



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CIVIL CASE NO.79 OF 2009

DAVID KIPKEMOI KOSKEI.....PLAINTIFF/APPLICANT

VERSUS

KENYA COMMERCIAL BANK.....1ST DEFENDANT/RESPONDENT

J. OSORO T/A VIGILANT ACUTIONEERS.....2ND DEFENDANT/RESPONDENT

RICHARD BENGAT.....3RD DEFENDANT/RESPONDENT

R U L I N G

1. The Application coming for consideration in this ruling is the one dated 15/1/2021 seeking the following orders.

(i) SPENT

(ii) SPENT

(iii) SPENT

(iv) THAT this Court issues temporary Stay of Execution of the Judgment and Decree of this Court given on 4/6/2020 pending the hearing and determination of this application.

(v) THAT this Court be pleased to review AND/OR set aside the Orders of 23/10/2020 by reducing or removing the amount of security to be deposited i.e. Kshs.3,000,000/=.

(vi) THAT on the alternative to prayer (v) above this court be pleased to enlarge the time within which the Plaintiff/Applicant is to comply with the conditions for granting Stay of Execution of the Judgment and Decree of this Court given on 4/6/2020 contained in it's order dated 23/10/2020.

(vii) THAT the costs of this application be provided for.

2. The 3rd Defendant/Applicant also filed an Application dated 15/1/2021 seeking the following orders:-

(i) SPENT

(ii) THAT this Court be pleased to issue an order directing the OCS Mogogosiek Police Station to render assistance to the 3rd Defendant to ensure compliance of an eviction order against the Plaintiff.

(iii) THAT costs of the Application be provided.

3. The Applications are supported by Affidavits sworn by the Plaintiff and the 3rd Defendant respectively. The parties filed Written Submissions after the Court gave directions that both Applications be canvassed by way of written submissions.

4. I have considered the rival submissions filed by the parties. A brief summary of this case is that on 4/6/2020, this Court delivered a Judgment against the Plaintiff after the Court found that the 3rd Defendant is the registered owner of KERICHO/CHEPTALAL/623 (hereafter referred to as the suit property) and the Court ordered that the Plaintiff vacates the suit property within 30 days from the date of Judgment and in default the 3rd Defendant be at liberty to use lawful means to evict the Plaintiff.

5. The Plaintiff preferred an appeal against the Judgment dated 4/6/2020 and filed the Application dated 16/6/2020 seeking Stay of Execution pending appeal.
6. The Application dated 16/6/2020 was allowed and the Plaintiff was ordered to deposit a security for costs amounting to Kshs.3,000,000/= within 60 days from the 23rd of October, 2020 when the ruling was delivered.
7. On 15/1/2021, the Plaintiff filed the Application coming for consideration seeking that the requirement for depositing security for cost be removed or the amount be reduced as the sum of Kshs.3,000,000/= is punitive.
8. The 3rd Defendant opposed the application dated 15/1/2021 and he also filed an application of even date seeking Police assistance to evict the Plaintiff from the suit property.
9. The Plaintiff opposed the 3rd Defendant's application on the basis that the firm of M/s Mutai Kemboi & Co., Advocates had not complied with Order 9 rule 9 of the Civil Procedure Rules since the said firm had taken over the matter after Judgment from the firm of Chelule and Company Advocates.
10. The issues for determination in the two Applications are as follows:-
 - (i) *Whether the Plaintiff has met the conditions for review of the orders issued on 23/10/2020.*
 - (ii) *Whether the 3rd Defendant's Application dated 15/1/2021 is competent.*
11. On the issue of review orders sought by the Plaintiff, the conditions for grant of the review orders are set out under order 42 and the Plaintiff has to establish that there is discovery of new and important evidence which was not within the knowledge of the Plaintiff when the order was made.
12. The Plaintiff must also show that there is a mistake or error apparent on the face of the record or other sufficient reason to warrant review of the Court Order.
13. The Application must also be filed without unreasonable delay.
14. I find that the Application was filed on 15/1/2021 within three months after the order to deposit security was made on 23/10/2020. I find that period reasonable in view of the circumstances under which the Courts are operating.
15. The Plaintiff stated in his submissions that he is a retiree aged 78 years receiving a monthly pension of kshs.12,935/= per month and that it would take him 19 years to raise a deposit of Kshs.3,000,000/=.
16. The Plaintiff also submitted that the suit property is in the name of the 3rd Defendant and further that the security for cost should not be meant to punish him but the purpose of the said deposit is to guarantee the due performance of such decree or order as may ultimately be binding upon him.
17. The 3rd Defendant opposed the Application and submitted that the Plaintiff has not met the conditions set out under order 42 for review of the order of the Court.
18. I find that the pecuniary circumstances of the Plaintiff warrant the review of the order of this court to enable the Plaintiff pursue his appeal.
19. I allow the Plaintiff's Application dated 15/1/2021 and reduce the security for costs from Kshs.3,000,000/= to 1,000,000/= on condition that the same is deposited within 30 days of this date and the Applicant also meets the 3rd Defendant's costs of the said Application.
20. On the issue as to whether the 3rd Defendant's Application dated 15/1/2021 is competent, I find that Mr. Joshua Mutai has always been on record for the 3rd Defendant and therefore the said application is properly on record.
21. However, the said application is seeking Police Assistant to evict the Plaintiff and since the Plaintiff has been granted leave to pursue his appeal, the 3rd Defendant's Application dated 15/1/2021 is held in abeyance pending appeal.

Delivered, signed and dated at Kericho this 9th day of April, 2021.

A. N. ONGERI

JUDGE