



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MAKUENI

ELC CASE NO. 373 OF 2017

JOHN KAVILI NGUI.....PLAINTIFF/RESPONDENT

VERSUS

MUTINDA NGUI.....DEFENDANT/APPLICANT

RULING

1. The application for determination is dated 18th February, 2020 and was filed by the Defendant/Applicant under certificate of urgency of even date. It is brought under Order 42 Rule 6 of the Civil Procedure Rules, 2010 and Section 3A of the Civil Procedure Act.

2. The Applicant seeks the following Orders:

1) Spent

2) Spent

3) That the court be pleased to stay execution in ELC Case No. 373 of 2017 pending hearing and determination of the Intended Appeal against the Judgment and subsequent decree made by Honourable Justice C.G. Mbogo.

4) That costs of this application be provided for.

5) Any other orders that meet the ends of justice.

3. The application is supported by the affidavit of Mutinda Ngui (*the Defendant/intended Appellant*), sworn on 18th February, 2020. The basis of the application is that this Court erred in ordering the Applicant to hand over to the Respondent all the original ownership documents for parcel known as Kisau/Ngoni/924 and all required completion documents. It has also been deposed that if the orders sought are not granted, then the intended appeal will be rendered nugatory. The Applicant also filed a further affidavit sworn on 21st February, 2021 wherein he deposed that the application is based on his apprehension that in the event the intended appeal is successful, then the same shall be rendered nugatory as the Plaintiff/Respondent may have sold the subject land to a third party.

4. The Plaintiff/Respondent has opposed the application vide the replying affidavit sworn on 9th October, 2020. He deposed inter alia that the Applicant has not demonstrated that he stands to suffer substantial loss if the suit property is transferred to him by the Applicant, that the Applicant has not furnished this Court with sufficient grounds for the exercise of discretion in his favour and that the application is defective because the Applicant's current advocate has not sought leave to come on record after judgment had already been entered.

5. Both parties filed their respective submissions in compliance with the directions issued on 2nd October, 2020. I have perused the Applicant's submissions filed on 28th January, 2021. He relies on the decision of the Court of Appeal in **Butt -vs- Rent Restriction Tribunal (1982) KLR 417** where the guiding factors for exercise of judicial discretion in applications for stay of execution have been outlined.

6. The Respondent filed his submissions dated 2nd February, 2021. In his replying affidavit, the Respondent has raised the argument that the Applicant's Advocate is improperly on record for want of leave of court to come on record after judgment was delivered on 28th January, 2020. It is a fact that the firm of Messrs. Maanzo & Co. Advocates was appointed to come on record for the Defendant/Applicant on 1st February, 2018. The said firm carried on in conduct of this suit until final submissions of the main suit were filed.

7. I have not seen a filed application for leave to come on record by the firm of Messrs. Bowyer Mahihu & Co. advocates after judgment

was delivered. Order 9 Rule 9 of the Civil Procedure Rules, 2010 is predicated in mandatory terms. It sets out as follows:

“When there is a change of Advocate, or when a party decides to act in person having previously engaged an Advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court—

a) upon an application with notice to all the parties; or

b) upon a consent filed between the outgoing Advocate and the proposed incoming Advocate or party intending to act in person as the case may be.”

8. It is unfortunate that the said firm has not taken the necessary interventions to cure the above defect in the Defendant/Applicant’s case. I cannot therefore address any of the prayers sought in this application.

9. The upshot of the foregoing is that the application is incurable defective and an abuse of court process and is hereby struck out with costs.

Signed, dated and delivered at Makueni via email this 2nd day of March, 2021.

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MBOGO C.G.

JUDGE

Court Assistant: Mr. Kwemboi