



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 7 OF 2014

JOHNSON THIAKA NYAGA.....PLAINTIFF/APPLICANT

VERSUS

JAMES KINYUA NYAGA.....1ST RESPONDENT

NJAGI NYAGA.....2ND RESPONDENT

WANJOHI MUTHONI NYAGA.....3RD RESPONDENT

JOSPHINE WAKERA NYAGA.....4TH RESPONDENT

KAMAU NYAGA.....5TH RESPONDENT

LAZARO MURIUKI NYAGA.....6TH RESPONDENT

RULING

In his application dated 17th December 2018, the Applicant sought the following orders:

- 1. That this Honourable Court be pleased to certify this application urgent and same be heard on priority basis and Ex-parte in the first instance due to its urgency.***
- 2. That pending the hearing and determination of this application ex-parte, the Honourable Deputy Registrar of the Honourable Court and the Honourable Judge be pleased to stay execution of the Court's orders dated 14th December 2018 issued Ex-parte ordering the defendants/Applicants to be evicted from portion of 1.5 acres out of L.R No. INOI/KAMONDO/79 and further ordering their houses to be demolished by Quick line Auctioneers under the security of the O.C.S Kerugoya Police Station.***
- 3. That the Honourable Court be pleased to stay execution of the ex-parte orders dated 14th December 2018 and all consequential orders pending the hearing and determination of Nyeri Court of Appeal Civil Application No. 144 of 2018 (Urgency No. 93 of 2018) being an application for stay of execution of the judgment and subsequent decree of Honourable Boaz Olao J. dated 20th March 2018 and ruling dated 1st November 2018 pending the hearing and determination of Nyeri C.A No. 136 of 2018 and which application dated 9th November 2018 has been certified as urgent and same is pending at the Court of Appeal Nyeri.***
- 4. That the costs of this application be provided for.***

APPLICANT'S CASE

The Applicant in his supporting affidavit sworn on 17th December 2018 deponed that this suit was heard on merits and on 20th March 2018, this Court rendered its decree whereby the suit land was held to belong to the Respondent and the Applicants were ordered to be evicted. He was aggrieved by that decision and lodged an appeal No. 136 of 2018. They also filed an application for stay pending appeal. Vide Miscellaneous Application No. 144 of 2018, (Nyeri) which was certified urgent under certificate of urgency No. U.R 93 of 2018). Before moving to the Court of Appeal, the Applicants filed an application before this Honourable Court dated 9th October 2018 seeking stay of execution of the judgment and decree under **Order 42 Rule 6 C.P.R.** After hearing the parties, this Court on 1st November 2018 dismissed that application. On 11th December 2018, the Respondent served them with an application dated 21st November 2018 in which the Respondent was seeking to evict them vide Quick line Auctioneers with the assistance of the O.C.S Kerugoya Police Station and on 14th December 2018, the said application was allowed ex-parte despite being served late.

RESPONDENTS CASE

The Respondent vide the replying affidavit sworn by Johnson Thiaka Nyaga opposed the application and deponed that in the judgment of this Court issued on 20th March 2018, the Applicants were given six (6) months notice to vacate from the suit property failing which they were to be evicted. In a Notice of Motion dated 20th June 2018, the Applicants sought a stay of execution of the judgment and decree of the Court pending the hearing and determination of an intended appeal. On 1st November 2018, this Court rendered itself by dismissing the same with costs. He then moved the Court vide a Notice of Motion dated 21st November 2018 seeking the execution of the judgment and decree of the Court and on 14th December 2018, the Court granted that application which seeks to enforce the judgment of this Court.

DECISION

The applicants are seeking to stay the orders of this Honourable Court issued on 14th December 2018 granting the Respondent the green light to execute the judgment and decree of this Court issued on 20th March 2018. The Applicants had sought to stay the said judgment and decree under a Notice of Motion dated 20th June 2018 which was declined by the Court in its ruling dated 1st November 2018. The Respondent had filed an application to enforce the orders of this Court vide the Notice of Motion dated 21st November 2018. When that application came up for inter-parties hearing on 14th December 2018, the Applicants applied for adjournment which was strenuously opposed by the Respondent. Upon considering the submissions for and against the application for adjournment, the Court declined to adjourn the matter and there being no opposition to the application, the same was allowed as prayed. It is the said orders allowing the execution of the judgment and decree of this Court issued on 20th March 2018 that the Applicants are seeking to stay execution.

I have carefully considered the affidavit evidence and the submissions by the counsels both in support and in opposition thereto. I have also looked at the authorities relied upon. This Honourable Court in its judgment delivered on 20th March 2018 held that the suit property which is the subject of this application belonged to the Respondent. The Court further gave the Applicants six (6) months notice to vacate the Respondents land failing which they were to be evicted. When the Respondent filed the application dated 21st November 2018 seeking enforcement of the judgment and decree of the Court, it was not a new cause of action. When the Court declined to grant the Applicants stay of execution of the judgment and decree of the Court on 1st November 2018, the natural consequences of that order was the execution of the judgment and decree of the Court. What the Applicant is attempting to do in the present application is to have a second bite of the cherry which is an abuse of the Court process. I also hasten to add that the application dated 21st November 2018 which came up for hearing on 14th December 2018 did not proceed Ex-parte as the Applicant was represented by Ann Thungu Advocate who was holding brief for Mr. Kahigah for the Applicant who made an application for adjournment which application was disallowed. The Applicant has not made an application to set aside and/or vary the said order. There is also no Notice of Appeal filed against that decision. There is therefore no proper application for stay pending appeal before me. In the same vein, the authorities cited are distinguishable and therefore un-applicable.

In the upshot, the application dated 17th December 2018 lack merit and the same is hereby dismissed with costs.

READ and DELIVERED in open Court at Kerugoya this 18th day of January, 2019.

E.C. CHERONO

ELC JUDGE

18TH JANUARY, 2019

In the presence of:

1. Mr. Kahiga for Applicant
2. M/S Wambui holding brief for Mr. Kagio for Respondent

MR. KAHIGA

I wish to apply for a stay for 14 days. I also pray for a certified copy of the order and the proceedings.

M/S WAMBUI – I leave it to the Court.

COURT

The parties to be supplied with a certified copy of the proceedings and the order upon payment of the requisite Court charges. However, the application for stay for 14 days is rejected.

E.C. CHERONO

ELC JUDGE