



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO. 6A OF 2011

ZAKIRA KIRUKI.....PLAINTIFF

VERSUS

SHADRACK MWITI.....1ST DEFENDANT

JANET MARINGA M'IKIARA.....2ND DEFENDANT

EVANGELINE NKIROTE M'IKIARA.....3RD DEFENDANT

RULING

1. This ruling is in respect of two applications.

Application dated 28.1.2019

2. This application was filed by the 3rd defendant and is brought under section 70 (d) of the Land Registration Act, where Applicant sought the removal of the inhibition and or restrictions over the suit land NKUENE/U-MIKUMBUNE/574 and an order for the respondent to give vacant possession of the suit land. Applicant avers that the suit was finalized in favour of the defendants and therefore, there was nothing pending before this court and the decree of the court needed to be implemented.

3. This application was opposed by the plaintiff via his Replying affidavit dated 11.2.2019. Therein, he avers that he has already filed a notice of appeal and that he was also filing the application for stay of execution.

Application dated 11/2/2019

4. This application was brought forth by the plaintiff. It is premised under the provisions of Order 42 Rule 6 (1) and (2) and Order 50 Rule 6 of the Civil Procedure Rules. The plaintiff is seeking for a stay of execution of the decree in this suit pending the hearing and determination of the intended appeal or further orders of this court. He also seeks an order to extend or enlarge time to appeal to the Court of Appeal.

5. The application is based on the grounds set out in the face of the application and in the supporting affidavit of the plaintiff. He avers that Judgement was delivered on 17th October 2018 and on 24th October 2018 through his advocate he applied for the record of proceedings and judgement. However to date the said proceedings have not been availed. He further states that an application to commence execution of the decree is underway. He has duly filed a Notice of Appeal and requests the court to grant a stay of execution

6. The 1st defendant in his affidavit dated 15th March 2019 has opposed this application of the plaintiff. He avers that plaintiff has not demonstrated that he made a further request to have the proceedings supplied in time and neither did he annex a letter from the Deputy Registrar showing that there had been a delay. The period within which the appeal was to be lodged has expired and therefore no stay of execution pending appeal should be granted and nor should the period to lodge the appeal be extended.

7. The 3rd defendant also opposed the application of the plaintiff via her replying affidavit dated 25.2.2019. Her averments are similar to those made by the 1st defendant. She added that plaintiff is not destitute as he has his father's land where he has built his home. She also stated that the dispute is very old having been filed in the courts in 1998 and that the 2nd respondent is very old being over 80 years thus if the stay is granted she would have been denied justice.

Determination

8. It is only logical to determine the two applications simultaneously since the bottom line is whether the decree herein should be implemented or not. If the court was to grant the prayers of vacant possession, there would be no stay and vice versa. Thus I frame the issues

for determination as follows;

- a. Whether to grant an extension of time to appeal to the Court of Appeal?
- b. Whether to grant a stay of execution pending hearing and determination of the intended appeal?

Extension of time

9. The power to grant leave extending the period of filing an appeal out of time is discretionary and must be granted on a case by case basis. While not a right, it must be exercised judiciously and only after a party seeking the exercise of the discretion places before the Court sufficient material to persuade the Court that the discretion should be exercised in their favour. Some of the factors to be considered include:

- a. **The period of delay;**
- b. **The reason for the delay;**
- c. **The arguability of the appeal;**
- d. **The degree of prejudice which could be suffered by the Respondent if the extension is granted;**
- e. **The importance of compliance with time limits to the particular litigation or issue; and**
- f. **The effect if any on the administration of justice or public interest if any is involved.**

See- **Mwangi vs Kenya Airways Ltd [2003] KLR.**

10. In **Buscar EA Ltd t/a Starways Express & another v Patrick Ngala Riziki (supra)**, the court cited the case of **Leo Sila Mutiso –vs- Rose Hellen Wangari Mwangi, (Civil Application No. Nai. 255 of 1997) (unreported)** where the Court of Appeal stated thus;

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary.....”

11. Judgement herein was delivered on 17th October 2018. However according to the applicant the court delayed to supply the proceedings and judgement. This was later confirmed by the Deputy Registrar when he provided a certificate of delay dated 22nd March 2019. He indicated that the advocate for the applicant was informed that the proceedings were ready on 15th March 2019. The plaintiff has also availed a copy of the Notice of Appeal which was filed on 24.10.2018. This is a clear manifestation that plaintiff desired to lodge an appeal. I therefore find that the prayer for extension of time is merited.

Stay of execution

12. In considering whether to grant an order for stay of execution or not, the applicant must satisfy the provisions of **Order 42 rule 6 (2)** i.e.

- (i) **application is brought without undue delay**
- (ii) **Substantial loss will result**
- (iii) **Provision for security for costs**

13. On the issue of delay, I find that the applicant herein moved this court on 11th February 2019 after judgement had been read on 17th October 2018. The period of 3 months and 24 days can be termed as a delay, but it is not an unreasonable delay especially considering that plaintiff has given an account of how he has tried to acquire the proceedings herein.

14. The second issue is substantial loss. The plaintiff in his submissions stated that he is a peasant farmer who derives his livelihood from the suit land and has no other income. If he is removed, ejected and evicted from the suit land before his intended appeal is heard and determined, the appeal would be rendered nugatory. On the other hand the 3rd defendant argued that the plaintiff is carrying on destruction of the suit land by cutting trees and excavating stones. I have perused the pleadings all over again and I find that in the plaint filed in court on 21.1.2011, the plaintiff had sought for the eviction of 1st defendant from parcel no. Nkuene/U- Mikumbune /574. This is a clear indication that plaintiff is not the only person who is using the suit land.

15. I find that plaintiff in his submissions has indicated that he is willing to offer reasonable security or collateral as a condition for the grant of stay of execution. I am therefore persuaded to grant conditional stay.

Final orders:

- a. **Leave is hereby granted to the Plaintiff/Applicant to file his Appeal, whereby the memorandum of appeal is to be filed and served within seven days of the date hereof.**

b. A Stay of execution of the Judgment herein is given on the following conditions

- 1) The plaintiff is to deposit a sum of sh.300 000 as security into this court within a period of 30 days from the date of delivery of this ruling.**
- 2) The stay of execution entails that status quo is to be maintained on the suit land, whereby none of the parties are to undertake any wastage or destruction of the property including cutting trees or excavating stones.**
- 3) The order of stay is to remain in force for a period of 8 MONTHS ONLY.**
- 4) The application of 28.1.2019 is marked as spent.**
- 5) Each party to bear their own costs of the applications.**
- 6) If the Plaintiff/Applicant fails to comply with any of the orders given herein, then the orders set out in clause a and b shall lapse.**

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 2ND DAY OF OCTOBER, 2019 IN THE PRESENCE OF:-

C/A: Kananu

Mutegi holding brief for Riungu for plaintiff

Muriithi holding brief for E. Mwangi for 2nd and 3rd defendnats

Kamwarago holding brief for Ntarangwi for 1st defendant

All parties

HON. LUCY. N. MBUGUA

ELC JUDGE