



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

APPEAL No. 17 OF 2019

SILVANUS KAMAAMIA.....APPELLANT

VERSUS

PETERSON WARUINGE KIGURU.....RESPONDENT

RULING

1. By Notice of Motion dated 29th July 2019, the appellant seeks the following orders:

1. *Spent*

2. *Spent*

3. *Spent*

4. *THAT there be a stay of execution of the decree and or order of court dated 21st May, 2019 in Naivasha Chief Magistrates' Court Civil Case Number 249 of 2014 by Hon. E. Kimilu and/or any other subsequent orders of the court pending the hearing and determination of this appeal.*

5. *THAT in the likely event that the appellant is evicted before the hearing and determination of this application, this honourable court be pleased to order the respondent, his servants and/or agents or otherwise be ordered to reinstate the appellant/applicant back to the piece of land registered as land reference number 28068/587 comprised in 141591/1 formerly plot number 348 ADC Ndabibi.*

6. *THAT this honourable court be pleased to grant any other orders and/or relief befitting the circumstances.*

7. *THAT the costs of this Application be provided for.*

2. The application is supported by an affidavit sworn by Silvanus Kopes Rakita Kamamia, who states that he is the applicant. He deposed that hearing proceeded against him ex parte in Naivasha Chief Magistrates' Court Civil Case Number 249 of 2014 and as a result an eviction order was issued against him through judgment dated 21st May 2019. That his application to set aside the ex parte proceedings was dismissed through a ruling delivered on 23rd June 2019 and that he has filed an appeal. He annexed a copy of a Memorandum of Appeal dated 29th July 2019 whose heading refers to a ruling delivered on 23rd June 2019. Prayer (i) of the Memorandum of Appeal seeks setting aside of orders made in a ruling delivered on 23rd June 2019 while prayer (ii) seeks setting aside of eviction orders issued on 21st May 2019. I am thus at a loss as to what orders the appeal is against. It is further deposed in the supporting affidavit that the appellant will suffer damage and the appeal will be rendered nugatory if the orders sought are not granted.

3. The respondent opposed the application through a replying affidavit in which he deposed that the decree was executed on 7th August 2019 by way of demolition of the applicant's incomplete walls and his eviction and that there is therefore nothing to stay. He annexed a copy of a letter dated 10th August 2019 written by the OCS Kongoni Police Station. He added that the appeal is against the ruling delivered on 23rd July 2019 which dismissed the appellant's application to set aside the judgment and that there is nothing arising from the ruling that can be stayed.

4. The application was canvassed through written submissions which both sides duly filed. I have carefully considered the application, the affidavits and the submissions. The application is brought, among other provisions, under **Order 42 rule 6 (1) and (2) of the Civil Procedure Rules, 2010** which provide as follows:

6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under sub rule (1) unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

5. Thus, an applicant seeking stay of execution pending hearing and determination of an appeal to this court must in the first place demonstrate that there exists an appeal. Once an appeal is shown to exist the applicant must then satisfy the court that substantial loss will result to him if stay is not granted and that the application has been made without unreasonable delay. As Platt Ag JA (as he then was) stated in **Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] eKLR**, substantial loss is the corner stone of the jurisdiction to grant stay of execution pending appeal. It is virtually impossible for such an application to succeed when an applicant fails to demonstrate that he will suffer substantial loss if stay is not granted.

6. **Section 16A of the Environment and Land Court Act, 2011** gives guidelines for filing of appeals from the subordinate court to this court. It provides:

(1) All appeals from subordinate courts and local tribunals shall be filed within a period of thirty days from the date of the decree or order appealed against in matters in respect of disputes falling within the jurisdiction set out in section 13(2) of the Environment and Land Court Act, provided that in computing time within which the appeal is to be instituted, there shall be excluded such time that the subordinate court or tribunal may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.

(2) An appeal may be admitted out of time if the appellant satisfies the court that he had a good and sufficient cause for not filing the appeal in time. [Emphasis supplied]

7. Thus, an appeal to this court has to be filed within 30 days from the date of the decree or order appealed against. I have already stated the difficulties I have faced in determining whether there is an appeal and if so, against which order. An appeal against the judgment said to be dated 21st May 2019 would have to have been filed by 21st June 2019. Similarly, an appeal against a ruling delivered on 23rd June 2019 would need to have been filed by 23rd July 2019. The copy of a Memorandum of Appeal dated 29th July 2019 herein is dated 29th July 2019, way out of time in respect of the judgment said to be dated 21st May 2019 and the ruling said to have been delivered on 23rd June 2019. To further compound the problem, no copy of any of the decisions referred to in the Memorandum of Appeal is annexed to the application. Further, the present application seeks “*stay of execution of the decree and or order of court dated 21st May, 2019*” as opposed to the orders said to have been made on 23rd June 2019 and or 23rd July 2019. Despite the file before me being the actual appeal file, I have not seen any original of a Memorandum of Appeal in it. I am therefore unable to discern if there is any appeal.

8. Even assuming that there is an appeal, the applicant has to show that he will suffer substantial loss if stay is not granted. Whereas the respondent stated in his replying affidavit that the decree was executed on 7th August 2019 by way of demolition of the applicant’s walls and his eviction and that there is therefore nothing to stay, the applicant has not filed any further affidavit to challenge that position. In the circumstances, I am not persuaded that he will suffer substantial loss.

9. In view of the foregoing, I find no merit in Notice of Motion dated 29th July 2019. The application is dismissed with costs to the respondent.

10. This ruling is delivered remotely through video conference and e-mail pursuant to the Honourable Chief Justice's “Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, other Court Users and the General Public from the Risks Associated with the Global Corona Virus Pandemic” (Gazette Notice No. 3137 published in the Kenya Gazette Vol. CXXII—No. 67 of 17th April, 2020).

Dated, signed and delivered at Nakuru this 14th day of May 2020.

D. O. OHUNGO

JUDGE