



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT THIKA

MISC. APPLICATION NO 29 OF 2019

LAWRENCE KARURI MWATHE.....1<sup>ST</sup> APPELLANT /RESPONDENT

SCHOLASTICA WANGARI KIRURI.....2<sup>ND</sup> APPELLANT/RESPONDENT

VS

DUNCAN MUKUNDI KARANJA.....1<sup>ST</sup> RESPONDENT /APPLICANT

GITHUNGURI CONSTITUENCY RANCHING CO LTD...2<sup>ND</sup> RESPONDENT/RESPONDENT

RULING

1. The Applicant/1<sup>st</sup> Respondent filed the instant Application on 25<sup>th</sup> February 2021 seeking orders that;

a. Spent.

b. This Honorable Court be pleased to set aside and vacate its orders of 19<sup>th</sup> December 2019 granting the Applicants/Respondents herein leave to appeal out of time and a stay of execution of the judgment and decree in Thika CMCC 122 of 2011, Duncan Karanja Mukundi –vs- Lawrence Kiruri and Another.

c. Costs of this Application be awarded to the provided. (sic)

2. The application is based on the grounds on the face of it and the Supporting Affidavit of **Duncan Mukundi Karanja**, the Applicant. He deponed that this Court granted the Respondents leave to appeal out of time and an order for stay of execution of the Judgment delivered in Thika CMCC 122 of 2011. The Judgment being in his favor, had declared the Applicant the bona fide owner of land parcel no. Ruiru East Block 1(Githunguri)/583 and awarded him Kshs. 300,000/= as damages for trespass. He swore that the Respondents were directed to deposit Kshs. 300,000/= as a condition for the said stay of execution.

3. The Applicant avowed that the Respondents failed to comply with stay of execution orders and to prosecute their appeal. Further that the Respondents have been interfering with the suit land denying him quiet and peaceful possession of the same. Lastly, he deponed that the Respondents procured the said orders by material misrepresentation of facts by alleging that they were in occupation of the suit land when they were not.

4. The Respondents filed their joint Replying Affidavit sworn on 9<sup>th</sup> April 2021. They admitted filing their appeal out of time pursuant to leave granted by this Court on 19/12/2019. That they indeed deposited Kshs. 300,000/= as directed by Court and annexed a copy of the Court deposit slip dated 16/1/2020, **LKM-002**. That they filed their appeal vide ELCA No. 3 of 2020 and duly requested for transfer of the trial Court file to this Court.

5. The Respondents averred that they have fully complied with the Court orders and in fact it is the 1<sup>st</sup> Applicant who was in contempt of those orders. They faulted the Applicant for attempting to appeal against the orders for stay of execution through the instant Application. They urged the Court to dismiss the application with costs and allow the appeal to be heard on merit.

6. The application was canvassed by way of written submissions.

7. The firm of **Muchoki Kangeta Njenga & Company Advocates** filed submissions dated 14/6/2021 on behalf of the Applicant. They reiterated the contents of the rival parties' pleadings and submitted that this Court is empowered to set aside its own orders. That the Respondents have inordinately delayed to prosecute their appeal thereby denying the Applicant the fruits of his judgment.

8. Further, they argued that the Respondents obtained stay of execution orders through material concealment and misrepresentation of facts. That infact it was a third party who was in actual occupation of the land and urged the Court to allow their application.

9. On the other hand, the Respondents filed their submissions dated 9/6/2021 through the firm of **JK Felix & Smith Advocates LLP**. On the issue of failing to comply with the Court order to deposit Kshs. 300,000/=, the Respondents submitted that they duly paid the deposit for security on 16/1/2020 well within the period granted by the Court. Secondly, on the issue of filing their appeal, they reiterated that the memorandum of appeal was filed on 16/1/2020 and enumerated their efforts to follow up on the typed proceedings. That the Applicants' prayer for setting aside the stay orders is a crafty attempt to appeal against this Court's Ruling and as such should not be allowed.

#### **Analysis & Determination**

10. The sole issue for determination is whether the Applicant has established a sufficient cause to set aside the orders of 19/12/2020. The application is expressed under Sections 1, 1A, 3B of the CPA and Order 42 Rules 6(6), 7(1), 11 and 12 of the Civil Procedure Rules (CPR).

11. The legal provisions for setting aside Court orders and/or judgments are found in the Civil Procedure Rules depending on the nature of Order i.e. ex parte, interlocutory, default etc. The instant application seeks to set aside the Court Ruling of dated 19/12/2019. Order 42 Rule 6 (6) CPR is not relevant to the scenario at hand. Order 45 of the CPR on Review is pertinent to this application because the Applicant is aggrieved by the said Ruling but has not preferred an appeal. That said the Court shall proceed under Order 50 rule 10(2) of the CPR which says:-

**“No application shall be defeated on a technicality or for want of form that does not affect the substance of the application.”**

12. It is trite that the setting aside of orders is an exercise of judicial discretionary and must be exercised judiciously. The Applicants' arguments can be summarized into three grounds namely; the Respondents have failed to comply with stay of execution orders, that the Applicants have failed to prosecute their appeal and lastly the Respondents obtained stay of execution orders by concealment and misrepresentation of material facts.

13. I will start by addressing the last issue that the stay of execution orders were obtained by concealment and misrepresentation of facts. That this is due to the fact the Respondents were not in actual occupation of the suit land but by a third party thus misled the Court to grant stay of execution. In opposition, the Respondents turned around and blamed the 1<sup>st</sup> Applicant for being in contempt of the said orders when he coerced their caretaker to vacate the suit land. That accordingly they filed contempt of Court proceedings against the 1<sup>st</sup> Applicant vide the application dated 22/2/2021. That application is pending determination.

14. I have perused the record and note that the alleged concealment of facts was not raised in opposing to the Respondents' application for stay of execution and leave to appeal out of time dated 28/5/2019. That said the Respondents informed the Court that they are in occupation of the suit land through a caretaker on the ground. There is no contrary evidence to rebut this position.

15. The other issue was the Respondents' inordinate delay in prosecuting the appeal. The Respondents explained in great details the efforts they undertook in filing their appeal. Notably they annexed correspondences requesting transfer of the Court file to this Court. It is my view therefore that the Respondents are not guilty of inordinate delay as alleged.

16. Lastly the Applicants argued that the Respondents failed to comply with preconditions for stay of execution. The Respondents adduced evidence of payment of the deposit and further filed their Memorandum of Appeal within time as directed by Court.

17. In the end I find that the application is unmerited.

18. To expedite the determination of ELCA No. 3 of 2020 and ensure ends of justice are met, the Respondents be directed to file their Record of Appeal within 60 days and thereafter take directions on the hearing of the appeal on priority basis.

19. Costs of this application are payable by the Applicant.

20. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT THIKA THIS 22<sup>ND</sup> DAY OF NOVEMBER 2021 VIA MICROSOFT TEAMS.**

**J. G. KEMEI**

**JUDGE**

**Delivered online in the presence of;**

Ms. Mbale for the 1<sup>st</sup> Appellant/Respondent

Ms. Odhiambo for the 2<sup>nd</sup> Appellant/Respondent

Ms. Swaka holding brief for Njenga for the 1<sup>st</sup> and 2<sup>nd</sup> Respondent/Appellant

