



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CIVIL NO. 2 OF 2009

JOHN MUHATIA
PLAINTIFF/APPLICANT

VERSUS

JOASH SHIVUKALE DEFENDANT / RESPONDENT

R U L I N G

1. The application dated 8th April, 2015, by the defendant is essentially for stay of execution pending appeal. It is based on the ground that there is already a notice to show cause on eviction taken out by the plaintiff against the defendant and that the defendant has been in occupation of the suit property for over thirty (30) years. That the defendant has no other home and if stay is not granted his appeal will be rendered nugatory. These grounds are fortified by the averments and annexures contained in the defendant's supporting affidavit dated 8th April., 2015.
2. The plaintiff opposes the application on the basis of the grounds contained in his replying affidavit dated 8th May 2015 in which he avers that the application is an afterthought and calculated at denying him the enjoyment of the fruits of his judgment by obstructing the expeditious execution of the decree issued herein. That, the notice of appeal was filed in February 2014, yet this application was filed well over a year without any explanation.

The plaintiff further avers that the appeal has slim chances of success as he is the absolute registered proprietor of the suit property and the defendant stands to suffer no substantial or irreparable damages if the order sought is not granted.

3. At the hearing of the application, the defendant/applicant through learned counsel *M/s Arunga*, relied on his supporting grounds and supporting affidavit and submitted that the plaintiff is his brother and both reside on the suit property which he (applicant) has occupied for thirty (30) years and has no alternative place to live. That, the notice of appeal was filed on time but despite a request to the court for typed proceedings the same are yet to be supplied. That, the notice to show cause taken out by the plaintiff was put on hold pending hearing of this application. That, the plaintiff has not demonstrated how he shall suffer prejudice if stay is granted.

In response to the foregoing, the plaintiff / respondent who appeared in person relied on his verifying affidavit and contended that the suit property was divided into two parts with him occupying his part and the defendant his part.

4. **Rule 6(1) of Order 42 of the Civil Procedure Rules, 2010**, provides that an appeal shall not 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, and **Rule 6(2)** provides that no order for stay of

- execution shall be made unless 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 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. The cornerstone of the discretionary power conferred by the aforementioned provision of the law is the element of substantial loss. It is not for this court to consider whether or not the intended appeal has high probability of success or in that case, whether the appeal shall be rendered nugatory if stay is not granted. It was for the applicant to satisfy this court by credible and substantial facts that he stands to suffer substantial loss if stay is not granted. He says that he has resided in the suit property for more than thirty (30) years and that is where he has set up his home. He also said that there is no alternative place for him to go. He thus implied that the legal ownership of the property is vested in him. However, he did not produce any documentary evidence to establish his alleged ownership of the property and / or whether he has indeed set up his home there.
 6. The respondent stated on his part, that he is the absolute registered proprietor of the suit property. This fact was not therein disputed or discredited by material evidence from the respondent. Also not disputed was the contention by the respondent that the suit property is divided into two parts such that the respondent possesses one part and the applicant the other. It is therefore apparent that the applicant has failed to demonstrate that he shall suffer substantial loss unless stay is granted.
 7. Added to the foregoing, it is clearly notable that this application was brought rather belatedly thereby contravening the requirement of time in terms of **Rule 6(2) of Order 42**.

The material judgment was delivered on 11th February, 2014 after which a notice of appeal was filed on 17th February, 2014 yet this application was filed on 8th April, 2015, more than a year after the filing of the notice of appeal.

There was no satisfactory explanation from the applicant as to why it took that long for the application to be filed. Such omission militates against exercise of discretion in his favour.

It may also be noted that there is no evidence showing that there has been a delay in the supply of typed proceedings and that the delay is or was occasioned by the court. There is also nothing to

show that the applicant has ever made a follow up of the proceedings after his initial letter requesting for the same dated 21st February 2014.

8. For all the foregoing reasons, this court must and hereby finds, that this application is lacking in merit and is indeed intended to delay the execution of the judgment made in favour of the respondent and thus deny him the enjoyment of its fruits.

The application is therefore dismissed with costs.

J. R. KARANJA

JUDGE

Read / Signed this 9th day of June 2015

In the presence of Mr. Yano for Applicant and Respondent in person.

J. R. KARANJA

JUDGE