



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC ORIGINATING SUMMONS NO. 25 OF 2009

TABITHA CIOMBOROKI.....PLAINTIFF/APPLICANT

VERSUS

TWAMWARI MUMIIRA.....DEFENDANT/RESPONDENT

RULING

1. The applicant seeks stay of execution of the judgment delivered on **10.4.2020** and an order of status quo to be maintained so as to prevent any eviction alongside her family from **Parcel No. Nyaki/Kithoka/926** pending hearing of her intended appeal.
2. The application is supported by a supporting affidavit sworn on **1.4.2020**.
3. The grounds upon which the application is based are that the applicant occupies part of the subject land which is approximately 2 acres, her appeal is arguable; she is likely to suffer for she has invested heavily on the suit land since 1976; there is an impending eviction; any delay was due to Covid19 and it is in the interest of justice the orders be granted so that she can pursue her rights as to an appeal.
4. By a replying affidavit sworn on **28.10.2021** the respondent's legal representative **Monicah Nkiorote M'Itwamwari** opposes the application.
5. First it is stated judgment was made on **10.2.2020** and not **20.4.2020**. Second the application was filed 1 year and 4 months after the judgment. Thirdly, there is no appeal which has been filed and no reasons have been given why the same is yet to be filed.
6. Fourthly is that the court is **functus officio** and the only option left for the applicant is to file the application before the appellate court which is the court capable of determining if the intended appeal has any chances of success or raises arguable grounds of appeal.
7. Fifthly is that no draft memorandum of appeal has been attached.
8. Sixth, the applicant has not demonstrated if she sought for any leave of the court for an extension of time to file an appeal.
9. Lastly the court should not act on speculations, in vacuum and especially where no security has been offered for due performance of the decree should the intended appeal not succeed.
10. With leave of the court, parties were allowed to file written submissions by 12.11.2021.
11. The respondent submits the applicant has been sitting on the orders of status quo but has taken no action to file and or prosecute the appeal if any is existing.
12. In support of the grounds of opposition the respondent relies on ***Kagaari South Farmers Co-operative Society & 4 Others –vs- Bernard Mugo & 5 Others [2016] eKLR*** on the proposition that no arguable appeal has been demonstrated and no evidence has been tabled to show the appeal would be rendered nugatory if stay is not granted.
13. Secondly the respondent relies on ***Stanely Kangethe Kinyanjui –vs- Tony Ketter & 5 Others [2013] eKLR and Licinus Investments Ltd. –vs- Maurizio Dalpiaz [2020] eKLR*** on the proposition that failure to exhibit a notice of appeal with a signature and a memorandum of appeal with appeal number makes an application for stay of execution incompetent as the court's jurisdiction has not been properly invoked.
14. As a starting point this court delivered its judgment on 7.2.2020 dismissing the consolidated suit with no order as to costs.

15. On 21.9.2020 the parties advocates appeared in court and indicated the plaintiff and the defendant were both deceased. Pending substitution, the court by consent ordered status quo to be maintained.
16. From the records it appears the grant of letters of administration ad litem was issued on 24.2.2020 to the respondent which was almost two weeks after delivery of judgment. Subsequently, the application for substitution was filed on 24.2.2020.
17. The respondent filed a notice of appeal which was received on 24.2.2020. Mr. Kurauka advocate on 21/9/2020 informed the court his client had allegedly passed on, and stated he was in a possession of a copy of the death certificate and was proceeding to substitute her. Further on 11.3.2021, counsel sought for 30 more days to file an application for substitution since he could not get any family members.
18. For an applicant to be entitled for stay of execution under Order 42 rule 6 there must be substantial loss, the application must be made without unreasonable delay and lastly security must be offered for due-performance of the decree should the appeal be unsuccessful.
19. In the instant case, the court dismissed the applicant's suit for adverse possession with no order as to costs. In essence the court returned a negative order which is incapable of being stayed in law as held in **Milcah Jerugo –vs- Fina Bank Ltd [2013] eKLR.**
20. Secondly there is evidence the applicant passed on prior to delivery of judgment. There has been no substitution for the deceased party despite directives to that effect.
21. There is no demonstration empirically or otherwise that the respondent has proceeded to evict the applicant as alleged. This court has not been shown any decree which has been extracted and served upon the applicant. See **Kenya Shell Ltd –vs- Kibiru [1986] KLR 410.**
22. Thirdly the applicant has not demonstrated any willingness to offer any security for due satisfaction of the decree should the appeal be unsuccessful. See **Mwaura Karuga T/A Limit Enterprises –vs- Kenya Bus Services Ltd [2015] eKLR.**
23. This court is also enjoined to look at the overriding objective as per **Sections 1A & 1B** of the **Civil Procedure Act** over and above **Order 42 rule 6**. The records shows no substitution has been undertaken for over a year and half now. No application for extension of time has been filed so as to seek to file a notice of appeal out of time. Further there is no letter attached requesting for the proceedings which in any event have been ready. See **Vishram Ravji Halai –vs- Thornton & Turpin [1990] KLR 365.**
24. The court therefore has no material in which it can determine whether there is a pending appeal and at what stage so as to exercise any discretion in favour of the applicant.
25. As rightly stated and submitted by the respondent, status quo orders were granted on 21.9.2020 on humanitarian grounds. The same were also extended on 11.3.2021 on the understanding that an application for substitution be filed within 30 days. To date none has been filed.
26. The policy and objective of **Sections 1A & 1B** of the **Civil Procedure Act** as read together with **Article 159** of the **Constitution** is expeditious delivery of justice in a timely and cost effective manner. The applicant has not complied with court orders.
27. In the premises, this application is an abuse of the court process and filed by a party who as stated above, was said to have passed on before 7.2.2020. The same is dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 1ST DAY OF DECEMBER, 2021

In presence of:

Kurauka for applicant

Nyaga Nyamu for respondent

Court Assistant - Kananu

HON. C.K. NZILI

ELC JUDGE