



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC CASE NO. 260 OF 2016

FATUMA MOHAMUD MOHAMMED MIRE.....PLAINTIFF

VERSUS

FRIDAH MAKANDI NTEERE (Suing as the Legal Representative of

JAPHET NTEERE MWENDWA (Deceased).....DEFENDANT

RULING

1. The application dated 30.7.2021 seeks for a further extension of stay orders granted by this court on 27.2.2021 till the hearing and determination of Nyeri Appeal No. 3 of 2019. The basis of the application is that the Court of Appeal is not fully constituted and hence directions on how to dispose the appeal have not been given, the applicant is on the suit land alongside his family who are likely to be prejudiced if stay is not extended as the land may be disposed of to a third party.
2. The application is supported by an affidavit sworn on 30.7.2021 of Fridah Makandi Nteere who states the stay was to expire on 27.8.2021; the defendant (appellant passed on and she has sought to substitute him at the Court of Appeal and hence is unable to seek for stay at the Court of Appeal before substitution is allowed. She maintains it is in the interest of justice the extension be allowed.
3. By a replying affidavit sworn on 17.9.2021, Fatuma Mohamud Mohammed Mire the defendant opposes the application on the grounds that 3 years have almost elapsed since delivery of the judgment; the dispute is over 30 years old; she continues to suffer loss and prejudice by not enjoying fruits of her judgment; the applicant has taken no steps to have the appeal heard; it amounts to abuse of court process and delay of justice in her favour; the commercial property generates over – Kshs. 300,000/=per month which is being enjoyed solely by the applicant and lastly she urges, if the court is to extend the orders, the rent payable be deposited in a joint interest earning account or a manager be appointed for the property so as to balance the interests of the parties.
4. The plaintiff/respondent submits the application is brought by a non-party to the proceedings; substantial loss has not been disclosed; the applicant is enjoying rental income to the exclusion of respondent. The court is urged to rely on *James Wangalwa & Another –vs- Agnes Naliaka Chesoto [2021] eKLR*; claims there has been unreasonable delay in making the application and no security has been offered for due performance of the decree.
5. The record shows this is the 2nd time the applicant is seeking for an extension of stay orders. The reasons given are that the Court of Appeal Nyeri is not yet fully constituted so as to hear the appeal. This fact cannot be true. It is common knowledge His Excellence the President swore in Court of Appeal Judges in 4.6.2021 following which the Court of Appeal started hearing matters outside Nairobi. The Court of Appeal has been having a cause list for Nyeri station since then. The applicant states her application for substitution is yet to be heard by the Court of Appeal. Leave was granted to put in a supplementary affidavit to explain the steps she has made to fastrack the appeal. None was filed as ordered.
6. In absence of an explanation and demonstration of the substantial loss, my finding is that the applicant has not demonstrated through both empirical and documentary evidence what substantial loss she is likely to incur if the orders sought are not granted.
7. On the aspect of security the applicant has offered none yet she continues to derive income from the suit property as averred in the replying affidavit.
8. For over 30 years since the sale agreement was made the respondent has been kept out of the property and now three years since delivery of the judgment, she is yet to enjoy the fruits of her judgment.
9. The applicant says she has filed an application for substitution in the Court of Appeal. None has been displayed here. No indication has been made when this was done. Similarly there is no law which bars a party seeking for substitution to seek for stay of execution at the

Court of Appeal. In *Fahim Yasin Twaha -vs- Timamy Issa Abdalla & 2 Others [2013] eKLR*, the Supreme Court held where a litigant is faced with more than one option to pursue he/she must settle on one of them. In the instant case, the applicant chose to go for substitution in the Court of Appeal but reverted to this court for this application.

10. Further there is no record to show the applicant after the ruling on 27.2.2021 she ever amended her papers, sought for the certificate of delay before this court so as to fastrack her appeal.

11. In *Board of Governors, Moi High School, Kabarak & another v Malcolm Bell [2013] eKLR*, the court held the main objective of stay was held to preserve the subject matter of an appeal. The applicant has not satisfied this court if her intended appeal is arguable and not frivolous and how it shall be rendered nugatory if stay orders are not extended, given the foregoing reasons that she has not been keen to pursue the appeal.

12. Lastly the application dated 27.2.2020 is identical to the one dated 30.7.2021. In my considered view what the applicant ought to have done is to come under **Section 95** of the **Civil Procedure Act** and **Orders 50 rule 6**. The court has already rendered itself on similar applications hence the current one is definitely res judicata as held in *Johnson Ngishu Kanyiri & Another -vs- Florence Wausi Mutiso [2019] eKLR*.

13. In *Nicholas Kiptoo Arap Korir Salat -vs- Independent Electoral & Boundaries Commission & 7Others (2014) eKLR* the court held there must be extenuating circumstances to enable the court extend time.

14. The respondent submits the application is an abuse of court process. I see no reasons to extend orders which are already spent with no new material brought forth.

15. The upshot is the application herein is dismissed with costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 24TH DAY OF NOVEMBER, 2021

In presence of:

Mwirigi Kaburu for defendant/applicant

Masamba for plaintiff/respondent

Court Assistant - Kananu

HON. C.K. NZILI

ELC JUDGE