

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL CASE NO. 90 OF 2007

MWANJE SHAMALA ALIAS

PETER MWANJEPLAINTIFF

VERSUS

MUGANDA MUKACHISIADEFENDANT

RULING

[1] The applicant brings his Motion under Order 12 Rule 6(1) (2) (3) (4) (5) and 6 of the Civil Procedure Rules and under Order 40 Section 1,2,3 and 4 of the Civil Procedure Rules.

He prays for a stay of execution pending the hearing and determination of the applicants intended appeal before the Court of Appeal. He states that his suit of adverse possession has been dismissed by the court and that the respondents have entered forcefully on the suit land and started cultivating and constructing on the land despite the pendency of the intended appeal.

[2] The respondents in their replying affidavit state that the application is aimed at frustrating his opportunity of enjoying the fruits of justice and that he is old and sickly. That the case was decided on 24/7/2015 that a notice of appeal was filed on 6/8/2015 and nothing else has been done. That there is no indication that the applicant will file any appeal. Mr. Manyoni for the applicant stated that the application is not made in bad faith. That they are waiting for the proceedings to be typed and that they pulled this file from the typing pool. Mrs Rauto argued that judgement was read on 24/7/2015. That is now 8 months. That there is nothing to show the applicant has requested for proceedings. There is no letter asking for proceedings exhibited and no court receipt for payment for the same. That the applicant has not complied with Section 74 of the Appellate Court Rules. That an appeal must be filed within 30 days otherwise the Notice of Appeal filed is deemed as withdrawn. That in this case it was withdrawn on 6/9/2015. Further that the applicant has not shown that the Appeal has high chances of success and that he has not demonstrated that he will suffer any prejudice if the prayers sought are not granted and that he has not provided security. She prays for the application to be dismissed.

[3] I have carefully considered the application by the applicant, the submissions by his counsel. I have equally considered the reply by the counsel for the respondent. I note that this judgement was delivered on 24/7/2015 by Sitati J, who had received it from Chitebwe J who wrote it and sent it to court for delivery. The judgement was typed. It was therefore quite easy for the applicant to have a copy of the typed judgement from 24/7/2015. I am not informed that the file was missing or that photocopies of the proceedings could not be availed. The handwritten copies of the proceedings are quite legible. There was no reason why the applicant could not prepare a Memorandum of Appeal within 30 days of the judgement. The typed proceedings could then later be availed for preparation of the record of Appeal.

[4] Be that as it may, I note the applicant wrote to the deputy registrar on 27/07/2015 asking for certified proceedings and judgement for purposes of preferring an appeal. He paid for the proceedings on 29/7/2015 vide receipt No. 6896034. He then went to sleep. It is now year down the line and appeal number has been filed. I was not shown what prejudice the applicant will suffer if this application is not granted. The applicant offered no security for costs. This case does not meet the thresholds set out in Geilla Vs Casman Brown and Co. Ltd (1973) EA. I am told that the applicant is not on the land. On my perusal of his evidence in court before Chitebwe J he stated on cross examination that he does not live on the land, that he lives on his own land. There is no allegation that if an injunction is not granted the

respondents cannot compensate him with money, should he file the appeal and win it.

[5] All in all, I am unable to grant the prayers sought in the motion dated 15th of December 2015. I dismiss it with costs to the respondents

Dated at Bungoma this 11th day of May 2016

S.MUKUNYA - JUDGE

Ruling read in open court in presence of

Mrs Rauto for the respondent

Firm of Momanyi for the applicant

S.MUKUNYA –JUDGE

11/5/2016