



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC CASE NO. 6 OF 2017

JAMES KIRIMI KIRIGIA.....PLAINTIFF

VERSUS

NKANATA WILFRED KITHINJI.....1ST DEFENDANT

MARTIN MWIRIGI ARIMI.....2ND DEFENDANT

RULING

1. There are two applications before the court dated 13.12.2019 and 11.11.2021 respectively.
2. The application dated 13.12.2019 seeks for stay of execution under **Order 22 Rule 25 Civil Procedure Rules** of the judgment/decreed dated 15.10.2010 pending hearing and determination of the intended appeal. The application is supported by affidavits sworn on 13.12.2019 by James Kirimi Kirigia.
3. The basis of the application is that there was imminent execution of the decree, the intended appeal would be rendered nugatory; there is an arguable appeal; if stay is not granted the applicant would be rendered homeless and suffer irreparable loss and that it would be in the interest of justice to grant the orders sought.
4. The 2nd defendant filed a replying affidavit sworn on 7.2.2020. The grounds of opposition are: the decree was that the plaintiff do vacate the land within 60 days in default he be forcefully evicted: the application was filed after the 60 days had elapsed; that the 2nd defendant had bought the land for great value and despite obtaining the title deed, he cannot access the land and make use of it hence he has undergone great loss and damage; the preferred appeal has no chances of success as the judgment was sound and clear; the plaintiff was busy carrying out acts of wastage of land by felling trees which were part of the consolidation over the purchase price and that he was apprehensive the land value may be diminished due to the acts of wastage; and lastly there has been no offer for security.
5. With leave, parties put in written submissions dated 30.6.2020 and 3.6.2020.
6. The applicant submits he has satisfied the conditions under **Order 42 Rule 6 Civil Procedure Rules**. Reliance was placed on ***Bank Ltd (In Liquidation) –vs- Norlake Investments Ltd (2002), Chris Munga Bichange –vs- Richard Nyagaka Tongi & 2 Others [2013] eKLR, Silverstein –vs- Chesoni [2002] 1 KLR 867, Arun C Sharma –vs- Ashana Raikundalia T/A Raikundalia & Co Advocates, Bashir Godana –vs- Fatuma Godana Tupi [2018] eKLR, Tassam Logistics Ltd –vs- David Macharia & Another [2018] eKLR.***
7. On the other hand, the 2nd defendant/respondent submits the applicant has failed to demonstrate substantial loss he was likely to suffer and if any, the same had been taken care by the judgment; he has offered no security and lastly that he was unreasonably obstructing him from enjoying the fruits of his judgment. He urged the application to be dismissed for lack of any merits.
8. The second application dated 11.11.2021 is brought under **Order 22 Rule 25, Order 40 Rule 6 and 7, Order 45 Rule 1, Sections 1A, 1B and 80 of the Civil Procedure Act** seeking to review/set aside and vacate the vesting order made on 3.11.2021.
9. The application is based on the ground on the face of it and a supporting affidavit of James Kirimi Kirigia sworn on 11.11.2021. The reasons given are that the court vacated the orders granted on 3.11.2021 whose implication was that the applicant risked being evicted from L.R No. Abogeta U-Kithangari/2567 in execution of the judgment delivered on 15.10.2019; the delay was not deliberate and that it was in the interest of justice the orders be reinstated on such conditions as the court may impose.

BACKGROUND

10. On 15.10.2019, the court pronounced its judgement in this matter following which an application dated 13.12.2009 was filed and interim orders of stay granted.
11. On 20.1.2020, parties were ordered to file written submissions within 30 days. The interim orders were extended. A mention was put for 21.5.2020. Parties did not attend but the interim orders were once more extended.
12. On 13.10.2020, there was no appearance by the applicant and no orders were extended. The respondent took no action until 27.1.2021 when the matter was fixed for mention on 11.5.2021.
13. On 11.5.2021, the court ordered the application dated 23.7.2020 to be served for hearing on 5.7.2021. When the matter came up on 5.7.2021, once more it was fixed for hearing on 26.7.2021. No orders were extended since they had already lapsed.
14. On 26.7.2021, the applicant fixed the matter for 29.9.2021. When the matter was called up on 29.9.2021, the applicant seemed not aware that the matter was for mention and for that reason, they prayed for another mention dated for 3.11.2021.
15. On 3.11.2021, the applicant appeared but there was no evidence of service upon the respondent. There being no explanation, the court listed for hearing the two pending applications dated 12.7.2020 and 23.7.2021 and vacated any existing interim orders. The court also ordered a hearing notice to be served upon the 1st respondent for hearing on 2.12.2021.
16. When the matter came up for hearing on 2.12.2021, once again the applicant had not been served the hearing notice and no reason was given at all for non-compliance. The court gave another hearing date for 14.12.2021.
17. On 14.12.2021, the 1st defendant was not present though it was alleged he had been served. The court ordered parties to put in written submissions and an affidavit of service to be filed by the close of business the same day.
18. The affidavit of service was eventually filed sworn by John K. M'ikiara indicating service upon the 1st defendant was made at Rukina village Kiagu location on 11.12.2021 at 4 p.m.
19. Having set the background, it is obvious that whereas the applicant filed the application for stay on 16.12.2019 which was almost two months after the judgment was passed, the sixty days stay granted to comply had lapsed and no reason was given why there was delay in filing the application.
20. Secondly, the record indicates the interim orders lapsed and were not revived at all. So as at 3.11.2021 there was nothing the court was vacating going by the inadvertently court record. On the said date, the applicant had indicated and or perhaps was all long under the mistaken belief there were in existence interim orders.
21. When the court issued the interim orders on 29.1.2020, it did not indicate they were to subsist till the application herein was heard and determined. The orders were last extended on 5.10.2020 till 13.10.2020. The applicant did not attend court that day and there was no attempt to revive and or extend the same up to and including 26.9.2021.
22. On that ground alone, my finding is that the application dated 11.11.2021 is made of ignorance and also lacks merits. This court did not issue any injunctive or vesting orders after the judgment was delivered.
23. It is also not lost to this court that since the filing of the notice of appeal, the applicant has neither requested for nor paid for the typing of the proceedings so as to facilitate the hearing of the intended appeal notwithstanding the fact that no memorandum of appeal has been filed so far.
24. My finding therefore is there has been inordinate delay in prosecuting the current application. There has also been lack of diligence on the part of the applicant in having the intended appeal filed and prosecuted. **See *Andrew Kiplagat Chemaringo –vs- Paul Kipkorir Kibet [2018] eKLR.***
25. On the second pillar of substantial loss, courts have held it was not enough to allege substantial loss that a party was in occupation and or shall suffer loss and damage without demonstrating it through cogent and clear evidence. **See *Charles Wahome Gethi –vs- Angela Wairimu Gethi [2008] eKLR.***
26. In this application, the applicant has demonstrated nothing over the alleged loss to suffer. There are no photographs or valuation reports on any developments over the subject land. **See *Butt –vs- Rent Restriction Tribunal [1982] KLR 417.***
27. The respondent has stated he was suffering for being kept out of the suit property yet he has both a title deed and a judgment in his favour. Further, he has stated that any loss was taken care of by the judgment that the moment he takes possession he pays the applicant **Kshs. 400,000/=.**
28. The rights of both parties have to be taken into consideration and more so the court has to do a balancing act. In this application, the applicant has not offered any security for the due satisfaction of the decree. Sufficient cause has not been given why a successful party should be kept out of enjoyment of the fruits of his judgment as held in ***Kenya Shell Ltd –vs- Kibiru & Another [1986] KLR 410.***
29. The applicant has not demonstrated how that the respondent takes up the property his appeal would be rendered nugatory.

30. As stated above, the applicant seems to be in no hurry fasttracking his appeal. Therefore, in my view, it would not be in the interest of justice to grant any stay orders. See *James Karano Christopher and Another –vs- Christopher Njagi Karano & 4 Others [2018] eKLR.*

31. Consequently, considering the totality of the above, the applications are hereby dismissed with costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU

THIS 2ND DAY OF MARCH, 2022

In presence of:

Orimbo for Rimita for plaintiff

No appearance for defendants

Court Assistant – Kananu

HON. C.K. NZILI

ELC JUDGE