



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL APPEAL NO. 2 OF 2019

(FROM THE RULING OF L.N WASIGE(SRM) DELIVERED ON 23RD JANUARY, 2019

COSMAS LEGIRU TANDASI.....APPELLANT

VERSUS

ANTHONY MWENGA MAVUA....RESPONDENT

RULING

1. I have before me for determination a Notice of Motion application dated 11th February 2019. By the said Motion, Cosmas Tandasi Legiru (the Appellant) prays for an order of stay of execution of the decree issued in *Kilifi PMCC No. 2 of 2011* on the 24th April 2017 pending the hearing and determination of this Appeal.

2. The application which is supported by an affidavit sworn by the Appellant is premised on the grounds that the appellant was not a party to the said suit and his evidence ought to have been taken in order to conclusively make a determination on the rights of the parties herein. Attempts by the Appellant to file a suit were dismissed on the ground that his suit discloses no cause of action and it is in the interest of justice that the dismissal be stayed pending the hearing and determination of the appeal.

3. The application is opposed. In a Replying Affidavit sworn and filed herein on 15th March 2019 Anthony Mwenga Marua (the Respondent) avers that he is the owner of Plot No. 52 in Kilifi town the same having been allocated to him by the defunct County Council of Kilifi on 15th February 1980.

4. The Respondent asserts that the Appellant was extensively mentioned in *Kilifi PMCC No. 2 of 2011; Isaac Njoroge –vs- Anthony Mwenga Mavua*. On 25th July 2013, Judgment was delivered therein in favour of the Respondent with an order that the Plaintiff in the said matter- Isaac Njoroge- grants vacant possession of the premises. Not satisfied by the decision, the Plaintiff appealed in *Malindi ELC CA No. 34 of 2013* but the appeal was dismissed on 27th February 2014.

5. Subsequently the Appellant herein filed *Kilifi Civil Suit No. 50 of 2014* which later became *Kaloleni Land Case No. 1 of 2018* whereby he acquired an injunction order against the order granting vacant possession of the premises to the Respondent. On 23rd January 2019 the Appellant's suit was dismissed as being res judicata.

6. The Respondent avers that the Appellant's application does not meet the threshold for the grant of stay and urges the Court to dismiss the same.

7. I have perused and considered the application and the response thereto. I have equally perused the submissions and authorities placed before me by the Learned Advocates for the parties.

8. The application before me I must say is as ambiguous as they come. Prayer No. 3 thereof which is presently for determination reads as follows:-

“3. Pending the hearing of this appeal, orders do issue staying the dismissal of Kaloleni Land Case No. 1 of 2018 in the Senior Resident Magistrate's Court with a further order restraining and extending the restraining orders issued therein on 24-4-2017 against execution of the decree in Kilifi Principal Magistrate's Court in Civil Suit No. 2 of 2011.”

9. The Affidavit in support thereof is not any clearer either. Mercifully upon going through the full record herein, I gathered that the Respondent herein was previously sued by his tenant one Isaac Njoroge in *Kilifi PMCC No. 2 of 2011*. In the said matter, the present

Appellant was widely mentioned as a sub-tenant of the Plaintiff.

10. By a Judgment delivered on 25th July 2013, the Kilifi Court decided in favour of the Respondent with an order that the said Plaintiff Isaac Njoroge grants vacant possession of the suit premises within 30 days. Dissatisfied by the Judgment, Isaac appealed vide **Malindi ELC CA No. 34 of 2013**. As it turned out, that Appeal was heard and dismissed by the Honourable Justice Angote on 27th February 2014.

11. Subsequently, the Appellant herein in March 2014 proceeded to Court and filed **Kilifi PMCC No. 50 of 2014** against the Respondent claiming to be the proprietor of the demised premises wherein the Respondent runs a business under the name King'enda Bar and Restaurant. For some undisclosed reason, the Magistrate seized of the matter at the Kilifi Law Courts disqualified himself and the matter was then transferred to Kaloleni Law Courts thereby becoming **Kaloleni Land Case No. 1 of 2018**.

12. By an application dated 27th November 2017, filed before the Kaloleni Court, the Respondent herein urged the Court to strike out the Appellant's suit. Having heard both sides, the Honourable Senior Resident Magistrate Mrs L.N Wasige on 23rd January 2019 determined that the suit was res judicata and proceeded to dismiss the same with costs. It is that Ruling that forms the basis of the application before me.

13. In regard to an application for stay pending appeal, Order 42 provides at Rule 6 (2) as follows:-

“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 of order as may ultimately be binding on him has been given by the applicant.

14. I have looked at the Appellant's Supporting Affidavit. He claims to have put up 30 permanent business stalls worth millions of shillings. He asserts at Paragraph 5 thereof that the Respondent herein had a tenant by the name Isaac Njoroge in the Respondent's premises described as Plot No. 52 and that the Respondent and the said tenant tussled in Court over a tenancy dispute which ended in favour of the Respondent.

15. The Appellant avers at Paragraph 6 thereof that in the process of execution of his Judgment against the tenant, the Appellant came to learn that the Respondent was claiming the whole area and he wanted to use the order to evict the Appellant and others from the premises by demolishing the Appellant's Stalls.

16. The Appellant does not offer any explanation how he came to learn that the Respondent wanted to use the order to demolish his stalls. The order granted by the Court was that the said tenant Isaac Njoroge was to grant vacant possession of those premises within 30 days and pay rent arrears. In an application such as this, the Appellant ought to have demonstrated clearly the basis of his apprehension that execution of the Court's Judgment would prejudice him in any way whatsoever.

17. As it were, this dispute has been pending in Court since the year 2014. Prior to that, the Respondent had been in Court with his tenant since the year 2011. In my understanding, the right of appeal must be balanced against an equally weighty right that the successful party ought to be allowed to enjoy the fruits of his Judgment unless there be a just cause to deprive him of the same.

18. At any rate, an applicant seeking an order of stay pending appeal should, as a sign of good faith, offer or propose any such security for the performance of the decree. Nowhere in his 24 paragraph affidavit does the Appellant make any such offer.

19. In the premises, I was not persuaded that there is any merit in the Appellant's application. The same is dismissed with costs.

Dated, signed and delivered at Malindi this 6th day of May, 2020.

J.O. OLOLA

JUDGE