



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI

ELC NO. 268 OF 1997

GEOFREY MBUGUA DEDAN.....1ST PLAINTIFF

HANNAH NJOKI GATHUKU & JOSEPH MBURU GATHUKU

(SUING AS THE LEGAL ADMINISTRATIVE OF THE ESTATE OF

GATHUKU GICHUGU (DECEASED)2ND PLAINTIFF

=VERSUS=

JOSEPH MBUGUA DEDAN GACHUMI.....1ST DEFENDANT

JAMES GUCHUGU GACHUMI.....2ND DEFENDANT

RULING

1. This is a Ruling in respect of a preliminary objection raised by the Respondents. The preliminary objection was raised against the Applicants' notice of motion dated 10th July 2019 in which the Applicants seek stay of execution of the decree issued in this case.
2. The Respondents had sued the Applicants in this suit which was filed in 1997. Judgement was delivered on 14th February 2014 in favour of the Respondents. The Applicants filed a Notice of Appeal against the said judgement. The Applicants also obtained stay of execution pending the hearing and determination of the intended appeal. The Applicants did not however file the intended appeal even after they were notified through their advocate of the availability of typed proceedings.
3. The Respondents moved the Court of Appeal for dismissal of the Notice of Appeal. The Court of Appeal in a Ruling delivered on 29th September 2017 allowed the Respondent's application and deemed the filed Notice of Appeal as having been withdrawn. The Court of Appeal further vacated the stay of execution which had been granted by the trial court on 18th June 2015.
4. After the vacation of the stay orders, the Respondents proceeded to execute the decree in their favour. The Respondents then asked the Applicants to remove structures which fell on the Respondents' portions. This is what prompted the Applicants to file the Notice of Motion dated 10th July 2019 in which they seek to stay the eviction pending the hearing and determination of a Notice of Motion filed before the Court of Appeal which seeks reinstatement of the Notice of Appeal which was deemed as withdrawn.
5. The Applicants had filed a Notice of Motion before the Court of Appeal seeking review of the Court's ruling of 29th September 2017. This Application was dismissed for non-attendance. The Applicants then filed a Notice of Motion seeking to set aside the dismissal order. This is the application which is pending before the Court of Appeal for which the current stay is being sought before this court as the Applicants pursue the pending application before the Court of Appeal.
6. The Respondents contend that this Court does not have jurisdiction to entertain the application by the Applicants as the Court is functus officio. The Respondents argue that this court cannot grant stay orders when stay orders which had been issued by this court were vacated by the Court of Appeal. The Respondents argue that this court cannot grant stay pending determination of the proceedings pending before the Court of Appeal.
7. The Applicants argued that though they are at liberty to file the current application before the Court of Appeal, they thought that this court has jurisdiction to grant their prayers as the application before the Court was dismissed for non-attendance and as such the same was not heard on merits.

8. I have considered the preliminary objection by the Respondents as well as the opposition thereto by the Applicants. The only issue for determination is whether this court has jurisdiction to grant stay of execution. This court had granted stay of execution which was to last until the intended Appeal was heard and determined. The intended Appeal was never filed. When the Respondents moved the Court of Appeal to deem the Notice of Appeal as having been withdrawn, that application was allowed and the Court of Appeal proceed to vacate the orders of stay which had been granted by the trial court. This court thus became functus officio and has no jurisdiction to grant stay of execution which stay of execution was vacated by the Court of Appeal. The Applicants should have filed any application for stay before the Court of Appeal. I therefore find that this Court has no jurisdiction to grant any stay. I uphold the preliminary objection by the Respondents and proceed to strike out the Notice of Motion dated 10th July 2019 with costs to the Respondents.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 15TH DAY OF APRIL 2021

E. O.OBAGA

JUDGE

In the Virtual Presence of :-

Mr Kabue for Respondents

M/s Gathua for Applicant

Court Assistant: Okumu

E.O.OBAGA

JUDGE