



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELC NO. 111 OF 2017

MUKUNYA MUGO 'A'1ST PLAINTIFF/RESPONDENT

MUKUNYA MUGO 'B'2ND PLAINTIFF/RESPONDENT

VS

ELIZABETH MUGURE MUKUNYA.....DEFENDANT/APPLICANT

RULING

1. On application by the Applicant on 18/4/18 sought to set aside the proceedings that took place in this matter on the 11/10/17. The Court, after considering the application on its merits, determined that the application was not merited and dismissed it with costs. The ruling was delivered on the 31/7/18. The Applicant states that he wants to appeal against the said ruling.

2. The Applicant moved the Court in the instant application by way of a Notice of Motion dated 16/8/2018 and filed on 20/8/2018. It is brought under section 6 and 3A of the Civil Procedure Act, Order 51 rule 1 of the Civil Procedure Rules and Article 159 of the Constitution of Kenya. The Applicant sought the following orders;

a. That there be a stay of proceedings in this case pending the hearing and determination of the appeal by the Defendant against the ruling of this Honourable Court delivered on 31/7/ 2018.

b. That costs of this application be provided for.

3. The application is based on the grounds that;

a. That the Applicant is aggrieved by the ruling of the Court delivered on 31/7/2018 and has lodged notice of appeal.

b. That it is in the interest of justice that the proceedings in this case be stayed pending the outcome of the intended appeal.

c. That the Defendant will be grossly prejudiced if the matter were to proceed in the form in which it is now.

4. In support of the application the Applicant, deponed that being dissatisfied and aggrieved with the ruling of 31/7/18 she intends to appeal and has filed a notice of appeal thereto. She expressed her apprehension that the Plaintiff may take steps to finalize the case and averred that should the matter proceed without her participation she is likely to be prejudiced by the outcome. She implored the Court that in the interest of justice the proceedings should be stayed to await the outcome of her appeal.

5. Although the Respondents did not file any response to the application, they have duly filed their written submissions.

6. In her brief submissions she states that section 6 of the Civil procedure Act allows the Court to stay such further proceedings because in the event that the intended appeal is successful and this Court is ordered to try the suit afresh then the orders shall be rendered nugatory if this Court shall have delivered its judgement one way or another.

7. Further that the Court has inherent powers under 3A of the Civil Procedure Act to grant orders of stay of proceedings to ensure justice is done to the parties in the suit. Placing reliance on Article 159 of the Constitution, she opined that the Constitution mandates the Court to make such orders as shall ensure that justice to all without undue regard to procedural technicalities.

8. The Respondents filed submissions on the 21/11/18 and submitted that the grounds for stay of execution pending appeal are; substantial loss may result to the Applicant unless the order is made; the application has been made without undue delay; such security as to costs has been given by the Applicant. That the Applicant has not extracted the order for it to be stayed. Further that section 6 of the Civil Procedure

Act relied on by the Applicant is not applicable as it relates to stay of proceedings when another suit is pending and section 3A should only be invoked when the provisions of the law are silent. They opined that in the instant case the Applicant should be have invoked the provisions of Order 42 rule 6 of the Civil Procedure Rules. They faulted the Applicant for not attaching the Memorandum of Appeal nor orders that she desires to appeal against. They urged the Court to dismiss the application on account of want of merits.

9. I have read and considered the submissions as filed by the parties on record.

10. In the case of **Kenya Power & Lighting Co. Ltd vs. Esther Wanjiru Wokebii Civil Appeal No. 326 of 2013 (2014) eKLR,**

there are other cases in which the matter in issue in this case is also directly and substantially in issue in a previously instituted suit or proceedings. The Applicant has informed the Court of her intention to file an appeal. It would appear that no appeal has been filed yet. The Court also notes that there are no orders of the superior Court staying the proceedings in this case. Following the hierarchical and adversarial system of litigation in this country this Court cannot sit on appeal on its own ruling.

20. Furthermore Section 75 of the Civil Procedure Act read together with Order 43 rule 1 clearly states when appeals lie as of right and when leave of the Court is to be sought. An appeal from a ruling of a Court such as this one requires leave of the Court. The Applicant has not demonstrated whether the leave of the Court has been duly sought and obtained. In addition, no draft appeal has been presented before this Court.

21. The Court is of the view that the provisions of section 6 of the Civil Procedure Act are not helpful to the Applicant in as far as the application she has brought before this Court is concerned.

22. Section 3A of the Civil Procedure Act provides as follows;

“Nothing in this Act shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court”

23. It is trite law that section 3A is applicable by the Courts where there is a vacuum but not where there are provisions to cater for such as in this instance case.

24. Section 3A of the Civil Procedure Act relates to the wide powers of the Court to exercise its discretion to the end of justice between the parties. This Court already expressed itself in the ruling delivered on 31/7/18 in respect to exercising its discretion to grant prayers to set aside proceedings. This Court takes the view that this application being similar to the one dated 18/4/18 stands already adjudged as far as the issue of setting aside proceedings are concerned. The Applicant has not established sufficient cause to the satisfaction of the Court that it is in the interest of justice to grant the orders sought.

25. In the end the application is without merit and is dismissed with costs to the Respondents.

Orders accordingly

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 24TH DAY OF JANUARY, 2019.

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

1st & 2nd Plaintiffs/Respondents – Absent.

Mbuthia HB for Mwaniki Warima for the Defendant/Respondent

Irene and Njeri, Court Assistants