REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

ENVIRONMENT AND LAND CASE NO. 113 OF 2016

PRISILA JESONDIN CHUMO.....PLAINTIFF/APPLICANT

VERSUS

NELLY JEBOR ALIAS NELLY CHEBOR.....DEFENDANT/APPLICANT

RULING

This ruling is in respect of an application dated 21st December 2018 seeking for orders that there be stay of execution and/or further execution of the decree/ruling delivered on 17th April 2018 and 19th December 2018 respectively pending the hearing and determination of the intended appeal.

APLLICANT'S SUBMISSION

Applicant's counsel argued the application and relied on the grounds on the face of the application together with the supporting affidavit. It was counsel's submission that the applicant will suffer substantial loss if the orders are not granted and that the application was filed without inordinate delay. That the applicant is ready and willing to comply with any conditions set by the court.

Counsel urged the court to exercise its discretion and allow the application, which discretion should be exercised judiciously. She relied on the case of **Butt v. Rent Restriction Tribunal[1982] eKLR 417**, where the Court of Appeal held that discretion should be exercised in a way not to prevent an appeal. The purpose of stay of execution was to preserve the subject matter so that the right of appeal could be exercised without prejudicing the applicant as the appeal would be rendered nugatory if stay is not granted. See also **Equity Bank Ltd v. West link MBO ltd[2013]e KLR**.

On the issue of substantial loss, counsel submitted that the applicant will suffer substantial loss as her and her children will be rendered destitute if they are evicted from the suit land and that this argument has not been controverted.

Order 42 rule 6 empowers the court to stay execution either of its judgment or that of a court whose decision is being appealed against. Counsel further submitted that the applicant had satisfied the conditions set in order to be granted stay.

Counsel also submitted that the instant application is not res judicata as the application dated 24th May 2018 was for stay of the objection proceedings but the current application seeks to stay the decree in force pending the hearing of the intended appeal. Counsel therefore urged the court to allow the application as prayed.

RESPONDENT'S SUBMISSIONS

Counsel for the respondent opposed the application and submitted that the application is an abuse of the court process since a similar application had been heard on merit and was dismissed with costs. That the court is therefore *functus officio*. Further that the application will deny the respondent the fruits of her judgment, as it was an afterthought which would occasion injustice to her. That the applicant has failed to demonstrate which kind of loss she would suffer.

Counsel relied on the case of Mwangi *S. Kimenyi v. A.g & anor, civil suit Misc no. 720 of 2009* where the court restated the test for grant of stay of execution. The court held that if the delay is long and may occasion prejudice on one part, then the court in its discretion may dismiss the action, but this should not prevent the court from doing justice. The court should ensure substantive justice is served in exercise of judicial discretion. Counsel urged the court to dismiss the application with costs to the respondent.

ANALYSIS AND DETERMINATION

The issues that arise for determination are as to whether the application has met threshold for grant of stay of execution and whether this application is res judicata.

The application seeks stay of execution and or further execution of the ruling delivered on 17th April 2018 and 19th December 2018 pending the hearing and determination of the intended appeal.

From the application the applicant seeks for stay of a ruling 17th April 2018, however the court record is so clear that what was delivered on 17th April 2017 is a judgment. The court had issued the following orders:

> a. A declaration that the plaintiff is the absolute registered owner of all that parcel of land known as Turbo East/Sosiani Block 1 (Sugoi) 12 and therefore the defendant is a trespasser
>
> b. That the defendant do give vacant possession of the suit land within 45 days from the date of this judgment or decree failure of which an order of eviction to issue against the defendant.
>
> c. An order of a permanent injunction restraining the defendant her agents and/ or servants from intermeddling, interfering, trespassing and/or in any way adversely dealing with the suit parcel of land.
>
> d. The defendant to pay costs of this suit.

The applicant was aware of the contents of the judgment and the records show that an application vide a notice of motion dated 24th May 2018 was filed in court seeking to stay the orders issued on 17th April 2017 and further staying the objection proceedings filed by the applicant. The court issued its ruling dated 19th December 2018 and stated as follows:

> "if the defendant has an objection in a succession cause, there is nothing stopping her from pursuing the same without staying a valid judgment which she has not appealed against or intends to appeal against. If she succeeds in the objection proceedings then she will be vindicated but I see no proper ground for me to stay the enforcement of a decree that has been issued. If the defendant was aggrieved with the decision of the court, she could have filed an appeal against the judgment and not the current application. It seems the defendant is trying her luck in two different forums, through this case and the succession cause. From the above, I find that the application lacks merit and is therefore dismissed with costs to the plaintiff."

The above is a clear indication that the applicant had previously sought for the same reliefs that had been sought in the application dated 24th May 2018. The respondent is right when they say that the court has a duty to exercise its discretion in a judicious manner, but can the applicant be allowed to abuse the court process by filing similar applications which have been determined?

I therefore find that the current application is res judicata. In the Court of Appeal case of *Siri Ram Kaura – Vs – M.J.E. Morgan, CA 71/1960 (1961) EA 462* the then EACA stated that:-

> **"**The general principle is that a party cannot in a subsequent proceedings raise a ground of claim or defence which has been decided on which, upon the pleadings or the form of issue, was open to him in a former proceeding between the same parties.
>
> The mere discovery of fresh evidence (as distinguished from the development of fresh circumstances) on matters which have been open for controversy in the earlier proceedings is no answer to a defence of res judicata...
>
> The law with regard to res judicata is that it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. The only way in which that could possibly be admitted would be if the litigant were prepared to say, I will show that this is a fact which entirely changes, the aspect of the case, and I will show you further that it was not, and could not by reasonable diligence have ascertained by me before ...
>
> The point is not whether the respondent was badly advised in bringing the first application prematurely; but whether he has since discovered a fact which entirely changes the aspect of the case and which could not have been discovered with reasonable diligence when he made his first application.
>
> It is therefore not permissible for parties to evade the application of Res judicata by simply conjuring up parties or issues with a view to giving the case a different complexion from the one that was given in the former suit."

I have considered the application together with submissions of counsel, and find that the application lacks merit and is therefore dismissed with costs to the respondent. The applicant can try other fora as filing similar applications which have been adjudicated upon is an abuse of court process.

DATED and **DELIVERED** at **ELDORET** this **10TH DAY** OF **MARCH, 2020**

M. A. ODENY

JUDGE

RULING read in open court in the presence of Mr. Maina holding brief for Mr. Omusundi for Plaintiff/Respondent and Mr. Kipnyekwei holding brief for Miss. Isiaho for Defendant/Applicant.

Mr. Yator – Court Assistant