



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC NO. 66 OF 2014

SILAS TOWETT KAMUREN

GRACE JERUTO KAMUREN

(Suing as the Administrators of the Estate of

DAVID YATICH KAMUREN).....PLAINTIFFS

VERSUS

MOSES SIMATWA.....1ST DEFENDANT

PAUL KAMUREN.....2ND DEFENDANT

RULING

1. The Notice of Motion dated **11/2/2019** which has been filed by the 1st defendant seeks the following orders:

1.....spent

2.....spent

3. That the court be pleased to set aside proceedings made on 14/6/2018 and the judgment entered on 29/1/2019, the matter be re-opened and the defendants be afforded an opportunity to be heard.

4. That in the alternative there be stay of execution of the judgment and decree pending hearing and determination of Eldoret High Succession Cause No. 10 of 2018, being the estate of David Yatich Kamuren.

2. The Notice of Motion is founded on the grounds set out at the foot of the application and in the supporting affidavits of 1st defendant.

3. The grounds for the application are that the matter herein proceeded ex-parte and as a result thereof the court ordered that the defendant be evicted from the suit land; that prior to and during the hearing of the suit there were active negotiations between the parties which occasioned non-attendance at the hearing; that the suit property in which the 1st defendant is to be evicted from forms the estate of **David Kamuren** in which the 2nd defendant is an heir; that the 2nd defendant had proposed that the 0.5 acres occupied by the 1st defendant be deemed to constitute his share in the estate and that the application has been brought without inordinate delay. Those grounds are amplified in the supporting affidavit sworn by the 1st defendant and Counsel for the 1st defendant, both dated **11/2/2019**.

4. The plaintiffs relied on a replying affidavit sworn on **5/3/2019** by the 1st plaintiff and filed on **8/3/2019** in opposition to the application. The gist of that affidavit is that the applicant, not being a son to the deceased proprietor was not in any manner entitled to property from the estate of the deceased; that he has since the commencement of the suit hurriedly constructed a permanent house on the suit land despite being warned by the plaintiffs; that the defendants and their advocates on record failed to attend court on numerous occasions despite being served with notice and that no reasonable explanation for failure to attend court has been given; that the suit was decided on merit; that active negotiations do not warrant non attendance at a hearing; that in any event negotiations broke down in 2017 due to the non-responsive attitude of the defendants; that it would be unjust to stay the execution of the judgement and decree of this court pending the hearing and determination on **Eldoret HC Case No. 10 of 2018** estate of David Yatich Kamuren as the causes of action are completely separate and it is necessary to correct and preserve the property belonging to the estate of the deceased.

5. None of the parties filed any submissions in the matter.

6. It is noteworthy that the application does not state the provisions of the law under which the application is brought.
7. However I must consider **Order 42 Rule 6 (2)** as the appropriate order under which an application for stay of execution of judgment may be brought in civil proceedings.
8. One of the vital conditions set out under that order is that there shall be an appeal. Under **Order 42 Rule 6 (4)** the filing of a notice of appeal under Court of Appeal rules suffices to be an appeal for the purposes of an application for stay.
9. Further no order of stay of execution may be granted under that rule unless the court is satisfied that substantial loss may be occasioned to the application and such security as the court orders for the due performance of such a decree or order as may ultimately be binding on the applicant has been given by the applicant.
10. In this case no notice of appeal appears to have been filed in the record with regard to the judgment issued on **29/1/2019** and in any event no copy of such notice has been exhibited in the supporting affidavit to the application. I find in the absence of such notice of appeal this court does not have jurisdiction to consider the prayer for stay of execution.
11. It is noteworthy that prayer No. 4 seeks stay of execution pending and determination of **Eldoret High Court Succession Cause No. 10 of 2018 - Estate of David Yatich Kamuren**. The application before me is however made by the 1st defendant who is an heir to that estate. Conspicuously absent from these proceedings, just as he was absent in the proceedings in the main suit, is the 2nd defendant, yet the judgment was against both of them.
12. It cannot be understood why the 2nd defendant prefers to remain in the shadows whereas he ought to be at the frontline of the proceedings such as the instant application by virtue of his status as an heir to the estate and seller of land to the 1st defendant.
13. Be that as it may the stay application is principally premised upon the allegation that the plaintiffs are likely to demolish a house which the 1st defendant has built on the suit land thereby occasioning substantial loss. If he were an heir this court may have considered a stay; however the administrators to the estate are the persons entitled under the Law of Succession Act to deal with property belonging to the estate and now they are before me objecting strenuously to the instant application for stay.
14. The applicant is armed with nothing while the administrators are clothed with power to deal with the property of the deceased. That power is granted by statute. These are two very unequal parties in these proceedings.
15. Besides I do agree with the respondents that the house the applicant fears may be demolished may have been built during the pendency of this suit because an application dated **20/9/2018** notified this court that the 1st defendant was during the pendency of the proceedings hurriedly constructing a permanent house on the suit property despite being served with that application as evidenced by the affidavit of service filed by Jackson Nyongesa Simiyu on **4/10/2018** no response was filed by the two defendants and on **24/8/2018** the court directed that all further construction on the suit premises should immediately cease and that the parties should attend court on **26/9/2018** for directions.
16. On **26/9/2018** the interim orders were extended and the court directed a proper affidavit of service be filed and set the application down for hearing on **4/10/2018** when Mr. Wanyama held brief for Mr. Korir for the defendants and the matter was rescheduled to **1/11/2018** for hearing. On **1/11/2018** Mr. Chemoyai holding brief for Mr. Korir applied for an adjournment which was declined and hearing proceeded.
17. It is noteworthy that the hearing of this matter begun as far back as **14/6/2018** when the defendants and their counsel failed to attend court. It is a strange thing those proceedings had been on the record for more than 7 months before the instant application was made and that on two occasions that is on **4/10/2018** and **1/11/2018** the defendants were represented in court.
18. I would have expected an application seeking setting aside of those proceedings should have been filed within a reasonable time after **4/10/2018** and in any event before the close of the plaintiff's case.
19. In my view 7 months amounts to inordinate and inexcusable delay, which has not been satisfactorily explained. I find that the conduct of the defendants herein including the instant application is calculated in delaying this litigation for as long as possible for their own unknown reasons.
20. I am also convinced that the application dated **20/9/2018** was well grounded and that the 1st defendant had by expediting the construction of a house on the suit premises attempted to steal a march on the plaintiffs. However when all is said and done I find that the 1st defendant's conduct falls afoul of the provisions of **Section 45 (1)** of the **Law of Succession Act** where it is stated that except as expressly provided by the Act or by any other written law or by a grant of representation under the Act no person shall for any purpose take possession dispose of or otherwise intermeddle with any free property of a deceased person.
21. **Section 45 (2)** provides for penalties to be imposed against an offender who has intermeddled with a deceased person's estate. I find that the applicant has not demonstrated that he qualifies to be an "authorised person" under the provisions of **Section 45(1)** of the Law of the Succession Act or that he is not intermeddling with the estate of David Yatich Kamuren.
22. For the above reasons I find that the applicant has no right of audience before this court and that his plea counterpoised as it is against the legal administrators of the estate has no chance of success whatsoever.
23. I do not have any good ground upon which I can grant either an application for stay or setting aside of the proceedings of **14/6/2018** and

the judgment of **29/1/2019**, or to even reopen the matter so that the defendants may be afforded an opportunity to be heard. In any event the affidavit of the 2nd defendant is conspicuously missing from the current application. The 1st defendant cannot be heard to be speaking on his behalf while his supporting affidavit sworn on **11/2/2019** does not state as much.

24. In the end I find the application dated **11/2/2019** has no merit and the same is dismissed with costs to the respondents.

Dated, signed and delivered at Kitale on this 13th day of May, 2019.

MWANGI NJOROGE

JUDGE

13/5/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Ms. Arunga holding brief for Lilan for Plaintiff

N/A for the defendant

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

13/5/2019