



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 169 OF 2015

(FORMERLY KERUGOYA ELC 732 OF 2013)

GATHURI NGARI.....PLAINTIFF

VERSUS

ALLAN NYAGA GATHURI NGARI.....DEFENDANT

RULING

1. By a notice of motion dated 9th July 2018 brought under the provisions of **Order Rule 42 Rule 6 of the Civil Procedure Rules, section 1A of the Civil Procedure Act (Cap 21)** and **all other enabling provisions of the law**, the Defendant sought an order for stay of execution of the decree of the court dated 7th December 2017 pending the filing, hearing and determination of an intended appeal against the said decree.
2. The said application was based upon the grounds set out in the motion the gist of which was that the Plaintiff had commenced irregular eviction proceedings against him and that the intended appeal might be rendered nugatory unless the stay is granted.
3. The said application was supported by an affidavit sworn by the Defendant on 9th July 2018 together with the annexures thereto. It was deposed by the Defendant that the Plaintiff had issued a 10-day notice of eviction in violation of the law and that if he and his family were evicted, they would be rendered homeless and destitute. It was stated that a notice of appeal had been filed intimating the Defendant's intention to appeal against the decree of 7th December 2017.
4. The Plaintiff filed a replying affidavit sworn on 14th July 2018 in opposition to the said application. It was contended that the Defendant was indolent and had not taken any steps to file a record of appeal and to prosecute the intended appeal. It was pointed out that the court had suspended execution of the decree for 90 days at the time of delivery of the judgement but the Defendant did take steps to vacate the suit property.
5. The Plaintiff also took issue with the Defendant's new advocates on record and contended that they were not properly on record. It was contended that the firm of Morris Njage & Co Advocates did not obtain leave of court to come on record after judgement in place of the previous advocates.
6. When the said application was listed for hearing on 16th July 2018, the Defendant's advocate prosecuted the said application orally. Mr. Morris Njage submitted that he had not replaced the advocates on record but the Defendant had simply appointed an additional advocate. That is why he filed a notice of appointment, and not a notice of change, of advocates. He further submitted that the Defendant was in possession of the suit property and that if evicted at this stage, his intended appeal might be rendered nugatory.
7. The Plaintiff's advocate, on the other hand, submitted that Mr. Morris Njagi was improperly on record because of failure to comply with the provisions of **Order 9 Rule 9 of the Civil Procedure Rules** on change of advocates after judgement. He asked the court to strike out the Defendant's said application as incompetent. It was further submitted that the Defendant has never been diligent in pursuing his intended appeal since he went to sleep after filing a notice of appeal.
8. It was further submitted by the Plaintiff's advocate that the Defendant did not apply for stay of execution expeditiously and that he moved the court only after being served with an eviction notice. The court was thus asked to dismiss the application for stay.
9. The provisions of **Order 42 Rule 6 (2) of the Civil Procedure Rules** on stay of execution provide as follows;

“6 (2) 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.

(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.”

10. The main question for determination herein is whether or not the Defendant has satisfied the conditions for the grant of an order of stay of execution of the decree. In his supporting affidavit, the Defendant claimed that if evicted at this stage, he will be rendered homeless and that his intended appeal might be rendered nugatory. The court is prepared to hold that those events may constitute substantial loss within the meaning of **Order 42 Rule 6 of the Civil Procedure Rules**. The court is, however, concerned that the Defendant does not appear keen on pursuing his intended appeal. The record shows that he was not keen on filing a record of appeal.

11. The second aspect for consideration is whether the application was filed without unreasonable delay. It is common ground that the judgement whose execution is sought to be stayed was delivered on 7th December 2017. It is also common ground that the application for stay of execution dated 9th July 2018 was filed on 10th July 2018. There was no explanation whatsoever rendered by the Defendant for the delay of eight (8) months in filing the application.

12. The court is inclined to hold that the Defendant is not a diligent litigant and that the application was merely filed as an afterthought and a delaying tactic to forestall execution of the decree. It has been held that undue delay may disentitle an applicant to an order of stay. In the instant case, the court finds that there is undue delay in filing the application and that there is no explanation for such delay.

13. The final issue for consideration is the legal representation of the Defendant. Although the Plaintiff's advocate submitted that the Defendant had undertaken an irregular change of advocates after judgement without leave of court, the court is unable to accept that submission. There is no notice of change of advocates on record. The court is inclined to accept the explanation by Mr. Morris Njage that the Defendant simply appointed an additional advocate. There is no bar under **Order 9 of the Civil Procedure Rules** to a party appointing an additional advocate to represent him after judgement.

14. The upshot of the foregoing is that even though the Defendant has satisfied one requirement for the grant of an order of stay, the court finds that there was undue delay in moving the court for a stay. The court shall accordingly decline to grant a stay. However, in exercise of the inherent powers of the court, the court shall grant an order for maintenance of *status quo* for a limited period of time to enable the Defendant pursue and prosecute the intended appeal.

15. The court, therefore, makes the following orders;

a. The Defendant's notice of motion dated 9th July 2018 is hereby dismissed with costs to the Plaintiff.

b. The *status quo* on possession obtaining as at today shall be maintained for a period of two years to enable the Defendant pursue his intended appeal.

16. It is so ordered.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this 7th day of **FEBRUARY, 2019**.

In the presence of Mr. Njage holding brief for Mr. Wanjohi for the Plaintiff and Mr. Morris Njagi for the Defendant.

Court clerk Muinde.

Y.M. ANGIMA

JUDGE

07.02.19