice of Motion dated the 14th September, 2020 unmerited and will proceed to strike it out.

Costs of the Application is awarded to the Respondent.

Dated Signed and delivered virtually at Kajiado this 22nd Day of February 2021.

CHRISTINE OCHIENG

JUDGE