



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT NAKURU

ELC APPEAL NO. 18 OF 2021

ISAAC KIMANI KAMAU.....APPELLANT

VERSUS

EUNICE WANGUI MUNYUNGU

(Suing as the Legal Representative of the Estate

of the Late William Munyungu Chege).....RESPONDENT

RULING

1. This legal opinion is in respect of the notice of motion application dated **17/08/2021** and filed on **19/08/2021** by the appellant seeking the following orders:

1. ...Spent

2. ...Spent

3. That this honorable court be pleased to order a stay of execution of the ruling and order made in Molo Chief Magistrate's Court (Civil Division) No. 77 of 1993 on the 3rd day of August 2021 by Hon. E.G Nderitu pending the hearing and final determination of the applicant's appeal.

4. That the honorable court be pleased to make such further or other orders as it may deem just and expedient in the circumstances of this application.

5. That costs of this application be provided for.

2. The application is supported by the affidavit sworn by the appellant on **17/08/2021**. The grounds on the face of the application and the supporting affidavit are that a ruling was delivered on **3/08/2021** by Hon. E.G. Nderitu which allowed the respondent's application and issued eviction orders against the applicant in execution of a decree that is over twenty years old; that the eviction orders were issued without due regard to the provisions of **Order 22 Rule 18** of the **Civil Procedure Rules**; that as a result of that ruling the respondent has started fencing the subject suit land **plot No. 21 Tayari Farm Molo**; that the respondent has now intruded on the applicant's parcel of land and uprooted and destroyed trees incurring great loss; that his family has been in occupation of the suit land for many decades; that the judgement in that matter was delivered on **16/06/2000** and the respondents did not execute the judgement until twenty one years later; the appellant prays that his application for stay of execution be granted.

Response

3. The respondent filed a replying affidavit sworn on **26/08/2021** and filed on **30/08/2021**. She deposed that her late husband instituted a claim against the appellant herein and judgement entered in his favor on **16/06/2000**; that the appellant then filed **HCCA No. 71 of 2000** and obtained stay of execution of that judgement; that the appeal was dismissed on **28/04/2010**; that on **13/05/2010** the appellant filed **Molo SPMCC No. 263 of 2010** which was heard and dismissed on **05/04/2016**; that the appellant failed to vacate the suit property as ordered by the court in its judgement and so the respondent filed the application dated **22.03.2021** seeking orders of eviction of the appellant herein; that the appellant filed a preliminary objection dated **05.04.2021** which was dismissed on **3.08.2021** and the respondent's application allowed; that the eviction was carried out before this application was filed and therefore it is overtaken by events.

Submissions

4. The applicant filed submissions on **19/11/2021** and the respondent filed herds on **16/11/2021**.

Determination.

5. The only issue for determination is whether the court should grant stay of execution of the ruling and order delivered and issued on **03/08/2021** in the Molo Chief Magistrate's court in **Molo CM Case No. 77 of 1993**.

6. **Order 42 Rule 6(2)** of the **Civil Procedure Rules** provides as follows:-

(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.

7. The court in the case of **RWW vs. EKW [2019] eKLR** stated as follows on stay of execution pending appeal:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

8. For the court to grant stay of execution pending appeal, the applicant will have to satisfy the following three conditions, the applicant has come to court without unreasonable delay, that the applicant stands to suffer substantial loss if the stay order is not granted and give security for due performance of the decree if the appeal fails.

9. In the present application, the appellant is seeking for stay of execution of the order made in **Molo Chief Magistrates case No. 77 of 1993** that allowed his eviction from the suit property **Plot No. 21 Tayari Farm**. The said ruling was delivered on **3.08.2021** and the application was filed on **19.08.2021** and so it was filed without unreasonable delay.

10. In her submissions the respondent avers that the appellant/applicant admits that he has already been evicted from the suit property and so in essence the application has been overtaken by events. A stay order, like an order of injunction can only be issued against an event that has not yet occurred. Issuance of a stay order after the event intended to be barred has occurred is futile. Has the applicant admitted that he has already been evicted?

11. The appellant avers in his application that the respondent began to invade the suit land and cause destruction even before the extraction of the orders. He further avers that as at the time the order of temporary stay was granted by this court on **20/8/2021** he had not been evicted and that the provisions of **Section 152 B 152 C 152 D** and **152 E** of the land act provides for the lawful procedure that has to be followed before an eviction is carried out. He submits that that law requires that an eviction notice should issue not less than **90** days before the eviction. From the contents of the applicant's submissions I do not find that the applicant has admitted that he has been evicted from the suit premises.

12. I have examined the replying affidavit of the respondent which exhibits a letter dated **11/8/2021** from the auctioneers said to have effected the eviction of the appellant and the receipt dated **4/8/2021** showing the fees paid in respect of their services by the applicant. She states that the eviction took place even before this appeal was filed. It is noteworthy that there is no supplementary affidavit controverting the respondent's position and the argument the applicant now raises can not be made in this application after the eviction.

13. After due consideration of the matter I find that the plaintiff has been evicted and he does not consider the eviction procedural. However that is not an issue to be dealt with by this court as what is currently before me is only a notice of motion for stay. The issue of whether the execution of the eviction orders was legal or not should be agitated elsewhere and not in this appeal. As I have stated before an order of stay can not be issued to bar an action that has already taken place.

14. The upshot of the foregoing is that the appellant's application dated **17/8/2021** has been overtaken by events, lacks merit and is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 25TH DAY OF NOVEMBER, 2021.

MWANGI NJORGE

JUDGE, ELC, NAKURU.