



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT ELDORET

E&L CASE NO. 186 OF 2016

CHARLES CHEBORE CHELIMO.....1ST PLAINTIFF

LYDIA JEROTICH CHEPSAIGUT.....2ND PLAINTIFF

VERSUS

JACKSON CHERONO.....DEFENDANT

RULING

Introduction

1. The Defendant/Applicant filed a Notice of Motion dated 24th December, 2019 in which he sought Stay of Execution of the Decree herein pending hearing and determination of an Appeal he had preferred to the Court of Appeal against a judgment which was delivered on 4th December, 2019. The Applicant had been sued by the Plaintiffs/Respondents who had sought a permanent injunction against him restraining him from interfering with LR.No.Baringo/Kiboino/A” 7, (suit property).
2. The Applicant filed a defence and raised a counter claim in which he sought to restrain the Respondents from interfering with the suit property and for a declaration that the Respondents had obtained title to the suit property fraudulently. The Applicant also sought for cancellation of title held by the Respondents.
3. At the hearing of the suit, the Applicant who had been duly served with a hearing Notice through his Advocates did not attend the hearing. The hearing therefore proceeded ex-parte. Judgment was entered in favour of the Respondents and the Applicant’s Counter-Claim was dismissed with costs.

Applicant’s Application

4. The supporting affidavit to the Applicant’s application was sworn by Kalya Jemutai Kipsumei, who is the Applicant’s daughter. The deponent contends that her father was ordered to be evicted from the suit property within 30 days from the date of the impugned judgment; that her father was not given opportunity to be heard as he was in prison; that her father has been in occupation of the suit property for the entire period of the pendency of this suit; that the Respondents have since delivery of judgement been subdividing the suit property and that if stay of execution is not granted, the intended Appeal will be rendered nugatory.

5. The Applicant further contends that his Appeal has high chances of success and that should stay of execution not be granted, he will suffer substantial loss.

Respondent’s Response

6. The Respondents contend that the Applicant’s application is incompetent in that the supporting affidavit has been sworn by a stranger who is not a party to the proceedings Contrary to the Provisions of Order 19 Rule 3(1) of the Civil Procedure Rules. The Respondents further contend that the application by the Applicant has been overtaken by events in that the execution process has been completed as the Applicant has already been evicted from the suit property and there is therefore nothing to stay.

7. The Respondents further argue that the Applicant is to blame for not securing stay before he was evicted and that the current application is meant to reinstate the Applicant into the suit property and that in any case, the applicant has not met the threshold for grant of Stay pending Appeal.

Analysis

8. The parties to this application were directed to file written submissions in respect of the application within seven days from 23rd June, 2021. The Respondents filed their submissions on 1st July, 2021. The Applicant did not file any submissions. I have considered the Applicant's application, the opposition thereto by the Respondents as well as the submissions by the Respondents. The issues which emerge for determination are firstly, whether the Applicant's application is incompetent. Secondly, whether the Applicant's application has been overtaken by events and lastly whether the Applicant has met the threshold for grant of stay pending Appeal.

9. On the first issue as to whether the Applicant's application is incompetent, there is no contention that the supporting affidavit to the Applicant's application was sworn by the daughter of the Applicant. The Applicant's daughter was not a party to the proceedings and no leave of court was given to her to swear the affidavit. Order 19 Rule 3(1) of the Civil Procedure Rules provides as follows:-

“ 3. (1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove:

Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof”.

10. In the case of Kenya Power & Lighting Company Limited =vs= Julius Wambale & another [2019] eKLR, Justice Githua quoted a decision of the court of Appeal in Moijo Matanya Ole Keiwa =vs= Chief Justice of Kenya & 6 others [2008] eKLR where the Court of Appeal held that affidavits which are sworn by persons who are not parties to proceedings before the court are incompetent and ought to be expunged from record.

11. Based on the decision of the Court of Appeal as quoted in the case of Kenya Power and Lighting Company (Supra), I proceed to expunge the affidavit sworn by M/S.Kalya Jemutai Kipsumei from the record. This being the case, the Applicant's application has no ground to stand on. It has crumbled. I therefore need not consider the other two issues save to add that were it not that the Applicant's application is incompetent, it would not have succeeded because the Applicant had already been evicted from the suit property and there is therefore nothing to stay. In the case of William Lerikan Konchellah & another =vs= Julius Labarai Ole Maito Lampushi [2014] eKLR, the Court of Appeal stated that it could not grant an order of stay of execution where execution had already been carried out to completion as courts do not give orders in vain.

Disposition

12. It is clear from the foregoing analysis that the Applicant's application is incompetent. It is hereby struck out with costs to the Respondents.

It is so ordered;

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 18TH DAY OF OCTOBER, 2021

E.O. OBAGA

JUDGE

In the virtual presence of

Mr. Kagunza for Respondent

Court Assistant - Mercy

E.O. OBAGA

JUDGE