



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC CASE NO. 25 OF 2007**

**GRACE WAMUYU MAINA**

**(Suing as the legal representative of the**

**Estate of JOHN G. MAINA (Deceased).....PLAINTIFF**

**-VERSUS-**

**EDWARD M. TENGA.....1<sup>ST</sup> DEFENDANT**

**CITY COUNCIL OF NAIROBI.....2<sup>ND</sup> DEFENDANT**

**RULING**

There are two applications for determination before this court, one is dated 24/5/2018 and the second one is dated 12/6/2018. The court will first determine the application dated 12/6/2018 brought by the 1<sup>st</sup> Defendant seeking to strike out the Plaintiff's Notice of Appeal and the letter to the Deputy Registrar of this court dated 27/4/2018 and 8/5/2018 applying for certified copies of the decree and of the proceedings respectively. The application is made on the ground that the Plaintiff violated the Civil Procedure Rules. The application was supported by the 1<sup>st</sup> Defendant's affidavit. He deponed that the firm of Njoroge O. Kimani and Company Advocates is purporting to represent the Plaintiff contrary to Order 9 rule 9 of the Civil Procedure Rules which provides that a change of advocates after judgement has been delivered can only be effected either on application with notice to all the parties or upon a consent being filed between the outgoing advocate and the incoming one. He averred that Njoroge O. Kimani and Company Advocates filed and served a Notice of Appeal dated 27/4/2018 yet they are strangers in the suit for failing to come on record properly after delivery of judgement. He urged that the documents filed by Njoroge O. Kimani and Company Advocates should be struck off the record. The 2<sup>nd</sup> Defendant supported the 1<sup>st</sup> Defendant's application.

The Plaintiff opposed the application, and submitted that Order 9 rule 9 should be a handmaiden of justice and not a mistress of justice. Further, that the 1<sup>st</sup> Defendant's application should have been filed within 30 days of the date the Notice of Appeal was filed pursuant to Section 2 of the Appellate Jurisdiction Act and that under Rule 2 of the Court of Appeal Rules, this application ought to be made in the Court of Appeal.

The court has considered the application dated 12/6/2018 and the submissions filed by the parties. Order 9 does not impede the right of a party to be represented by an advocate of his choice. It only provides rules to bring order in civil proceedings. Any change of advocates should comply with the rules. The Plaintiff did not comply with Order 9 Rules 9 and 10 of the Civil Procedure Rules. Be that as it may, Article 159 enjoins the courts to disregard procedural technicalities for the sake of dispensing substantive justice. Judgement was delivered on 19/4/2018 which is over a year ago. The Plaintiff has a right to pursue his appeal and challenge the decision of this court. In the interest of justice and for the expeditious and just determination of the proceedings, the court grants the Plaintiff leave to file a consent effecting the change of advocates within 14 days. The court declines to allow the application dated 12/6/2018. The 1<sup>st</sup> Defendant is awarded the costs of the application to be borne by the Plaintiff.

The second application dated 24/05/2018 was brought by the Plaintiff, seeking stay of execution of the judgement delivered by this court on 19/04/2018. The Plaintiff also seeks a temporary injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants from dealing or interfering with the property known as Plot No. 25 Kahawa West Phase 11 within Nairobi City County until the intended appeal is heard and determined. The application is based on the grounds that the Plaintiff has filed a Notice of Appeal intimating her intention to challenge the entire judgement of this court dated 19/04/2018 and that she has a *prima facie* appeal with high chances of success. The application was supported by the Plaintiff's affidavit sworn on 24/05/2018 in which she deponed that the judgment delivered on 19/04/2018 which dismissed her case gives the Defendants leeway to proceed with activities on the suit land, yet she wishes to appeal against the judgement. She deponed that after filing the Notice of Appeal, she learnt that the 2<sup>nd</sup> Defendant has initiated the process of disposing of the suit land in an attempt to defeat the intended appeal and that unless stay is granted, the 2<sup>nd</sup> Defendant may dispose of the suit property. She further deponed that the suit land was left to her by her deceased husband hence it has great sentimental value to her family which cannot be compensated in monetary terms. She deponed that the 2<sup>nd</sup> Defendant still collects rates from her and that the land is vacant save for shabby temporary structures which the 2<sup>nd</sup> Defendant put up on the land. She attached photographs of the land and a copy of the receipt as evidence of payment of rates.

The application was opposed by the Defendants through the grounds of opposition dated 12/06/2018 who urged that there was nothing to be stayed the court having dismissed the Plaintiff's suit. Further, that the Plaintiff has not met the conditions for the grant of stay set out under Order 42 Rue 6(1) and (2) of the Civil Procedure Rules and is therefore not entitled to the orders sought.

The Plaintiff submitted that the application had been brought without delay and that she was prepared to abide by any terms of security that the court may require her to furnish. The 1<sup>st</sup> Defendant relied on the case of **George Ole Sangui & 12 others v Kedong Ranch Limited [2015] eKLR** regarding grant of stay on a dismissed order. The 2<sup>nd</sup> Defendant associated himself with the submissions of the 1<sup>st</sup> Defendant.

The court has considered the application, supporting affidavit, grounds of opposition and submissions made by the parties. In the judgement dated 19/04/2018, the court found that the Plaintiff had failed to prove her claim on a balance of probabilities and dismissed the suit with costs to the 1<sup>st</sup> Defendant and directed that the 2<sup>nd</sup> Defendant would bear its own costs. The order was for dismissal, meaning there is nothing to be stayed. The court finds no merit in the application dated 24/05/2018 and dismisses it with costs to the 1<sup>st</sup> Defendant.

**Dated and delivered at Nairobi this 9<sup>th</sup> day of July 2019**

**K.BOR**

**JUDGE**

**In the presence of: -**

Mr. V. Owuor- Court Assistant

No appearance for the Plaintiff and the Defendants