



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT ELDORET**

**CIVIL SUIT NO. 176 OF 2017**

**RODAH CHEPTONUI LANG'AT.....PLAINTIFF/APPLICANT**

**VERSUS**

**REV. AGGREY WATINDI.....1<sup>ST</sup> DEFENDANT/ RESPONDENT**

**LOGOS REVIVAL MINISTRIES.....2<sup>ND</sup> DEFENDANT/ RESPONDENT**

**PRINCEDOM EDUCATION CENTRE.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**RULING**

This ruling is in respect of two applications by the plaintiff/applicant and the defendant/applicant dated 18<sup>th</sup> January 2021 and 14<sup>th</sup> February 2020 respectively. The plaintiff's application dated 18<sup>th</sup> January 2021 seeks for the following orders:

- a) Spent
- b) This Honourable Court in execution of the judgment delivered on 29<sup>th</sup> May 2019 be pleased to issue an order of eviction against the Defendant/ Respondents herein evicting them from all that land parcel known as ELDORET MUNICIPALITY BLOCK12/288 to be executed by Eshikhoni Auctioneers.
- c) An order do issue directing the Officer Commanding Station (OCS), Langas Police Station, to supervise the eviction of the defendants, from land parcel No. ELDORET MUNICIPALITY BLOCK12/288.
- d) Costs of this application be borne by the Defendants/ Respondents.

The second application by the defendant/respondents sought for the following orders:

- a) Spent
- b) Pending the hearing inter-parties and determination of the application there be stay of enforcement of the decree.
- c) The time within which to comply with the payment of Kshs. 150,000/ = be extended.
- d) Costs of the application be in the cause.

Counsel agreed to canvas the two applications by way of written submissions which were duly filed.

The court will therefore first deal with the application dated 14<sup>th</sup> February 2020 seeking for stay of enforcement of the decree and extension of time within which to complying with the payment of Kshs. 150,000/. If the application is disallowed, then the application for eviction will be in the affirmative.

**DEFENDANT/APPLICANT'S SUBMISSION**

Counsel submitted that the court granted a conditional stay of execution whereby the applicant was to pay the respondent Kshs. 150,000/

failure to which the order lapses. It was counsel's further submission that the money was paid to the Judiciary through a KCB agent and that the bank deposit receipt was handed over to a third party to secure a court receipt of the same.

Mr. Momanyi submitted that the third party seems to have misplaced or lost the deposit receipt/ slip which has necessitated the filing of this application for extension of time. Counsel stated that the Plaintiff will not be prejudiced if time to comply with the conditional stay is granted.

Counsel therefore urged the court to allow the application as prayed.

### **PLAINTIFF/RESPONDENT'S SUBMISSIONS**

Counsel for the plaintiff opposed the application and submitted that the grounds relied on for extension of time are not tenable as the alleged third party did not swear an affidavit to state the facts alleged and the deposit slip was not annexed.

Counsel further submitted that no explanation has been given why the money was not paid to the plaintiff as ordered by the court before the lapse of the 30 days from 26<sup>th</sup> September 2019. That the order was specific that the payment of Kshs. 150,000/= be made to the Plaintiff within 30 days and not to the Judiciary.

Mr. Yego submitted that the Defendants took no steps to prosecute the application dated 14<sup>th</sup> February 2020 until they were served with the Plaintiffs application for eviction dated 18<sup>th</sup> January 2021. It was counsel's further submission that the defendant filed a similar application dated 2<sup>nd</sup> January, 2020 which application was withdrawn and filed the current one without disclosing that that he had made payment to the judiciary.

Counsel also stated that on 12<sup>th</sup> February 2021 the Defendants' Counsel sent a letter dated 10<sup>th</sup> February 2021 forwarding cheque a for Kshs. 150,000/= allegedly as a condition for stay of execution of the decree but the letter was received under protest as the time to pay the amount had lapsed on 26<sup>th</sup> October 2019.

Further that the fact that the Defendants sent a cheque of Kshs. 150,000/= to the Plaintiff's counsel on 12<sup>th</sup> February 2021 confirms that its earlier allegation that they had paid the sum of Kshs. 150,000/= to the Judiciary was false hence the court should not entertain the application hinged on falsehoods.

Counsel cited the **Supreme Court in Civil Application No. 3 of 2016 - County Executive of Kisumu —vs County Government of Kisumu & 7 Others** at page 5 on the issue of extension of time where the court held:

[23] It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court. Further, this Court has settled the principles that are to guide it in the exercise of its discretion to extend time in the *Nicholas Salat* case to which all the parties herein have relied upon. The Court delineated the following as:

“the under-lying principles that a Court should consider in exercise of such discretion:

1. *Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;*
2. *A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;*
3. *Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;*
4. *Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;*
5. *Whether there will be any prejudice suffered by the respondents if the extension is granted;*
6. *Whether the application has been brought without undue delay; and*
7. *Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”*

Mr. Yego, counsel for the plaintiff also relied on the case of **National Social Security Fund v John Ochieng Opiyo [20061 eKLR]** where the court pronounced itself thus:-

“However, we need to address the issue of this court validating the order, which has lapsed. I know of no law under which an issue which has died/lapsed/expired can be validated other than under the Order referred to herein above. The court cannot validate orders, which upon expiry, have ceased to exist.”

Counsel therefore urged the court to dismiss the application and allow the application for eviction and an order to be enforced by the OCS, Langas Police Station.

## **ANALYSIS AND DETERMINATION**

The issues for determination in the two applications is whether the applicant should be allowed extension of time to comply with the conditional stay of execution and whether the plaintiff's application for eviction should be allowed.

The court has powers to extend time upon such terms if any as justice of the case may require as provided for under Order 50 Rule 6 of the Civil Procedure Rules;

Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise."

In the Supreme Court of **Nicholas Kiptoo Arap Salat v. Independent Electoral and Boundaries Commission & Ors. (2014) eKLR** on 'the underlying principles that a court should consider in exercise of the discretion to extend time" as follows:

*This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:*

- 1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;*
- 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court*
- 3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;*
- 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;*
- 5. Whether there will be any prejudice suffered by the respondents if the extension is granted;*
- 6. Whether the application has been brought without undue delay; and*
- 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.*

It is trite law that one who comes to equity must come with clean hands as the orders sought are discretionary. The Court of Appeal held in the case of John **Njue Nyaga v Nicholas Njiru Nyaga & Another (2013) eKLR**;

*"It is our considered view that one who comes to equity must come with clean hands and equity frowns upon secrecy and underhand dealings." The applicant has not done so and is underserving of the orders he seeks."*

The applicant claims to have deposited the amount in court and not to the plaintiff as ordered by the court. The third party, a KCB Judiciary agent, who allegedly made the deposit and lost the receipt has not sworn an affidavit to explain the circumstances surrounding the payment

Further it is suspect why the applicant's counsel had to send another cheque to the plaintiff's counsel after a period of one and half years when the application was filed for extension of time. Is there something that is not adding up as Judiciary is an institution of record and if any money was paid then the same could have been traced from the system as the money was paid in respect of a specific file.

Is it possible that the applicant wanted to forgo the amount already paid to the judiciary and pay another amount to the plaintiff? This shows that the applicant has not come to court with clean hands. The application is a ploy to buy time and not comply with the terms of the conditional stay. The order was also very specific that the money was to be paid to the plaintiff and not to the court.

The reason for delay is unsatisfactory and I notice that the application was filed about four months after the orders for stay had lapsed. Further, the applicant made the payment on 10<sup>th</sup> February 2021, which is over 12 months after the date it was due.

I find that the applicant has not come to court with clean hands as there are certain issues which has not been cleared and further some facts do not add up. The application is therefore dismissed with costs to the plaintiff.

On the issue whether the application for eviction should be allowed, the court had determined that the plaintiff is the lawful registered owner of the suit parcel of land and that the defendants are trespassers. The defendants made an application for stay of execution which the court heard and granted a conditional stay whereby the defendants were to deposit Kshs. 150,000/ with the plaintiff within 30 days which they never complied with.

The stay orders lapsed upon the expiry of 30 days on non-compliance with the conditional stay more than one year ago. I therefore find that the application for eviction has merit and is therefore allowed as prayed with costs. OCS Langas Police Station to assist with the enforcement

of the orders.

**DATED AND DELIVERED AT ELDORET THIS 30TH DAY OF JUNE, 2021**

**M. A. ODENY**

**JUDGE**