



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT CHUKA

CHUKA ELC CASE NO. 99 OF 2017

FORMERLY MERU ELC 73 OF 2006

EMILIO MARANGU M'NDIIRI.....PLAINTIFF

VERSUS

ANJERO MUNENE MARINDI.....1ST DEFENDANT

LAWRENCE ANTONY KINYUA.....2ND DEFENDANT

FAITH N KINGA KABUCHA.....3RD DEFENDANT

ERIC GITONGA MBAKA.....4TH DEFENDANT

EVANGELINE MAKENA MITAMBO.....5TH DEFENDANT

RULING

1. There are 2 applications in this suit. This ruling concerns both applications. The first one has been filed by the defendants and is dated **5th November, 2020**. It seeks the following orders:

1.THAT this application be Certified Urgent and the service be dispensed of in the first instant.

2.THAT this Honourable Court be pleased to issue an order of eviction against the respondent by himself or his agents from land reference numbers UPPER -KARIMBA /2028, 2029, 1600,1601, 1598, 1599 &1278 pursuant to the orders/decrees of Justice P.M NJOROGE granted on the 3RD November, in ELC NO.99 OF 2017 Chuka.

3.THAT the Officer Commanding Police Division (OCPD) and the Officer Commanding Ntumu Police Station (OCS) be authorized to enforce compliance of the Court Orders.

4.THAT the cost of this application be borne by the Respondent.

2. The application is supported by the affidavit of the 2nd, 3rd, 4th and 5th defendants sworn on **5th November, 2020** and has the following grounds:-

a) **THAT** the court entered judgement in favor of the Defendants on the 13th day of December 2018.

b) **THAT** the respondent served upon us a notice of intention to appeal but has not served us with any other document to evidence lodging an appeal.

c) **THAT** the plaintiff/respondent herein also filed an application on the 10th day of January seeking stay of execution.

d) **THAT** the court vide a ruling dated 27th day of March 2019 dismissed the said application for stay after the plaintiff failed to deposit a security of Kshs.1,000,000 in court.

e) **THAT** despite the Judgement of the Court the plaintiff has not vacated as ordered hence necessitating the application herein to enforce compliance as well as keep peace.

f) **THAT** as a result of the breach, the Plaintiff is losing income and his only source of livelihood.

3. The 2nd application has been filed by plaintiff and is dated **13th November, 2020**. It states that it has been brought to court under Order 10 Rule 11 of the Civil Procedure Rules, sections 1A and 1B, 3 & 3A of the Civil Procedure Act, Article 159 sub-article 2(d) and (e) of the Constitution and all other enabling provisions of the law.

4. The application seeks the following orders:

1. **THAT** the matter be certified urgent and this Honourable Court be pleased to dispense with service of this application in the first instance.

2. **THAT** the firm of Warutere & Associates Advocates be allowed to come on record for the Plaintiff/Applicant herein in place of the firm of Beth Ndorongo & Co. Advocates.

3. **THAT** this Honourable Court be pleased to set aside the judgment on record delivered on **13th December, 2018** and the consequential orders arising therefrom.

4. **THAT** the Honourable Court be pleased to stay the execution of the judgment on record and the consequential orders arising therefrom pending the hearing and determination of this application.

5. **THAT** the costs of this application be provided for.

5. The application is supported by the affidavit of **Emilio Marangu Ndiiri**, the applicant sworn on **13th November, 2020** and has the following grounds:

a) **That** the Defendants/Respondents have obtained judgment which was delivered on **13.12.2018**.

b) **That** Plaintiff/Applicant being aggrieved by the aforesaid judgment filed an Appeal No. 80/2019 (UR 57/019) which is still pending in court.

c) **That** unless this application is allowed, the Plaintiff/Applicant will be condemned without being heard.

d) **That** unless the judgment obtained and the consequential orders arising therefrom are stayed, the Plaintiff's/Applicant's application will be rendered nugatory and the Plaintiff/Applicant will be exposed to irreparable loss as the subject matter herein is land upon which the Plaintiff/Applicant resides and it is the only source of his livelihood.

e) **That** any prejudice that may be occasioned to the Defendants/Respondents can be adequately compensated with payment of reasonable costs which the Plaintiff/Applicant would be willing to pay.

f) **That** the Plaintiff/Applicant has come before this Honourable Court in good faith and without undue delay and it is in the interest of justice that the application be allowed.

6. The applications were canvassed by way of written submissions.

7. I opine that in matters not canvassed orally, and especially where the submissions are not too long, it is more efficient to reproduce the submissions in full, which in this case I will do.

8. The applicant's submissions are pasted herebelow without any corrections whatsoever, be they spelling, grammatical or any other.

APPLICANTS' SUBMISSIONS

May it please your Lordship,

Introduction

The applicants herein have filed a Notice of Motion dated 5th day of October 2020 in which that are seeking eviction orders against the respondent after they obtained judgment in their favour on the 13th day of December 2018. The respondent failed to deposit the sum of Kenya shillings 1,000,000 as ordered by this Honourable court on the 27th day of March 2019 as a precondition for being granted stay. To date the respondent herein has only served the applicants with the notice of appeal with no other documents being served upon them. That the judgement and decree have ben dully served upon the respondent but he has failed to vacate the suit properties citing the appeal No. filed 80/2019 which is allegedly pending before court.

Analysis of the law

Your Lordship under Order 42 rule 6(1) of the Civil Procedure Rules the law states that

No appeal or a 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 an application being made, to consider such application and to make such orders thereon as may to it seem just, 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 the orders set aside.”

Order 42, rule 6 states:

“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.”

Your Lordship to date the respondent has not evidenced the deposit of the sum that was outlined by the courts and not in any way indicated that he is willing to pay the said sum for stay of execution against the decree and judgement that was obtained in our favour. Further ,the applicant has not produced any order of the court of appeal staying the execution of the decree and judgement entered against him. The respondent is engaging in delaying tactics to deny the applicants the fruits of judgment obtained in their favour.

It is our submission that in the case of **Mohamed Salim T/A Choice Butchery Vs Nasserpuria Memon Jamat (2013) eKLR**, the Honourable court stated that:-

“That right of appeal must be balanced against an equally weighty right, that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right”

Further in the case of **Carter & Sons Ltd vs Deposit Protection Fund Board & 2 Others Civil Appeal No. 291 of 1997, the court at Page 4 stated** as follows:

“ . . . the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay. . .the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security, and the application must, of course, be made without unreasonable delay.”

It is our submission that despite there being evidence of a notice of appeal being served upon us no other documents has been served upon us to date one year later which has necessitated the application herein seeking eviction orders.

Your Lordship it is our submission that there is no appeal which this court can order stay of execution as what has only been produced is the notice of appeal with no deposit of the amount ordered by this Honourable Court. That the respondent herein wants to continue enjoying his stay in the applicants land contrary to the orders of this Honourable court greatly resulting in an injustice to the defendants. It is unfair that the respondent continues to occupy the suit property and now cites an appeal and has not in any way shown this Honourable Court that he can be able to compensate the defendant for the loss that they continue to suffer. The only way that the respondent could have shown his good faith was through the deposit of the sum ordered by this Honourable court on the 27th day of March .See **Richard Kubondo v Ndungu Waweru [2019] eKLR**.

Conclusion

Your Lordship in view of the foregoing, we urge this Honorable Court to grant the orders prayed for in our favour and allow us to evict the respondent as all litigation must come to an end. The respondent as evidence is engaging in delaying tactics to deny us the fruits of the judgement obtained in our favour also pray for cost of this application.

THAT is all.

DATED at CHUKA this.....7th.... day ofDecember,... 2020

DRAWN & FILED BY:

LAWRENCE ANTHONY KINYUA

P.O BOX 52

CHUKA

9. The Respondent's submissions are pasted herebelow without any corrections, whatsoever, be they spelling, grammatical or any other.

DEFENDANTS/RESPONDENTS SUBMISSIONS

The defendant has filed the application herein dated 13th day of November 2020 in which the plaintiff/applicant seeks orders of stay against the judgment on record delivered of the 13th day of December 2018 and the consequential orders arising therefrom. The plaintiff has not indicated that he had filed a similar application on the 10/1/2019 in which he was ordered to deposit the sum of Ksh.1,000,000 as ordered by the court on the 27th day of March 2019 evidencing that the application herein is an afterthought only aimed at denying the respondents the fruits of judgment obtained in their favour.

Analysis

Your Honour it is our submission that the application by the applicant is premised under Order 10 Rule 11 of the Civil Procedure Rules which empowers the court to set aside an *ex parte* judgment for default of appearance and defense. However, the same provision is not applicable to this case as the right law that governs this matter is order 42 Rule 6 of the Civil Procedure Rules. The judgment obtained herein is not an *ex parte* judgment and is instead the final judgment and decree obtained after all the parties were heard and the matter determined to finality.

The law governing stay of execution is set out under order 42 Rule 6 which allows the party to seek stay either in the trial court or the appellate court. However contrary to the law, the applicant was ordered to deposit the sum of Kenya Shilling 1,000,000 as a precondition for stay but to date has not deposited the said sum. The respondent has also to date not filed in the appellate court an order seeking stay as allowed under the Rules.

Your Lordship it is our submission that the said application lack merit as the preconditions that were set by this Honourable Court were ignored and hence the application herein is an abuse of the court process.

Order 42 Rule 6(2) of the Civil Procedure Rules provides that;

"....no order of stay of execution shall be issued under sub rule (1) unless, 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. Such security as the court may order for the due performance of such decree or such orders as may ultimate be binding on him has been given by the applicant..."

The plaintiff is in occupation of the said land (less than ¼ an acre) and therefore continues to enjoy the suit property contrary to the judgment that was entered in favour of the defendants/respondents herein. It is our submission therefore that the failure by the plaintiff /applicant to deposit the amount ordered by this Honourable Court as a precondition evidences that he is not willing to pay if ordered by court contrary to the assertions made in his application dated 13th November 2020.

In the case of **Antoine Ndiaye vs. African Virtual University [2015eKLR]**, Gikonyo J. opined as follows;

"The relief of stay of execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules. The relief is discretionary although, as it has been said often, the discretion must be exercised judicially, that is to say, judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown by the Applicant. And in determining whether sufficient cause has been shown, the court should be guided by the three prerequisites provided under Order 42 Rule 6 of the Civil Procedure Rules, that:

- a) *The application is brought without undue delay;*
- b) *The court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered; and*
- c) *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".*

Your Lordship it is trite law that a litigant must enjoy the fruits of judgment obtained in their favour. In the case of **Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [20021 KLR 63]** it was held that:

. to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court"

Contrary to the assertions that the applicant has come in good faith the same could not be further from the truth. He has conveniently

failed to mention before this Honourable Court that he had been ordered to deposit a sum of One million Kenya shillings as a precondition for stay and once again seeks to stop the respondents from evicting him from their suit property. The respondent continues to frustrate the efforts of the defendants/respondents. All litigation must come to an end. The Notice of Appeal was filed on the year 2019 but to date no other documents have been served upon the respondent resulting in undue delays on the part of the plaintiff/applicants.

The applicant has not demonstrated how he stands to suffer any loss as he is in occupation of the suit property and he continues to enjoy quiet possession while the defendants languish in poverty even after obtaining judgment in their favour.

Conclusion

In view of the foregoing, we urge this Honourable Court to throw away the application by the plaintiff/applicant as it lacks merit and is an abuse of the court process. We pray for the cost of this application.

DATED at CHUKA this.....7th ... day ofDecember,..... 2020

DRAWN & FILED BY:

LAWRENCE ANTHONY KINYUA

P.O BOX 52

CHUKA

10. I agree with the defendants that the applicant cannot rely on Order 10 of the Civil Procedure Rules. This order deals with consequences of non-appearance, default of defence and failure to serve. This is not the case here: a judgment was delivered on **13th December, 2018, over 2 years ago.**

11. Among other things, the plaintiff prays that this court sets aside its judgment delivered on **13th December, 2018.** This prayer is not tenable because the plaintiff states that there is a pending appeal.

12. This principle is succinctly enunciated by the case of *Otieno, Ragot & Company versus National Bank of Kenya* [2020] eKLR where the Court held:

“... It is not permissible to pursue an appeal and an application for review concurrently: If a party chooses to proceed by way of appeal, he automatically loses the right to ask for a review of the decision sought to be appealed. In the case of Karari & 47 Others versus Kijana & 2 Others [1987] KLR 557 the court held that:

‘... once an appeal is taken, the review is ousted and the matter to be remedied by review must merge in the appeal.’

[See also African Airlines International Limited V Eastern & Southern Africa Trade Bank Limited [2003] 1 EA1 (CAK).”

Even though the substantive appeal had not been filed, the respondent had filed a notice of appeal. At the time when the application for review was made, the notice of appeal was in place. In effect, it was pursuing the relief of the review while keeping open its option to appeal against the same ruling. It probably hoped that if the application for review failed it would then pursue the appeal. It was gambling with the law and the judicial process. It is precisely to avoid this kind of scenario that the option either to appeal or review was put in place. There can be no place for review once an intention to appeal has been intimated by filing a notice of appeal ...”

13. The plaintiff in prayer 4 of his application prays that there be a stay of execution of the judgment on record and consequential orders therefrom pending hearing and determination of this application. I observe that the plaintiff is re-litigating this issue. The plaintiff on **10th January, 2019** filed an application seeking stay of execution. This court heard the application and delivered a ruling on **27th March, 2019.** Therefore, regarding the prayer for stay of execution, I find that this court is ***functus officio.***

14. The doctrine of ***functus officio*** was succinctly elaborated by *The Supreme Court of Kenya in Election Petitions Nos. 3, 4, & 5 Raila Odinga & Others versus IEBC & Others* [2013] eKLR which cited with approval an excerpt from an article by *Daniel Malan Pretorius in “The Origins of functus officio doctrine with Specific Reference Its Application in Administrative Law”* (2005) 122 SALJ 832:

“The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.”

15. I opine that moving otherwise will spawn uncertainty in the administration of justice. Judicial officers will be reduced to negotiating points. The integrity of the judicial system would be put into question. This may even bring about proliferation of brokers, be they advocates or other people. Corruption would be alleged in such situations.

16. The applicant, on the face of this application, states that he relies on order 10 Rule 11 of the Civil Procedure Rules, Sections 1A & 1B, 3 & 3A of the Civil Procedure Act, and Article 159 Sub-Article 2(d) & (e) of the Constitution of Kenya. As I have already pointed out Order 10 Rule 11 is not applicable in this matter as in this case there was no non-appearance, default of defence or failure to serve. I have read Orders 1A, 1B, 3 and 3A of the Civil Procedure Act. They guide us on how courts should diligently handle cases and, therefore administer justice. I have taken into account the principles enunciated by those sections of the law. Regarding Article 159 (d) & (e) of the Constitution, I have taken into account the letter and the spirit espoused therein. However, the principles for review of cases and orders for stay of execution are anchored in law. For example, Order 42 Rule 6 contains the law that deals with stay of execution. Any decisions made under Order 42 Rule 6 are anchored in law. Issues concerning this area cannot be said to come under Article 159(2) d which decrees that justice shall be administered without undue regard to procedural technicalities. Enforcing Rules is a legal matter and not a procedural technicality. After all, rules are hand-maidens of lady Justice.

17. I wish to make a passing reference to Article 159(2) (b) of the Constitution which decrees that ***“justice shall not be delayed.”*** In this case, justice is veritably delayed. This suit was filed in **2006**. This suit has ambled, nay waddled, nay trotted in Kenya’s ostensibly and nay veritably very patient judicial system for **close to 15 years**. Somehow litigation must be brought to an end!

18. I find that the defendants’ application dated **5th November, 2020** has merit.

19. I issue the following orders:

a) Prayer 2 in the application dated **13th November, 2020** is allowed with the effect that the firm of Warutere & Co. Advocates is allowed to come on record in place of the firm of Beth Ndorongo & Co Advocates.

b) The defendants’ application dated **5th November, 2020** is hereby allowed.

c) An order of eviction against the plaintiff, (**EMILIO MARANGU M’DIIRI**) who is the respondent in the application dated **5th November, 2020** is hereby issued for him to be removed from Land Reference Numbers **UPPER-KARIMBA/2028, 2029, 1600, 1601, 1598, 1599 & 1278** and this order is in consonance with **this court’s judgment delivered on 13th December, 2018 in Chuka ELC No. 99 of 2017 (Formerly Meru HCCC No. 73 of 2006)**.

d) The application dated **13th November, 2020** which application was filed by the plaintiff is hereby dismissed.

e) Costs for both applications are awarded to the defendants in the main suit.

Delivered in open Court at Chuka this 9th day of February, 2021

in the presence of:

CA: Ndegwa

Emilio Marangu M’Ndiiri – Plaintiff

Anjero Munene Marindi – 1st Defendant

Lawrence Antony Kinyua – 2nd Defendant

HON. JUSTICE (Dr.) P. M. NJORGE,

ELC JUDGE.