

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI

CIVIL CASE NO. 100 OF 2015

NOOR AWADH SWALEH.....PLAINTIFF

VERSUS

BERNARD OMONDI.....DEFENDANT

RULING

The application dated 15.10.2015 seeks an order of stay of execution pending the hearing and determination of the appeal. It is supported by the applicant's affidavit sworn on 12.10.2015. The respondents filed a replying affidavit sworn by Noor Awadh Swaleh Ghalgau on 30.10.2015. Mr. Ogeto, counsel for the applicant submitted that Mr. Nyakoye advocate used to act for the applicant. He made a similar application that was granted but subject to certain conditions. Mr. Nyakoye did not file the appeal. The applicant was not aware until a notice to vacate the premises was served. The mistake was that of the applicant's advocate and should not be visited upon the client.

It is further contended that the applicant has lived in the premises since 1989. Every litigant has a right of appeal and the loss that would be incurred cannot be compensated monetarily. Mr. Ogeto urged the court to grant a 30 days stay of execution.

Mr. Kilonzo, counsel for the respondent opposed the application. Counsel maintains that there was a similar application dated 11.6.2015 and it was allowed. The appeal was to be filed within 30 days. The court is now functus officio. No appeal has been filed. No notice of appeal has been filed. Further, there is no prayer for extension of the earlier orders. The applicant lives and work in Germany and has never been in occupation of the premises. It is the respondent who will suffer loss and damage. No security has been offered.

The record shows that there was an application dated 11.6.2015 by the applicant herein. I have not been able to trace that application from the record. On 17.6.2015, I did grant that application and allowed the applicant 30 days stay of execution. The appellant was to file and serve the record of appeal within 30 days. I did further ordered that after the expiry of 30 days, the stay of execution would lapse and that any further proceedings should be conducted at the court of appeal.

It appears that the proceedings were not typed on time and a certificate of delay was issued on 7th September, 2005. A notice of appeal dated 3.10.2015 was lodged before this court on 4.11.2015. The applicant did not require the typed proceedings to file the notice of appeal.

The applicant is blaming her previous advocates on the fact that no appeal was filed on time. The record shows that there is another application dated 14.12.2015 whereby the firm of Oira & Co. Advocates is to take over the matter from the firm of Wesley John Austin & Associates. Once again, the applicant is blaming her other advocates for not filing the notice of appeal. The application seeks leave to file notice of appeal out of time.

Whereas the applicant has a right to pursue an appeal, the respondent should not just be kept pending at the mercy of the applicant. The respondent is a decree holder who is entitled to enjoy the fruits of his judgement at the earliest opportune time. The court granted a 21 days stay of execution when the

judgement was read on 20.5.2015. This court further granted 30 days stay of execution on 15.10.2015. Upto date execution has not been effected. The findings of Meoli, J. are that the applicant is a trespasser to the suit premises. The matter has been pending in court for quite some time. The applicant should not continue utilizing the house yet her claim to the same was dismissed. I do find that unless a stay of execution is granted by the Court of Appeal, this court has already exhausted its powers to grant such an order. Blaming one advocate after another cannot be a good ground to grant orders of stay of execution. The facts of this case do not support granting any order of stay. The applicant is not the original owner or a purchaser of the sit property.

In order to avoid a multiplicity of applications and rulings, I do grant the applicant leave to file notice of appeal out of time. The applicant to file his notice of appeal within fourteen (14) days hereof. The prayer for stay of execution is hereby dismissed. Costs to the respondents.

Dated and delivered in Malindi this 12th day of April, 2016.

S. CHITEMBWE

JUDGE