



**REPUBLIC OF KENYA**

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

**ELC APPEAL NO. 55A OF 2013**

**JAMES KINYUA MIGWI.....APPELLANT**

**VERSUS**

**ANTHONY WACHIRA WANGARI.....1<sup>ST</sup> RESPONDENT**

**TIMOTHY NJIRAINI WARUI.....2<sup>ND</sup> RESPONDENT**

**RULING**

The application coming up for hearing is the Notice of Motion dated 20<sup>th</sup> December 2018 brought under **Order 45, Rule 1 & 2, Section 3A Civil Procedure Act, Section 1A of Civil Procedure Rules**. The applicant seeks the following orders:

- 1. That the Court do review and set aside orders made on the 1<sup>st</sup> day of November 2018 dismissing the application dated 17<sup>th</sup> August 2018 and the said application be heard on merits.***
- 2. That in the meantime, there be an order for stay of execution of any orders evicting the applicant from land parcel No. INOI/KARIKO/2594.***
- 3. That the Court do make such other orders as the Court may deem just.***

The application is supported by the appellant/applicant's affidavit sworn the same date. The application is opposed with a replying affidavit sworn by the respondent on 14<sup>th</sup> March 2019.

**APPLICANT'S CASE**

The applicant deponed that on 1<sup>st</sup> November 2018, he attended Court for the hearing of his application dated 17<sup>th</sup> August 2018 seeking stay of eviction from land parcel No. INOI/KARIKO/2594. He stated that the matter was called out in the morning. He informed the Court that his lawyer would arrive late as he had another matter at the High Court in Nairobi. He stated that he attempted to seek adjournment as he could not proceed without the assistance of his counsel. The applicant contends that at around 11.00 a.m. the application was dismissed despite his presence in Court. He contends that unless the orders made on 1<sup>st</sup> November 2018 are reviewed and/or set aside, he will suffer irreparable loss. He stated that he is ready and willing to prosecute the said application if the orders sought are granted.

**RESPONDENT'S CASE**

The respondent in his replying affidavit stated that from the Court record, it is evidence that the appellant has always delayed the fair hearing of this appeal. He stated that the order of this Honourable Court made on 1<sup>st</sup> November 2018 is a negative order and that there is nothing to stay in the said order. The respondent further contends that prayer No. 2 in the Notice of Motion dated 20<sup>th</sup> December 2018 is negative order and the Court did not make any positive orders capable of being executed and is not seized of any appeal against the decree of the lower Court.

**ANALYSIS AND DECISION**

I have considered the affidavit evidence both in support and in opposition to the application herein. I have also considered the submissions by the parties. The substantive prayer in this application is for setting aside the orders of this Honourable Court dismissing the applicant's application dated 17<sup>th</sup> August 2018 for want of prosecution. The applicant stated that on 1<sup>st</sup> November 2018 when the said application came up for hearing, he was present in Court but his lawyer was absent. He stated that his lawyer had informed him that he was involved in other matters before the High Court of Kenya at Nyeri being HCCC No. 5 of 2017 and HCCC No. 37 of 2011 which caused him to delay in prosecuting the application. The applicant did not attach a supplementary affidavit by the lawyer acting for him or a cause list confirming

that indeed the lawyer had engagements before the Nyeri High Court on the fateful day. The hearing of that application on 1<sup>st</sup> November 2018 had been fixed by consent of the lawyers appearing for both the applicant and the respondent. It was incumbent upon the counsel for the applicant to engage a counsel to hold his brief and seek adjournment giving explanation why he could not attend Court on the said 1<sup>st</sup> November 2018.

The **Civil Procedure Act** which is the procedural law in our Courts enjoins advocates as officers of the Court to assist the Court to further the overriding objective of the Act to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes in our Courts. Having said that and considering that the applicant was present in Court when the order was being made, I find the applicant interested and desirous to prosecute this case and do hereby allow the Notice of Motion dated 20<sup>th</sup> December 2018 with costs to the 2<sup>nd</sup> respondent.

**READ, DELIVERED and SIGNED in open Court at Kerugoya this 13<sup>th</sup> day of March, 2020.**

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**E.C. CHERONO**

**ELC JUDGE, KERUGOYA**

In the presence of:

1. Wambui Mwai for Applicant/Appellant
2. Mr. Asimwe holding brief for Magee for 2<sup>nd</sup> Respondent
3. 1<sup>st</sup> Respondent – absent