



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT**

**AT SIAYA**

**ELC CASE NO. E 006 OF 2021**

**ALICE NGAIWA (Suing as the legal administrator of the estate of the late**

**JECONIA OCHIENG USITA.....APPELLANT**

**VERSUS**

**RUSALIA NYAGARE MUKUANA (SUED AS ADMINISTRATOR OF THE ESTATE OF**

**LEONADUS MUKUANA ADUDA- DECEASED.....1<sup>ST</sup> RESPONDENT**

**LAND REGISTRAR SIAYA.....2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**RULING**

**Introduction**

1. By a plaint dated 19/03/2019, the 1<sup>st</sup> respondent filed suit against the appellant whereby she sought the cancellation of Jeconiah Ochieng Usita (who is deceased and the appellant's husband) as the registered proprietor of land parcel title number **EAST GEM/KAGILO/1147 (the suit property)** and for the land register to be rectified to reflect the names of the previous owner one Leonadus Mukuana Aduda (deceased and husband to the 1<sup>st</sup> respondent). The 2<sup>nd</sup> and 3<sup>rd</sup> respondents entered appearance and filed a defence dated 7/06/2019. The appellant failed to enter appearance. Consequently, the court upon an application for request for judgment being made, entered interlocutory judgement against the appellant.

2. The case proceeded for hearing on 3/10/2019 and by its *ex parte* judgement dated 4/06/2020, the court granted the 1<sup>st</sup> respondent the following verbatim relief:

**“Entries no.3 and 4 made in favour of Jeconiah Ochieng Usita on the register of parcel no. EAST/KAGILO/1147 are hereby removed and the register is rectified to revert to the ownership of Leonadus Mukuana Aduda.”**

3. On 4/6/2020, the 2<sup>nd</sup> respondent executed the decree by registering the property in the name of the 1<sup>st</sup> respondent Rusalia Nyangare Mukuana who subsequently transferred it to Hezrone Omondi Omayo who eventually transferred it to Stemich Enterprises. In summary, the suit property has changed severally.

4. The appellant filed three applications on 3/09/2020. One was a notice to cross examine the process server while the other two were notices of motion. One motion sought leave for the advocate to come on record and for the annexed defence and counterclaim to be deemed as duly filed while the other motion sought to set aside the “summary” judgement dated 4/06/2020 and for an order of stay of the “summary” judgement. In the former motion, the appellant's advocates were granted leave to come on record while the latter motion was canvassed by way of written submissions.

5. By a ruling dated 26/11/2020, the court held that it was satisfied that the appellant was duly served with summons to enter appearance and consequently struck out the latter motion.

6. Another motion filed by the appellant dated 8/02/2021 was dismissed by the court for being an abuse of the court process.

7. The appellant did not let matters lie down and instead filed a memorandum of appeal dated 15/09/2021 together with a motion dated 28/09/2021. The instant motion is the subject of this ruling.

#### Appellant's case

8. In the instant motion, the appellant has sought the following verbatim reliefs:

“1) Spent

2) That the summary judgement delivered on the 4<sup>th</sup> June 2020 issuing orders to remove the entries No.2 & 3 made in favour of JECONIAH OCHIENG USITA (Deceased) the register parcel LR No.2 EAST GEM/KAGILO/1147 removed and the register rectified to revert to the ownership of LEONADUS MUKUANA ADUDA.

3) That pending the hearing and determination of this application interparties this honourable court be pleased to order stay of execution of the ruling made on the 26/11/2020 and 12/08/2021 pending appeal herein.

4) That the cost of this application be provided for.

9. The application was grounded on the following main grounds; (i) that the appellant had sought to set aside the summary judgement delivered by the court on 4/06/2020, (ii) that during cross examination of the process server, her advocate had informed the court that she was unwell but the court ignored this fact, (iii) that the court made a wrong finding in holding that the process was duly served, and, (iv) that the rulings of 26/11/2020 and 12/08/2021 had serious implications on the appellant. The appellant's affidavit in support reiterated the same grounds as set out in her grounds save that she urged the court to grant her an order of stay pending appeal.

#### Respondents' case

10. The 1<sup>st</sup> respondent filed a lengthy replying affidavit dated 15/10/2021. She gave a detailed background of the suit and the flurry of the applications filed by the appellant and the outcomes of these applications. She contended that the decree had been executed and the suit property had since changed hands. She submitted that the appellant had failed to provide security thus she does not warrant to be granted a stay of execution. She urged the court to dismiss the appellant's motion with costs to her.

#### Appellant's Submissions

11. The appellant filed written submissions dated 8/11/2021. She set out two issues for determination; (i) whether the “summary” judgement delivered on 4/06/2020 should be set aside and, (ii) whether stay of execution should be granted. On the first issue, the appellant relied on **Articles 50(1) and 159(2)(d) of the Constitution** and several authorities including the case of **MK vs MWM & Another (2015) eKLR**. On the 2<sup>nd</sup> issue, the appellant canvassed her submissions on stay pending appeal and equally placed reliance on several authorities including **Prime Bank Ltd vs Paul Otieno Nyamodi (2014) eKLR**.

#### Respondent's submissions

12. The 1<sup>st</sup> respondent put in written submissions dated 11/11/2021. She adopted the issues framed by the appellant. She argued that the judgement delivered on 4/06/2021 was regular and the suit property had since changed hands and consequently, the motion was moot. He placed reliance on several authorities including the case of **Daniel Kaminja & Others (Suing as Westland Environmental Caretaker Group vs County Government of Nairobi (2019) eKLR**.

#### Analysis and determination

13. This court has had a chance to look at the motion, supporting affidavit, replying affidavit, annexures, and written submissions and the only issue falling for determination is whether the appellant's motion is merited.

I will proceed to analyze the legal and jurisprudential framework on the issue.

14. The court is called upon to exercise its discretionary power judiciously. In making its determination, courts are usually guided by the pleadings presented before it by the parties and not on any other extraneous factors. Prayer number 1 is incomprehensible and this court is totally unable to make the head and tail of it. What did the appellant want the court to issue? Was it a final relief that was being sought at an interlocutory stage? The same fate befalls prayer number 2, does the appellant seek stay of execution pending interparties hearing or and does she seek stay of execution pending appeal? It is not the duty of the court to undertake a fishing expedition to infer the intent of the parties but rather it is the litigants who are called upon to be precise and clear in their pleadings. A court cannot exercise its judicial discretion to grant a relief which is not even sought by parties in their pleadings as granting such a relief would lead to a miscarriage of justice. It is trite law that court orders cannot be issued in vain and ultimately it is the finding of this court that prayer no.2 and 3 are vague, ambiguous and incapable of being issued.

15. Albeit the fact that the orders being sought are ambiguous, it has made reference to two rulings. One is dated 26/11/2020 while the other is dated 12/08/2021. This court has had a chance to look at these two rulings and it is quite obvious that the said rulings merely dismissed the appellant's applications and there were no positive reliefs issued that were capable of execution. This position was upheld in the case of **Oliver Collins Wanyama v Engineers Board of Kenya [2019] eKLR** where the Court of Appeal held thus;

**“...It appears to us that the applicant, being aware of the decisions in the long line of this Court’s determination on the subject, such as the decision in Shimmers Plaza Limited (supra), was shy to give the prayer prominence. An order of stay is not available to the applicant his application for judicial review having been dismissed, giving rise to a negative order that is incapable of being stayed...”.**

16. Consequently, it is the finding of this court that the motion is not merited.

17. Ultimately, I make the following disposal orders: -

- a. The Notice of Motion dated 28/09/2021 is dismissed.**
- b. Costs shall be borne by the appellant.**
- c. The record of appeal to be filed within 30 days from today.**
- d. Case to be mentioned for directions on 19/01/2022**

**Ruling delivered in open court**

**DATED, SIGNED AND DELIVERED THIS 25<sup>TH</sup> DAY OF NOVEMBER, 2021**

**In the Presence of:**

Mr. Ochami for the 1<sup>st</sup> respondent.

No appearance for the appellant

Court assistant - Sarah Ooro

**HON. A. Y. KOROSS**

**JUDGE**

**25/11/2021**