



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

MISCELLANEOUS CIVIL APPLICATION NO. 17 OF 2020

NGALAWA HOUSING CO-OPERATIVE SOCIETY LTD.... PLAINTIFF/RESPONDENT

-VERSUS-

BENJAMIN MAINA KOYRADEFENDANT/APPLICANT

RULING

Introduction:

1. This Ruling is in relation to a Notice of Motion Application dated, 4/06/2020, brought under **Order 22 Rule 22, Order 42, Rules 4 & 6, Order 51 Civil Procedure Rules and Article 159 (d)** of the Constitution in which the Applicant is seeking for the following Orders:

a. That this Honourable Court be pleased to order a stay of execution of the Judgment delivered ex-parte on 13.05.2020 by the trial Honourable C.C Oluoch Chief Magistrate in Mavoko CMCC ELC No. 160 of 2013 and the Decree (together with all consequential orders) pending the hearing and final determination of this application.

b. That this Honourable Court be pleased to order a stay of execution of the Judgment delivered ex-parte on 13.05.2020 by the trial Honourable C.C Oluoch Chief Magistrate in Mavoko CMCC ELC No. 160 of 2013 and the Decree (together with all consequential orders) pending the hearing and final determination of the Appeal Machakos Civil ELC Appeal No.12 of 2020 subject to this application.

c. That the costs of this application abide the outcome of the Appeal.

2. The Application is supported by the Affidavit of the Defendant/Applicant who deponed that the Judgment in this matter was unprocedurally delivered on 13/05/2020 in favor of the Respondent contrary to the directions issued by the superior courts on delivery of Judgments during this period of the Covid-19 pandemic and that he filed a Memorandum of Appeal against the said Judgment.

3. According to the Defendant/Applicant, the *ex-parte* delivery of the Judgment by the trial court was unprocedural for lack of consent to have the Judgment delivered electronically; that his filing of submissions was crucial as per the trial court's own Orders of 3/09/2019 as he was supposed to address pertinent issues in his submissions and that the trial court certified the suit ready for judgment and delivered the same *ex-parte* without notice in complete disregard of the directions issued by the superior courts on delivery of judgments during the covid-19 pandemic period.

4. It is the Defendant's case that the trial court failed to *suo moto* order for stay of execution of the Judgment; that the orders issued in the Judgment were quite grave as they consisted a permanent injunction, eviction and demolition orders against his homestead and that the directions on automatic stay of execution on matters whose Judgment had been delivered during the pandemic have since been lifted and was exposed to immediate execution.

5. In response, the Plaintiff/Respondent filed Grounds of Opposition together with a Replying Affidavit. In the Grounds of Opposition dated 20/7/2020, the Plaintiff averred that the Application did not accord with the terms and conditions set out under the law which it was brought and that the orders sought by the Applicant were not capable of being granted.

6. In the Replying Affidavit sworn on 19/08/2020, the Plaintiff's Chairman deponed that contrary to the Defendant's averments, the trial court gave a notice on delivery of the Judgment which was sent to the last declared e-mail addresses of both advocates; that the Application could not proceed contemporaneously with the appeal since they both touched on the same matter and that the Application should be dismissed with costs to the Plaintiff.

7. The Application was canvassed by way of written submissions which I have considered. I have also considered the filed authorities.

8. The Defendant/Applicant is seeking for an order of stay of execution of the Judgment of the lower court pending the hearing and determination of appeal by way of a miscellaneous application. **Order 42 Rule 6(1) and (2) of the Civil Procedure Rules** provides as follows:

“(1) No appeal or second appeal shall operate as a stay of execution or proceeding 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 to 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 for stay of execution shall be made under subrule (1) unless –

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that 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.”

9. A stay of execution of a Judgment can only be granted firstly, when a party files an appeal, and secondly, upon showing to the satisfaction of the court that unless the order of stay of execution is granted, the Applicant is likely to suffer substantial loss. That being the case, it is imperative on the Applicant to file the Application for stay of execution in the Appeal file and not a miscellaneous application, which is distinct to the appeal.

10. Having not filed the application in Machakos ELCA No. 12 of 2020, it is my finding that the Application dated 4th June, 2020 for stay of execution of the Judgment of the lower court is incompetent.

11. For those reasons, I strike out with costs the Application dated 4th June, 2020.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 22ND DAY OF OCTOBER, 2021

O. A. ANGOTE

JUDGE

In the presence of:

Ms Wanjiku for the Plaintiff/Respondent

N/A for the Defendant/Applicant

Court Assistant – John Okumu