



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

CIVIL SUIT NO 1925 OF 1998

JULIUS NYUMU & 31 OTHERS.....PLAINTIFFS

VERSUS

GITHUNGURI CONSTITUENCY RANCHING

COMPANY LTD & 29 OTHERS..... DEFENDANTS

RULING

This suit was dismissed by the court on 3rd November, 2017 on the ground that it was *res judicata*. The court held that the issues raised in the suit had been raised and determined in the earlier suits between the same parties namely, Nairobi HCCC No. 2573 of 1996 and Court of Appeal C.A No. 5 of 1998. On 29th January, 2018, the 1st plaintiff filed a Notice of Motion application dated 26th January 2018 seeking an order that the judgment of the court made on 3rd November 2017 be stayed pending the hearing of an appeal he had preferred against the same to the Court of Appeal. This is the application the subject of this ruling.

In his affidavit sworn on 26th January, 2018 in support of the application, the 1st plaintiff averred that judgment was entered against him on 3rd November 2017 and that he had filed a Notice of Appeal against the same and also requested for copies of the proceedings to enable him file the intended appeal. The 1st plaintiff averred that his intended appeal would be rendered nugatory if the stay sought is not granted. The 1st plaintiff averred that he was likely to be evicted from a parcel of land he had lived on since 1984. He averred that he had put up on the said parcel of land stone houses, a green house and had also planted fruit trees. In addition, he was also rearing cattle thereon. The 1st plaintiff averred that his appeal had good chances of success. The 1st plaintiff annexed to his affidavit in support of the application among others, a copy of a Notice of Appeal dated 7th November 2017 as well as a letter of the same date requesting the Deputy Registrar to furnish him with copies of the proceedings.

The defendants did not respond to the application. I have considered the application together with the supporting affidavit. The 1st plaintiff's application for stay was brought under Order 42 Rule 6 of the Civil Procedure Rules. Order 42 Rule 6(2) of the Civil Procedure Rules provides as follows:

“No order for stay of execution shall be made under subrule (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.”

I am of the view that the 1st plaintiff's application is misconceived. The plaintiffs brought this suit against the defendants. In a judgment that was delivered on 3rd November, 2017, the court did no more than dismissing the suit. The court did not even award costs to any party. In my view, there is no order in the judgment delivered by the court on 3rd November, 2017 capable of execution by the defendants or any other party to this suit. In the absence of an executable order, there is nothing to stay. In the case of Kanwal Sarjit Singh Dhiman v Keshavji Jivraj Shah [20008] eKLR, the Court of Appeal stated as follows:

“The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December, 2006. The order of 18th December, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus a negative order which is incapable of execution save in respect of costs only.”

The same reasoning was applied by Makhandia J. (as he then was) in the case of Raymond M. Omboga v Austine Pyan Maranga Kisii HCCA No 15 of 2010, where he stated as follows:

“The order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can be no stay of execution of such an order.”

For the foregoing reasons, the 1st plaintiff’s application for stay is not for granting. The 1st plaintiff has not satisfied the conditions for granting the order. The application is dismissed accordingly. Since the application was not opposed, each party shall bear its own costs.

Delivered and Signed at Nairobi this 24th day of January 2019

S. OKONG’O

JUDGE

Ruling read in open court in the presence of:

N/A for the 1st Plaintiff

N/A for the Defendants

Catherine-Court Assistant