



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

ELC CASE NO. 6 OF 2019

PAMELA ONYANGO OSANOPLAINTIFF

VERSUS

GEOFFREY MOMANYIDEFENDANT

RULING

Introduction

1. This is a ruling in respect of two applications and a Preliminary Objection. The first application is dated 2nd March, 2021. It is brought by the Defendant and it seeks stay of execution pending appeal. The second application is dated 12th May, 2021. It is brought by the Plaintiff and it seeks orders directed at the OCS Eldoret Central Police Station to oversee the eviction of the Defendant from LR No.Eldoret Municipality/Block 5/733. The Preliminary Objection is dated 6th April, 2021. It is brought by the Plaintiff and it attacks the Defendants application dated 2nd March, 2021 on the ground that the application has been brought under Provisions of Order 45 Rule 6 of the Civil Procedure Rules which deals with review and has nothing to do with appeals. The other ground of attack is that the application has been filed after inordinate delay.

2. The parties were direct to file written submissions in respect of the two applications and the Preliminary Objection. As regards the Preliminary Objection, the Plaintiff filed submissions dated 20th April, 2021 whereas the Defendant filed submission dated 12th April, 2021. As regards the application dated 2nd March, 2021, the Defendant filed submissions dated 12th April, 2021 whereas the Plaintiff filed submissions dated 20th April, 2021. As regards the application dated 12th May, 2021, the Plaintiff filed submissions dated 26th August, 2021 whereas the Defendant filed submissions dated 4th October, 2021.

Preliminary Objection

3. I have considered the submissions by the parties as regards the Preliminary Objection. The Plaintiff argues that the application dated 2nd March, 2021 was brought under Provisions of Order 45 Rule (6) of the Civil Procedure Rules which deals with review and that since the Defendant is seeking for stay of execution pending appeal, the application should therefore be struck out and that in any case, the application was filed after inordinate delay.

4. The Plaintiff argues that it cannot be assumed that the citing of wrong Provisions of the Law was a typing error and that the Defendant should have applied for amendment.

5. The Defendant argues that the citing of wrong Provisions of Law was a typing error and that the Preliminary Objection is based on a technicality which should be discouraged by the court.

6. In the case of *Mukisa Biscuit Manufacturing Company Ltd vs West End Distributors Limited [1969] EA, Law JA* stated as follows;-

“So far as I am aware a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and if argued as a preliminary point may dispose of the suit”.

7. I have looked at ground two of the Preliminary Objection by the Plaintiff. This ground is on delay to file the application dated 2nd March, 2021. This is not a point of law to qualify to be argued as a Preliminary point of law. The first ground is based on a technicality. Order 10 (2) of the Civil Procedure Rules Provides that no application shall be defeated on a technicality or for want of form that does not affect the substance of the application.

8. In the instant case it is clear that the Defendant is seeking stay pending appeal and not review. It is therefore absurd for the Plaintiff to seek dismissal of the application on this ground. Article 159 of the constitution mandates courts to administer substantive justice as opposed to technicalities. I therefore find that the Preliminary Objection by the Plaintiff lacks merit. The same is dismissed with costs to the Defendant.

The First Application

9. The Defendant contends that he has preferred an appeal against the judgment which was delivered on 2nd February, 2021 and that if execution is allowed to proceed, he will be evicted from the suit property which eviction will greatly prejudice him as he lives in the suit property with his family.

10. The Plaintiff opposed the Defendant's application based on a replying affidavit sworn on 6th April, 2021. The Plaintiff contends that the Defendant has not demonstrated that he will suffer substantial loss and or that the appeal will be rendered nugatory should execution proceed. In the alternative the Plaintiff argues that if the court grants stay, the Defendant should be ordered to give security which is equivalent to the value of the suit property.

11. Order 42 Rule (6) of the Civil Procedure Rules gives conditions upon which stay of execution pending appeal can be granted. First the application has to be filed without unreasonable delay. Second, the Applicant has to demonstrate that he will suffer substantial loss should stay of execution not be granted. Third, there has to be security given as may be binding upon the Applicant in the decree.

12. In the instant case, the impugned judgment was delivered on 2nd February, 2021. This application was filed on 2nd March, 2021. The court had granted the Defendant 45 days to move out of the suit property. This explains why he was not in hurry to file the application. In the circumstances, I find that the application was brought within reasonable time.

13. Demonstration of substantial loss is the cornerstone for grant of stay of execution. The Defendant herein lives in the suit property. He was living in it as a caretaker but after the registered owner was murdered, the Plaintiff obtained grant of letters of administration and filed this suit for eviction.

14. The Defendant in his defence tried to claim that the deceased had given him a share of the property as he considered him as one of his sons. The Defendant has not demonstrated what substantial loss he will suffer if he was evicted. If he is evicted and he eventually succeeds in his appeal, he will simply move back to the suit property. His eviction will not render the appeal nugatory.

15. Ordinarily, security for costs is ordered if the Applicant has demonstrated that he will suffer substantial loss. As the Defendant has not demonstrated substantial loss, I find that the application for stay has no merit. The same is dismissed with costs to the Plaintiff.

It is so ordered.

The Second Application

16. The Plaintiff contends that when the court granted the Defendant 45 days to vacate the suit premises failing which he be evicted, the court did not direct that Police do assist in the eviction. The Plaintiff therefore argues that there is need for the OCS Eldoret Central Police Station to oversee the eviction of the Defendant to allow her access the suit property.

17. The Defendant opposed the Plaintiff's application based on a replying affidavit sworn on 21st July, 2021. The Defendant argues that the Plaintiff has filed the current application well aware that he had filed the application dated 2nd March, 2021 which is yet to be determined. He argues that it is unprocedural for an Applicant to file an application to counter another application by the opposite party. He contends that this application is brought maliciously.

18. I have considered the Plaintiff's application as well as the opposition thereto by the Defendant. I have also considered the submissions by the parties. The only issue for determination is whether this court should order the OCS Eldoret Central Police to oversee the eviction. The judgment was clear that the Plaintiff was to vacate within 45 days failing which eviction was to issue. The 45 days given have since lapsed. The Defendant has not vacated. His application for stay pending appeal has been dismissed. The Plaintiff should enjoy the fruits of her judgment. I therefore find that the Plaintiff's application has merits. I allow the same with the result that the OCS Eldoret Central Police Station is hereby ordered to oversee the eviction of the Defendant from LR NO.ELDORET MUNICIPALITY/BLOCK.5/733. the Plaintiff shall have costs of this application.

It is so ordered.

DATED, SIGNED and DELIVERED at ELDORET on this 25TH DAY of NOVEMBER, 2021.

E.O. OBAGA

JUDGE

In the virtual presence of:-

Mr. Chemoyai for Defendant/Respondent

Court Assistant – Mercy

E.O. OBAGA

JUDGE