



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELC NO.515 OF 2017

JOSPHAT KAMANDE MACHARIA.....RESPONDENT/PLAINTIFF

VS

LIVINGSTONE WANYOIKE.....APPLICANT /DEFENDANT

RULING

1. This Motion filed on the 9/8/19 is brought under Section 3A of the Civil Procedure Act, Order 42 Rule 6, Order 22 rule 22 of the Civil Procedure Rules seeking the following orders;

a. Spent

b. There be stay of execution of the judgment issued on the 24/6/19 and other consequential orders till the Appeal is heard and determined. That status quo be maintained pending the hearing and determination of the Appeal.

c. Costs be in the cause.

2. The grounds in support of the application are that the Applicant is dissatisfied with the judgement of the Court and has filed a notice of Appeal; the intended Appeal shall be rendered nugatory if stay is not granted; the subject may be transferred to third parties if stay is not granted occasioning the Applicant irreparable loss and harm.

3. The supporting affidavit of the Applicant sworn on the 9/8/19 reiterates the grounds upon which he has based his application and in addition states that the Respondent has started marketing the suit land for sale and he will suffer loss and harm if stay is not granted. He states that he is ready to abide with any orders of security ordered by the Court including depositing the title deed of the suit land in Court.

4. In response the Respondent deponed that the application is intended to deny him the enjoyment of the fruits of his judgment and that the application is based on speculative and presumptuous reasons. That there is no prejudice to be suffered by the Applicant even assuming execution has commenced. That the Applicant has not explained the loss if any that he is likely to suffer if the orders of stay of execution are not granted.

5. Further the Respondent has raised an objection to the change of the Advocates by the Applicant without adhering to the procedure in the Civil Procedure Act.

6. It is the submissions of the Applicant that the dispute is between siblings and by its nature tends to generate ugly disagreements especially in respect to land. That the Applicant has filed a notice of Appeal and if the orders of stay are not granted the Appeal will be rendered nugatory. That the Respondent has invited all sorts of land agents, buyers onto the land with a view to disposing it and it is important that the suit land is preserved pending the hearing and determination of the intended Appeal.

7. In opposing the application, the Respondent stated that the Applicant has not complied with the provisions of Order 9 Rule 9 in respect to change of Advocates after judgement. He urged the Court to disallow the application.

8. Further the Respondent submitted that the principles for granting stay of execution are trite; there must be a valid Appeal and for the purposes of the Court of Appeal, a valid notice of Appeal should suffice; there must be substantial loss that may result to the Applicant unless an order of stay of execution is granted; the Court may require security for the due performance of the decree. In addition, the Respondent stated that the power to grant stay by a Court is discretionary which is granted in line with sound legal and judicial doctrine which include preservation of the subject matter of the suit and to do justice and equity to the parties. The legal burden is on the Applicant to proof that it is entitled to the orders of stay of execution.

9. In further submissions the Respondent argued that the Respondent is in actual occupation of the land decreed to be half share of the

properties in issue and faulted the applicant for not specifying the action of the Respondent that he is complaining about. Is it subdivision, eviction or registration? It is of the view that the Court cannot exercise discretion in a vacuum and it behoved the applicant to lay the facts before the Court instead of giving speculative reasons that there are buyers scouting to purchase the suit land.

10. That the Applicant has not demonstrated what substantial loss it is likely to suffer as the Applicant is in possession of the original title and no disposition can happen without his involvement.

11. Before delving into the issue of whether the Applicant deserves the orders of stay of execution pending Appeal, the Court will address the preliminary objection which is whether the filing of the application accords with the provisions of Order 9 rule 9 of the Civil Procedure Rules.

12. Order 9, Rule 9 of the Civil Procedure Rules provides as follows;

“When there is a change of Advocate, or when a party decides to act in person having previously engaged an Advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court—

a. upon an application with notice to all the parties; or

b. upon a consent filed between the outgoing Advocate and the proposed incoming Advocate or party intending to act in person as the case may be.”

13. Order 9, Rule 10 provides;

“An application under rule 9 may be combined with other prayers provided the question of change of Advocate or party intending to act in person shall be determined first.”

14. In this case the Applicant who was the defendant in the case before me was represented by a firm of Advocates namely Gori & Ombogi & co Advocates. This application has been filed by the firm of Kimwere & co Advocates. There is no evidence that it sought and obtained leave of the Court to effect the change of Advocates nor is there a consent filed between the outgoing Advocates and the proposed incoming Advocates.

15. The wording of the above provision is mandatory and I find and agree with the objection raised by the Respondent that the Applicant has flouted the provisions of Order 9 Rule 9. In the case at hand I find that I cannot proceed to determine the substantive application in the circumstances.

16. The application is struck out with costs to the Respondent.

17. **It is so ordered.**

DELIVERED, DATED AND SIGNED AT MURANG'A THIS DAY OF 30TH DAY OF JANUARY 2020.

J G KEMEI

JUDGE

Delivered in open Court in the presence of;

Kirubi HB for Nderi for the Plaintiff/Respondent

Defendant/Applicant: Present in person. Advocate is absent.

Irene and Njeri, Court Assistants