



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MAKUENI

ELC CASE NO.17 OF 2017

ELIJAH MUTHOKA DANIEL.....APPELLANT/APPLICANT

-VERSUS-

JUSTUS MUTUA MUSYIMI.....DEFENDANT/RESPONDENT

RULING

1. What is before this court for ruling is the Appellant's/Applicant's notice of motion application dated 01st February, 2019 and filed in court on 04th February, 2019 for orders;

1. Spent.

2. Spent.

3. This Honourable Court be pleased to stay execution of the judgement of the Environment and Land Court at Makueni (Justice Mbogo C. G.) delivered on 22nd November, 2018 in Makueni Environment and Land Court Case No.17 of 2017 pending the hearing and determination of the intended Appeal at the Nairobi Court of Appeal;

4. Costs of this application be awarded to the Appellant/Applicant.

2. The application is expressed to be brought under Order 42 Rule 6(1) and (2), Order 51 Rule 1 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all other enabling provisions of the law and is predicated on its face and is supported by the affidavit of Allan Kinyanjui, the advocate for the Appellant/Applicant, sworn at Nairobi on 01st February, 2019.

3. Justus Mutua Musyimi, the Respondent herein, has opposed the application vide his replying affidavit sworn at Machakos on 25th April, 2019 and filed in court on 26th April, 2019.

4. Pursuant to the directions issued on 06th May, 2019, the Appellant/Applicant and the Respondent filed their respective submissions on 24th June, 2019 and 18th July, 2019 respectively.

5. The Appellant/Applicant's Counsel framed the following issue for determination as follows: - whether the execution of the judgement delivered on 22nd November, 2018 should be stayed pending the hearing and determination of the appeal to be filed in Nairobi.

6. The Counsel cited **Order 42 Rule 6(1) & (2) of the Civil Procedure Rules** which provides that:-

1. "No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

2. No order of stay 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 the application has been

made without unreasonable delay; and

b. Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.”

As for prayer 3 of the application, the Counsel submitted that the same is discretionary and can only be granted if the court deems it fit and just to do so. The Counsel added that the Appellant/Applicant is not by any chance trying to deny the Respondent the fruits of his judgement but rather he seeks to have the execution of the judgement stayed pending appeal.

7. The Counsel for the Respondent submitted that whereas this court’s judgment was delivered on 22nd November, 2018, the Appellant/Applicant waited until 04th February, 2019 to file this application. The Counsel pointed out the application was filed two months and eleven days from the date of the delivery of judgement which in the Counsel’s view was inordinate delay. The Counsel went on to submit that the application is made as afterthought and that the Appellant/Applicant did not explain and/or proffer reason why he failed to file the application timeously. The Counsel pointed out that the Respondent is entitled to enjoy the fruits of his judgement and that the delay will occasion him prejudice.

8. It was further submitted that **Rule 82(1) of the Court of Appeal Rules, 2010** provide that: -

“Subject to rule 115, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the Notice of Appeal was lodged-

- a. A memorandum of appeal, in quadruplicate;
- b. The record of appeal, in quadruplicate;
- c. The prescribed fee; and
- d. Security for the costs of the appeal.....”

That arising from the above, the Appellant/Applicant had not lodged any appeal in terms of Rule 82(1) of the Court of Appeal Rules, 2010 and thus the Appellant/Applicant has employed delaying tactics with an aim of denying the Respondent from enjoying the fruits of his judgement.

9. The Counsel further submitted that the Appellant/Applicant has not shown sufficient cause to necessitate the grant of stay of execution of the judgment. The Counsel cited Order 42 Rule 6 of the Civil Procedure Rules and concluded that the application lacks merit, is an abuse of the court process, incompetent, bad in law and fatally defective thus it should be disallowed with costs to the Respondent.

10. Allan Kinyanjui, the Counsel for the Appellant/Applicant has deposed in paragraphs 2, 3, 4, 5, 13 and 15 of his supporting affidavit sworn at Nairobi on 01st February, 2019 that the Respondent obtained judgement (EMD-1) against the Applicant on 22nd November, 2018, that the Appellant/Applicant was dissatisfied with the said judgement/decreed and thus proceeded to file a notice of appeal (EMD-2) dated 05th December, 2018, that the notice of appeal was erroneously filed without the execution bit of the Deputy Registrar thus forcing the Appellant/Applicant to rectify the inadvertent mistake sometime in the late December, 2018, that the Appellant/Applicant is ready and willing to abide by the reasonable conditions as may be directed by the court and that no prejudice shall be suffered by the Respondent if the application is allowed.

11. Having read the application together with replying affidavit and the submissions that were filed, I do note that it is common ground that the principles for the grant of stay of execution pending appeal are as enunciated in Order 42 Rule 6 of the Civil Procedure Rules which both Counsel have cited.

12. On whether or not the Appellant/Applicant will suffer substantial loss, I do note that apart from stating that he will not recover if the title deeds are cancelled, the Appellant/Applicant has not shown how that will result in substantial loss to him since the registration of the title will revert to the original title. As for the application having been made without unreasonable delay, the judgement herein was delivered on 22nd November, 2018 while the instant application was filed on 04th February, 2019 which is 2 months and 11 days and in my view, that cannot be said to be unreasonable delay. The Appellant/Applicant has explained the reasons for the late filing of the application on the 04th February, 2019. However, the Appellant/Applicant has not proposed to provide security for the due performance of the decree as may ultimately be binding on him apart from saying that he is willing to abide by the reasonable conditions as may be directed by the court. As such, the application cannot be said to have fulfilled the threshold of the principles of grant of order of stay of execution as provided under Order 42 Rule 6(1) & (2) Civil Procedure Rules.

13. The upshot of the foregoing is that the application lacks merit and I hereby proceed to dismiss it with costs to the Respondent.

Signed, Dated and Delivered at Makueni this 04th day of November, 2019.

MBOGO C. G.,

JUDGE.

In the presence of: -

Ms. Kyalo for the Defendants/Respondents

Mr. Ndolo holding brief for Mr. Kinyanjui Appellant/Applicant

Ms. C. Nzioka – Court Assistant

MBOGO C. G., JUDGE,

04/11/2019.