



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL CASE NO. 59 OF 2019

LAWRENCE NG'ENTU MUGAMBI.....APPELLANT

VERSUS

TERESIAH KAITHIGA KINYUA.....RESPONDENT

JOHN MUGENDI.....JOCET AUCTIONERS

RULING

1. Before the court are two applications dated **16.8.2021** and **25.10.2021** seeking stay of execution by way of public auction due for **12.11.2021**, setting aside warrants of attachment dated **5.8.2021**, enlargement and extension of time within which the appellant may file and serve a memorandum of appeal against the judgment dated **14.7.2020** in **ELC Appeal No. 59 of 2019**.

2. Further the appellant seeks for an injunction stopping the sale of **Plot No. 260 Nkubu Market as per Nkubu PMCC No. 90 of 2019**.

3. The application is based on the grounds on the face of the notice of motion and a verifying affidavit sworn on 25.10.2021 by Titus Lameck.

4. As a starting point whereas the affidavit is sworn by one **Titus Lamech Omondi Ochichi** an advocate on record for the applicant, **paragraph 5, 6, 7, 9, 11, 14, 15, 16, 17, 18, 19, 20, 21, 24 and 28** therefore cannot pass the test in **Order 19 Rule 3 (1) of Oaths and Statutory Declaration Act**, and **Rule 8 of the Advocates Practice Rules**.

5. In **Simon Isaac Ngui –vs- Overseas Courier Services Ltd. [1998] eKLR** the court held:

“The applicant’s counsel has deponed to contested matters of fact and said that the same are true and within his own knowledge in information and belief. It is not competent for a party’s advocate to depone to evidential facts at any stage of the suit.”

In **Moijo Matunya Ole Keiuwa –vs- Chief Justice Kenya & 6 Others [2008] eKLR** the Court of Appeal held:

“Affidavits which are sworn by persons who are not parties to the proceedings before the court are incompetent and ought to be expunged from the court record.”

Mr. Ochichi has not been appearing for the intended appellant in this matter. There is no authority attached to authorize him to swear the affidavit on behalf of his client. The matters in the paragraphs quoted above cannot possibly be within his own knowledge and belief.

6. As held by the Court of Appeal in **Kamlesh M.A. Pattni –vs- Nasir Ibrahim Ali & 2 Others C.A. 354/2004**, and **Kenya Commercial Finance Co. Ltd –vs- Richard Akuesera Ondita C.A. 329/2009**, my considered view is that it is only the applicant who could explain out substantial loss, the inordinate delay in filing the suit and the offer for security for due performance of the decree.

7. The appellant’s lawyer M/s Kiogora Ariithi advocates had participated in the appeal to the extent of filing a record of appeal on 10.7.2020 and later on written submissions on 16.10.2020.

8. The record indicates M/s Murango Mwenda & Co. Advocates came on record on behalf of the appellant on 22.7.2020 through a consent dated on 22.7.2020 in place of Kioroga Arithi & Co. Advocates. The said law firm upon coming on record filed a notice of appeal dated 22.7.2020 on behalf of the applicant which was a year after the judgment was read. They also paid for the proceedings on 5.8.2020 and a certificate of delay was issued dated 12.4.2021. The firm of Ochich T.L.O & Associates came on record by a notice of appointment dated

19.7.2021 and filed on 13.8.2021 without compliance with **Order 9 Rule 9** after which they filed the current application. On that account alone the applications are filed by a law firm which is improperly before the court.

9. The above notwithstanding the delay in filing the application of over a year has not been explained. Secondly the application is based on falsehoods particularly the appellant making allegations over the failure of his lawyers to act for him yet the record shows the opposite. Thirdly, after the judgment was read the appellant had a duty to follow up his case and establish the progress. He cannot therefore blame his lawyers who as indicated above lawfully executed his instructions.

10. In the circumstances I find the two applications without merits. The same are dismissed with costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 10TH DAY OF NOVEMBER, 2021

In presence of:

Miss Murithi for respondent

Wanyanga holding brief for Ochich for applicant

Court Clerk: Kananu

HON. C.K. NZILI

ELC JUDGE