



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC MISC. NO. 18 OF 2016

RUKIA RAPHAEL THOYA..... PLAINTIFF

VERSUS

STEPHEN WANGURA & 2 OTHERS..... DEFENDANTS

RULING

(Application for stay; applicant's application for review having been dismissed; nothing to stay; application dismissed)

1. The application before me is that dated 20 March 2017. The orders sought are as follows :-

(a) Spent (certification of urgency).

(b) That the Honourable Court be pleased to grant Stay Orders against the ruling of the Environment and Land court in Misc. App No. 18 of 2016 pending hearing and determination of this application/intended Appeal.

(c) That this Honourable Court do grant leave to the Applicant to serve Notice of Appeal filed on 23rd February 2017 and file appeal out of time.

(d) Costs of this application be provided for.

2. There are various grounds listed in the application but before I go to these, I will first give the background leading to the application.

3. This matter was commenced through a Miscellaneous Application filed on 20 June 2016. The application inter alia sought orders for review of the orders issued on 30 October 2014 in Mombasa ELC No. 325 of 2010, Rukia Raphael Thoya vs Stephen Wangura & Others , and that the applicant be given leave to defend his suit in the Chief Magistrate's Court. I have discerned from the motion that the suit ELC No. 325 of 2010 was transferred on 30 October 2014 to the Chief Magistrate's Court for hearing and disposal and the court directed that the suit be fixed for hearing within 45 days failure of which the suit was to be dismissed. The suit was then given the number Mombasa PMC 75 of 2015 but it appears that the case was not listed for hearing within the 45 days as directed and the case was subsequently dismissed for that reason. That is why in the Miscellaneous Application filed on 20 June 2016, the applicant sought a review of the orders of 30 October 2014. That motion was heard by my predecessor, A. Omollo J, who dismissed it on 21 February 2017. A Notice of Appeal was filed on 23 February 2017. It is upon dismissal of that motion that this application was filed. It will be noted that one of the prayers sought in this application is to serve the Notice of Appeal out of time.

4. The supporting affidavit has been sworn by Dr. John M. Khaminwa, learned counsel on record for the applicant. He has deposed at length on why the suit was not fixed for hearing within 45 days as directed and has stated that the Notice of Appeal was not served as the court file was misplaced during filing of the Notice.

5. The application is opposed through the replying affidavit of Tamimi Lewa, learned counsel on record for the 1st respondent. He has deposed that the applicant only has herself to blame for the way she has conducted the matter. He has averred that stay orders cannot issue as the application was dismissed and there is nothing to stay.

6. Counsel were invited to file written submissions which they did. In his submissions, Dr. Khaminwa sought that prayer (c) of the application be withdrawn as the Notice of Appeal was filed and served within time. I guess therefore that the only substantive prayer to be argued is prayer (b) of the application which seeks a stay. Dr. Khaminwa submitted that the appeal is arguable and if stay is not granted the appeal will be rendered nugatory. Mr. Lewa on his part submitted that there is nothing to stay.

7. I have considered the application. I mark as withdrawn prayer (c) thereof which sought orders to file Notice of Appeal out of time. The only issue left is stay. I do not know what the applicant wants stayed because the result of the ruling of 21 February 2017, was to dismiss the application for review. I wonder what is there to be stayed, for no substantive order was made, other than the order that the application was dismissed. If there was an issue that needed to be stayed, this ought to have been made clearer but I am afraid that this is not the situation that I face.

8. I therefore find that there is nothing to stay, and that being the position, I find no merit in this application and it is hereby dismissed with costs.

9. Orders accordingly.

DATED, SIGNED and DELIVERED at MOMBASA this 6th day of November 2019.

MUNYAO SILA,

JUDGE.

IN THE PRESENCE OF:

Mr. Gitahi holding brief for Dr. Khaminwa for the appellant.

No appearance for the respondent.

Court assisntat; David Koitamet.