REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. APPEAL NO. 59 OF 2019

FATHER PAUL MALELU.....APPELLANT

VERSUS

IRENE NDUMI.....1ST RESPONDENT

JEFFERSON MUSYOKI PAUL.....2ND RESPONDENT

RULING

1. The Applicant approached the court with the instant Application vide a Notice of Motion dated 2nd March, 2020 that was brought under Order 42 Rule 6(1), (2) and Order 51 Rule 1 of the Civil Procedure Rules, Section 1A, 1B, and 3A of the Civil Procedure Act and all other enabling provisions of the law. The following orders were sought:

a) Spent.

b) Spent.

c) That there be a stay of execution of the Court's Judgment and Decree in MACHAKOS CMCC ELC No. 795 of 2013- Irene Ndumi & Another vs. Fr. Paul Malelu until the Appeal herein is heard and determined.

d) ***That the costs of this Application do abide the outcome of the Appeal.***

2. The Application is supported by the Affidavit of the Appellant/Applicant who deponed that he was the Defendant in the lower court in *Machakos CMCC ELC No. 795 of 2013- Irene Ndumi & Another vs. Fr. Paul Malelu* and that on 23rd October, 2019, the lower court delivered its Judgment and ordered for his eviction from the parcel of land known as MAVOKO BLOCK 3/3174 *(the suit property).*

3. The Appellant/Applicant deponed that the Respondents have already extracted the Decree of the lower court directing his eviction from the suit property and have also sought the supervision and/or enforcement of the court's Decree by the Officer Commanding (OCS) Makutano Police Station through an Application scheduled for inter-parties hearing on 4th March, 2020.

4. The deponent averred that he has already lodged an Appeal before this court; that the Decree was served upon their former Advocates on record *M/s Janet, Jackson & Susan Advocates* on 30th January, 2020 and that the said Advocates inadvertently did not inform him about the execution process by way of eviction levied against him.

5. According to the Applicant, the advocate only communicated to him about the execution process by way of eviction on 28th February, 2020 when the said firm was served with the Application seeking the supervision and/or enforcement of the court's Decree and that if the orders sought herein are not granted in the first instance, the Applicant will be evicted from the suit property.

6. The Application was opposed by the Respondents. The 2nd Respondent deponed that the Applicant has not demonstrated that he was entitled to the orders sought; that the firm of Kilonzo Muli and Associates were not properly on record for the Appellant by dint of Order 9 of the Civil Procedure Rules and that the reason for the delay in filing the instant Application was not sufficient as Judgment was entered on 23rd October, 2019.

7. The Appellant filed a Supplementary Affidavit in which he deponed that the suit in the lower court is separate, distinct and independent of the Appeal herein; that the firm of Kilonzo Muli is not required to comply with the provisions of Order 9 Rule 9 of Civil Procedure Rules, 2010 by filing an Application for leave or consent to come on record and that the Application was properly before the court.

8. The Application was canvassed vide written submissions. Learned counsel for the Applicant in his submissions cited the Court of Appeal

case of *Butt vs. Rent Restriction Tribunal [1982] KLR 417* where the court rendered itself as follows:

> *"It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett LJ in Wilson vs. Church (No 2) 12 Ch. D [1879] 454 at P 459. In the same case, Cotton LJ said at P 458:*
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> *"I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory."*

9. It was counsel's argument that the Appellant has demonstrated that he has all along been in possession, use and occupation of the suit land, the subject of the Appeal, since the year 2008; that if evicted, the Appellant/Applicant will suffer irreparable loss and damage since they will lose possession, occupation and use of the suit property and that there is a need to preserve the subject matter pending the hearing of the Appeal.

10. Learned counsel for the Appellant submitted that his Appeal is arguable and that the Respondents had not demonstrated at all that they will be prejudiced in any way if the Applicants' Application is allowed. Reliance was placed on the case of *Cosmas Kyule Ngunuu vs. Permanent Secretary, Ministry of Home Affairs & Another [2018] eKLR* where the learned Judge stated as follows:

> *"…Turning to the issue of whether the appeal had high chances of success. When the Applicant filed this Application, he did not include a copy of the Memorandum of Appeal for the intended appeal. However, the same was annexed to the Supplementary Affidavit of COSMAS KYULE NGUNUU sworn on 13th October 2017 and marked as "CKN 2". In the said copy of the memorandum of appeal, the Applicant raises three grounds of appeal. This court cannot discuss the merits of the grounds of appeal at this stage. However, I have read the three grounds of appeal and they raise issues which are worthy the consideration by an appellate court. As to whether the appeal will succeed, it would be premature to comment on this now. In the interest of justice, it would only be fair to allow the Applicant lodge the appeal and have it determined on its merits. The Respondents have not indicated how they would be prejudiced if this appeal is allowed. This court cannot on its own conclude that the Respondents will be prejudiced if the Application is allowed. On the contrary, this court opines that justice will be served to all parties if the Applicant is allowed to file the intended appeal…''*

11. It was counsel's further argument that there was no inordinate delay in filing the Application; that the Appellant/Applicant filed this Application on 2nd March, 2020 after receiving communication from his previous Advocates *Janet, Jackson & Susan Advocates;* that the Advocate had been served with an Application on 28th February, 2020 seeking the supervision and/or enforcement of the lower court's Decree and that the slight delay that might have occurred was occasioned by the mistakes of the Appellant/Applicant's previous firm of Advocates.

12. According to the Appellant's advocate, the court ought not to punish Appellant for the mistakes of his advocates. Reliance was placed on the Court of Appeal case of *Ahmed vs. Highway Carriers (1986) LLR 258 (CAK),* where the Court held that as follows:

> *"...A litigant should not suffer for his advocate's mistakes; if the court should be inclined to punish the advocate, it should state so and choose the appropriate punishment without injuring the litigant's rights".*

13. Counsel also cited the case of *Isaac Pere vs. Timina Lekeni Osio [2018] eKLR* where the Court held as follows:

> *"...It is not in dispute in the instant matter that the Appeal herein was filed in court in 2013 and the Appellant has not taken steps to have the matter prosecuted. However, the Appellant stated that the lack of progress and dismissal was occasioned by his previous advocates. The Appellant is seeking the court's discretion not to punish him for the mistakes of his advocates. This being an Application in which the discretion of the court is sought and the Appeal relating to a land matter, I will grant the Applicant the benefit of doubt...''*

14. Counsel submitted that the deposit of security in this matter is not necessary. Reliance was placed on the case of *David Oyiare Ntungani vs. Matuiya Ole Naisuaku Orket [2017] eKLR,* where the court held as follows:

> *"…It is therefore true that the demolition of the Applicant's houses will amount to substantial loss, considering that he will have to use resources to move his family and put up a new home on the land that he was allocated. The Application was filed without unreasonable delay and the subject matter being land, the deposit of security is not necessary…''*

15. The Appellant's advocate submitted that Order 9 Rule 9 of the Civil Procedure Rules, 2010, requires that where a party wishes to change an Advocate after a Judgment has been delivered, such a change must be effected by filing an Application to be served upon all the parties or through a consent executed between the outgoing Advocate and the incoming Advocate.

16. Counsel submitted that the Applicant's current firm of Advocates is properly on record and has audience before this court and that the lower court suit is a separate, distinct and independent suit of the Appeal herein.

17. In response, counsel for the Respondents submitted that the Applicant had not proved that he will suffer substantial loss if the orders sought are not granted by the court; that the eviction of the Appellant from his home is not substantial loss and that there was unreasonable delay in presenting the instant Application.

18. Having considered the pleadings and the submissions on record, the issues for determination are whether the Applicant's counsel is properly on record and secondly, whether the court should grant the Appellant/Applicant an order of stay of execution of the lower court's Judgment pending Appeal.

19. With regard to the first issue, the Respondent posited that by dint of Order 9 Rule 9 of the Civil Procedure Rules, the firm of Kilonzo Muli and Associates Advocates were not properly on record for the Appellants. The said Rule provides as follows:

> *"When there is a change of advocate, or when a party decides to act in person having engaged an advocate after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court –*
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> *(a) upon an Application with notice to all the parties; or*
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> *(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be."*

20. It is not in dispute that the Appellant was represented by the firm of Janet, Jackson & Susan Advocates in the lower court. However, after Judgment was delivered by the lower court on 23rd October, 2019, the firm of Kilonzo Muli filed the Memorandum of Appeal on behalf of the Appellant on 22nd November, 2019.

21. It will appear that after filing the Memorandum of Appeal, the firm of Kilonzo Muli and Associates obtained a consent from the Appellant's former advocate allowing them to come on record for the Appellant. The said consent was filed in this court on 2nd March, 2020, which is the same day that the current Application was filed. In my view, the filing of the consent between the two law firms validated the representation of the Appellant by the firm of Kilonzo and Muli Associates, notwithstanding that the consent was filed after the event.

22. In any event, the Appeal before this court is distinct from the suit in the lower court. Order 9 Rule 9 is applicable where the change of advocates occurs in the same suit, and not where one of the parties decides to hire a different advocate to prosecute an Appeal after the entry of Judgment in a lower court.

23. The principles to be met by an Applicant for the grant of a stay of execution pending Appeal are encapsulated in Order 42 Rule 6(2) of the Civil Procedure Rules as follows:

> *"No order for stay of execution shall be made under sub rule (1) unless—*
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> *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*
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> *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".*

24. The Court of Appeal in *Butt vs. Rent Restriction Tribunal [1982] KLR 417* gave guidance on how a court should exercise its discretion while granting or refusing to grant an order for stay of execution pending Appeal as follows:

> *"1. The power of the court to grant or refuse an Application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.*
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> *2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.*
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> *3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the Applicant at the end of the proceedings.*
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> *4. The court in exercising its discretion whether to grant [or] refuse an Application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.*
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> *5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon Application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse."*

25. The Court of Appeal in *Kenya Shell Limited vs. Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988) 1 KAR 1018* stated as follows:

> *"It is usually a good rule to see if Order 41 Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be a rare case when an Appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay."*

26. The evidence before this court shows that the learned Magistrate delivered his Judgment in Machakos CMCC No. 795 of 2013 on 23rd October, 2019. In the Judgment, the court issued a permanent injunction restraining the Appellant from entering or occupying the suit property. The court further directed the Appellant to give to the Respondents vacant possession of the suit property and in default to be evicted.

27. It is not in dispute that the Appellant is in possession of the suit property. Indeed, it is because of the said possession that the court directed that the Plaintiff should give vacant possession of the land or be evicted. The eviction of the Appellant from the suit property would mean that any house built on the suit property would be demolished, thus rendering the Appellant homeless.

28. The eviction of the Appellant from the suit property before the Appeal is heard and determined would occasion the Appellant substantial loss. I say so because other than losing the suit property, the Appellant will have his house demolished and will be required to acquire another piece of land and put up another home.

29. The Application was filed almost five (5) months after the date of delivery of the Judgment of the lower court. This in my view is an inordinate delay, and especially after the Memorandum of Appeal was filed in November, 2019, which was within a month after the delivery of the Judgment.

30. The Appellant seems to blame his former advocate for the delay in filing of the Application. However, as it has been stated by the courts for the umpteenth time, a suit always belongs to a litigant, and not his advocate. Therefore, it was upon the Appellant to make a follow up with his advocate for the filing of the Application for stay of execution timeously after learning about the decision of the lower court.

31. In this instant, even after filing the Memorandum of Appeal in good time, the Appellant and his advocate had to wait until the Respondent commenced execution proceedings to file the current Application. That in my view is contrary to the clear provisions of Order 42 Rule 6 (2) of the Civil Procedure Rules that provides that Applications for stay should be filed without unreasonable delay.

32. Having failed to convince this court why it took five (5) months to file the current Application, it is my finding that the Application was not filed without unreasonable delay.

33. On that ground alone, the Application dated 2nd March, 2020 is dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 9TH DAY OF OCTOBER, 2020

O.A. ANGOTE

JUDGE