



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ELC CASE NO. 108 OF 2010**

**CHARLES KIMAITA MWITHIMBU.....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**JANE GAUKU M'RITHARA (Suing as a legal representative of**

**M'RITHARA M'MUTUNGA (DECEASED).....PLAINTIFF/APPLICANT**

**VERSUS**

**EDWARD MUTUA M'MWITHIGA.....DEFENDANT/RESPONDENT**

**RULING**

1. Judgment herein was delivered way back on 25.10.2012 whereby plaintiff's suit was dismissed. An application to have the judgment reviewed was filed by plaintiff which application was dismissed on 21.7.2016. This ought to be a concluded matter.

2. However, the parties have approached the court, each with their respective application.

**Application dated 5.10.2018**

3. In this application, defendant is seeking for the removal of the inhibition lodged on parcel no. L.R NTIMA/NTAKIRA/1864 and NTIMA/NTAKIRA/1165. The grounds in support of this application are that the suit was dismissed yet when the suit was filed, the court had ordered that an inhibition be registered and no order was ever made for its removal.

4. No response was filed in respect of this application.

**Application dated 24.10.2018.**

5. This application has been filed by the plaintiffs who are seeking for an order of stay of execution pending the taxation of the bill of costs and pending the appeal. They are also seeking for a stay of the defendant's application of 5.10.2018 pending the appeal.

6. The grounds in support of this application are that applicants/plaintiffs have filed a notice of appeal as well as an application for leave to appeal out of time.

7. Charles Kimaita has sworn an affidavit in support of the application averring that he did not get money to proceed with this case as he had a sick relative and also his farming was damaged by drought hence his failure to proceed with the appeal. He also states that the appeal will be rendered nugatory if the stay is not granted.

8. A response was filed by the defendant vide a replying affidavit filed on 29.10.2018. Defendant avers that plaintiffs are dragging this old matter forever and that the prayer for stay of execution is an afterthought. Defendant further states that the purported appeal has never been filed and that there is no application for extension of time.

**Determination**

9. I will deal with both applications simultaneously where I frame the issues for determination as follows:

- Whether a stay of execution should be granted
- Whether the order for removal of inhibition should be granted.

**Stay of execution**

10. The first point of call is order 42 rule 6 of the Civil Procedure rules which provides that;

***“No appeal or second appeal shall 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 but the court appealed from may for sufficient cause order stay of execution of such decree or order.....”.***

11. To grant or refuse an application for stay of execution pending appeal is discretionary in that the court has to balance the interests of the appellants with those of the respondent- See **Selestica Limited vs Gold Rock Development Ltd HCC Appeal No. 48/15 NBI**

12. In the present case judgment was delivered way back in October 2012. Six years down the line, no appeal has been filed. Even the existence of the alleged application for leave to appeal out of time is nowhere to be found even though it has been referred to as annexure C.K.M.I.

13. This court has a constitution mandate to ensure that ***“Justice is not delayed”*** in line with article **159 (2) (b) of the constitution.**

14. It appears that plaintiff would want this matter to remain in abeyance. It is not lost to this court that even a lawful judgment may become stale through operation of the statutes, hence the need to ensure that court decrees are executed within a reasonable time.

15. It is unjust and unreasonable for the plaintiffs to seek for a stay of execution at this stage of proceedings when judgment was delivered more than **6 years ago**.

16. There is also no basis of praying for a stay of pending taxation of the bill of costs. I hence find the application of 24.10.2015 filed by plaintiffs to be unmerited.

**Order of inhibition**

17. The order for inhibition was sought when the suit was being filed for in an application dated 9.9.2010. The order was granted on 12.11.2010 until this suit is heard and determined or until further orders of this court. The suit was heard and determined years ago (in 2012) and hence the orders of inhibition should not be in force.

18. **Final orders:**

**(1) Plaintiff’s application dated 24.10.2018 is hereby dismissed with costs to defendant.**

**(2) Defendant’s application dated 5.10.2018 is allowed but with no orders as to costs. The inhibition lodged in parcels no’s NTIMA/NTAKIRA/1864 and NTIMA/NTAKIRA/1165 are to be lifted forth with.**

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 13<sup>TH</sup> FEBRUARY, 2019 IN THE PRESENCE OF:-**

C/A: Kananu

Plaintiffs present

Rimita for defendant/applicant

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**