



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ELC NO. 247 OF 2013**

**NALINCHANDRA DEVCHAND DODHIA .....1<sup>ST</sup> PLAINTIFF**

**TUSHAR JEVERCHAND DODHIA .....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**EVANS ONYANGO .....DEFENDANT**

**RULING**

The Plaintiff filed a Notice of Motion dated 2<sup>nd</sup> December 2019, seeking orders for police security during eviction and/or execution of orders issued against the Defendant from the suit land; and orders permitting the police and Sparknet Auctioneers to gain access to the suit land and demolish illegal structures and fencing erected thereon.

The basis for the application is the judgment delivered on 1<sup>st</sup> November 2019 ordering the Defendant to leave vacant possession of the suit land within 30 days, failure to which eviction order will be issued and to pay general damages of Ksh. 300,000/= to the Plaintiffs. The Plaintiffs state that the Defendant have refused to leave vacant possession of the suit land and the eviction process is a potentially dangerous venture requiring the provision of security.

**Defendant's Response**

The Defendant filed a Replying Affidavit dated 17<sup>th</sup> December 2019. The Defendant stated that he has never been in possession of the suit property and his efforts to explain this to the court have been refused. That the Defendant has been saddled with a judgment in a matter unfamiliar to him. The Defendant stated that he instructed his Advocate to file an appeal against the judgment, annexing a copy of a Notice of Appeal filed. That the court file had been previously untraceable at the registry and was curiously found to facilitate the filing of this application. That the allusion that the eviction is potentially dangerous is not supported by facts, more so give that the Defendant does not occupy the suit land. That since the Defendant did not have an opportunity to be heard at trial, the court reached a judgment impossible of performance and the judgment was therefore manifestly unfair.

**Issues for Determination**

**1. Whether a Notice of Appeal was properly lodged**

**Rule 75 Court of Appeal Rules 2010** provides that when appealing from a decision of this court, a notice of appeal shall be lodged with the registrar within 14 days of the decision being appealed against.

**Analysis**

The Defendant filed a Notice of Appeal on 15<sup>th</sup> November 2019 which was later signed by the Deputy Registrar on 10<sup>th</sup> December 2019.

The Court of Appeal in ***Prideinn Hotels & Investments Limited v Tropicana Hotels Limited [2018] eKLR*** held that there is no distinction between “filing” and “lodging” a Notice of Appeal in this respect, and the date on which the registrar signs the Notice of Appeal has no bearing on the definition:

**“I respectfully disagree with the respondent’s argument that there is a distinction between filing and lodging a document in court. To me, those words mean one and the same thing. Our position is reinforced by the *Black’s Law Dictionary, 9<sup>th</sup> Edition* definition of the word file:-**

**“1. To deliver a legal document to the court clerk or record custodian for placement into the official record... Also termed lodge.”**

**Thus, the use of one word over the other is just a matter of preference... Be that as it may, the appellant cannot be held responsible for the Deputy Registrar’s late action.”**

The Defendant had therefore lodged the Notice of Appeal within time.

**2. Whether a pending appeal can bar the court from dealing with this application**

Section 34 (1) of the Civil Procedure Act provides:

**“All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.”**

Further, Order 42 Rule 6 of the Civil Procedure Rules provides:

**“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order...”**

The Court of Appeal in Adiel Muriithi Philip v Thomas Maingi [2017] eKLR held:

**“The fact that the respondent had filed a notice of appeal in the High Court did not change this position as jurisdiction still remained with the High Court to deal with issues concerning the satisfaction of the decree... Therefore, without an order of stay of execution, either from the High Court or the Court of Appeal, the High Court remained seized of jurisdiction to deal with matters concerning the execution of the decree even where an appeal is pending in the Court of Appeal against the decree. The issue of the High court being *functus officio* does not therefore arise.”**

**Analysis**

Even though there is a pending appeal, as evidenced by the Defendant’s Notice of Appeal, there is no order for stay of execution therefore the court maintains its jurisdiction to determine this application.

**3. Appropriate orders**

Having found that the Plaintiffs had proven their case to the required standard and there being no evidence rebutting the Plaintiff’s pleading that the Defendant is in illegal occupation of the suit land, **I DO GRANT ORDERS THAT** the OFFICER IN CHARGE OF Kisumu police station do provide security to Sparknet Auctioneers services during eviction and or execution of orders issued by this court against the defendant in respect of the suit parcel herein and to use minimum force to gain access to the suit land and demolish illegal structures and fencing erected thereon.

**A.O. OMBWAYO**

**ENVIRONMENT & LAND**

**JUDGE**

DATED AND DELIVERED THIS 6<sup>TH</sup> DAY OF FEBRUARY, 2020.

**In the presence of:**

Mr. Anyul for Maua for Applicant

M/s Imbaya holding brief for Siganga for Respondent

A.O. OMBWAYO

**ENVIRONMENT & LAND**

**JUDGE**