



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. 2 OF 2019

DAVID MWITHIRWA M' IBAYA.....APPELLANT

-V-

GEOFFREY KIBAARA M' IBAYA.....RESPONDENT

RULING

1. Before me is a Notice of Motion application brought pursuant to provisions of Sections 3,3A of the Civil Procedure Act and Order 51 Rule 1 and Order 42 Rule 6 of the Civil Procedure Rules 2010 and all other enabling provisions of the Law in which the Applicant, David Mwithirwa M' Ibaya seeks stay of execution of the ruling-decree and all the consequential orders thereof in Tigania PM ELC NO. 47 of 2017 delivered on 20th December 2018, pending the hearing and determination of the appeal herein.

2. The gist of the application is that the ruling in Tigania PM ELC No. 47 of 2017 had been entered against him and that the Respondent was threatening to execute the said judgment against the Applicant which would render the Applicant and his entire family squatters, vagabond and homeless as they had no other place to call home. The Applicant further deposed that he had already filed a memorandum of appeal and applied for lower court proceedings and that he had a good appeal with high chances of success.

3. The application was opposed via a replying affidavit filed in court on 4th February 2019 by the Respondent who contended that the Applicant would not suffer any prejudice if the stay was not granted since he was not the owner thereof and was not in occupation of the suit land or any portion thereof. Further, it is contended that the stay sought was in vain since there was nothing to execute as the Applicant's case in the lower court was struck out with costs and that he was the defendant in that suit who had no counter claim and that further costs in the primary suit had not been assessed and as such he was not executing.

4. I have carefully considered this application and the rival contentions by the parties. Pursuant to provisions of Order 42 Rule 6 of the Civil Procedure Rules, the court has to consider; whether substantial loss will occur if the order is not granted, whether the application has been brought without unreasonable delay and whether there is provision of security for performance of the decree as the case maybe.

5. In the instant case the court merely struck out the Applicant's case with costs. The court did not order any of the parties to do anything or refrain from doing anything. What was therefore issued was a negative order not capable of execution save on issue of costs.

6. It is trite law that stay orders can only be issued in respect of positive orders. See the case of **Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya) [2015] eKLR** where Kantai JA stated thus:

“An order for stay of execution [pending appeal] is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a Judgment. The delay of performance presupposes the existence of a situation to stay – called a “positive order” – either an order that has not been complied with or has partly been complied with. See, for this general proposition, the holding of the Court of Appeal of Uganda in Mugenyi & Co. Advocates v National Insurance Corporation (Civil Appeal No. 13 of 1984) where it was stated:

‘..... an order for stay of execution must be intended to serve a purpose’ (emphasis supplied).

7. More recently the Court of Appeal in **Kenya Commercial Bank Limited v Tamarind Meadows Limited & 7 Ors [2016] eKLR**, stated as follows;

“In Kanwal Sarjit Singh Dhiman v. Keshavji Juvraj Shah [2008] eKLR, the Court of Appeal, while dealing with a similar application for stay of a negative order, held as follows:

“The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December, 2006. The order of 18th December, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only (see Western College of Arts & Applied Sciences vs. Oranga & Others [1976] KLR 63 at page 66 paragraph C.”

8. Similarly the contentions by the Applicant that the Respondent was threatening to execute were not supported by any evidence and the same remained mere allegations.

9. Taking into totality all the circumstances in this case it is my considered opinion that there is nothing to stay and as such the orders sought by the Applicant are not merited.

10. Accordingly, the Applicant’s application dated 7th January 2019 must fail and the same is hereby dismissed with costs to the Respondent. The orders issued on 8th January 2019 are hereby discharged.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 10TH DAY OF JULY, 2019 IN THE PRESENCE OF:-

C/A: Kananu

Ngugi for appellant/applicant

Appellant

Respondent

HON. LUCY. N. MBUGUA

ELC JUDGE