



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC APPEAL CASE NO. 17 OF 2018

KHLEAN JUMA MWAJIRANI.....PLAINTIFF

VERSUS

IDD JUMA KIBAO.....DEFENDANT

RULING

1. For determination is the notice of motion application dated 30th October 2018 brought by the Appellant seeking to be granted the following orders;

(a) Spent;

(b) The honourable Court be pleased to order the stay of execution pending hearing of the appeal and the determination of the other suit Land Case No. 15 of 2018;

(c) The costs of this Application be provided for;

(d) Such other and/or further orders as the Honourable Court may deem expedient and fit to grant.

2. The application is supported by the grounds inter alia that the judgment was based on fraudulent and illegal proceedings. That the Appellant is facing imminent eviction. The application is further supported by the facts contained in affidavit deposed to by Halfan Juma Mwijirani sworn on 30th October 2018. The Applicant deposed that Hon. P. Wambugu had directed that the Appellant's application dated 16th April 2018 filed before him be heard on 6th June 2018. That the trial magistrate also directed that land case No. 13 and 15 both of 2018 be placed before him on 6th June 2018 for directions.

3. The Applicant deposed that the Respondent failed to inform the court of case no. 15 of 2018 after their file vanished. That his advocate filed an application to say the delivery of the judgment. That he had not been served with pleadings in case no. 13 of 2018. The Applicant deposed further that the Respondent has failed to comply with Order 22 rule 6 for not serving him with notice of entry of judgment. That it is equitable that land case no. 15 of 2018 also be heard and determined on its merits.

4. The Respondent opposed the application by filing a relying affidavit as well as grounds of opposition on 21st November 2018. The Respondent 2018. The Respondent urges that no appeal has been filed against the Kadhi's decision in Succession Cause No. 373 of 2017 which found that he had an interest in Plot No. 45, Kwale Township. He also deposed that the applicant was duly served with STEA in Land Case No. 13 of 2015. That by failing to file a defence, the case proceeded to formal proof and judgment delivered procedurally on 17th October 2018.

5. In the replying affidavit, the Respondent annexed a copy of the decree issued in Kadhi Court Succession Cause No. 373 of 2017. He also annexed a return of service in Land Case No. 13 of 2018 which deposed that the Appellant was served with STEA. That unless this application is dismissed, he stands to suffer loss as he has already paid Kshs3,000,000/= for the property which the Appellant is denying him from using.

6. I must confess that I found the pleadings as filed to be equated as an application for setting aside exparte judgment instead of presenting a case for stay execution. The Appellant deposed at paragraph 11 of his affidavit that his advocate learnt on 28th September 2018 that Case No. 13 of 2018 was pending judgment. That he immediately prepared an application to arrest the judgment and set aside the exparte proceedings. However they did not file the application until 23rd October 2018.

7. The said judgment was delivered on 17th October 2018. The applicant does not explain why he did not pursue the application as regards the prayer for setting aside of the ex parte proceedings and probably Judgment. Instead he has filed this application to stay the execution of that judgement pending the determination of his appeal. The principles to be considered for granting stay of execution are set out in Order 42 rule 6 (2) to include inter alia substantial loss. The Appellant herein has extensively discussed the issue of hearing Case No. 15 of 2018 on merit as the reason why he is challenging the judgment.

8. This court having been approached as an appellate court cannot delve into the issue of lack of service before the court who determined the matter has rendered itself over the same. It is therefore my considered opinion that this application ought to have been filed in the trial court to include prayers for setting aside the proceedings and judgment. I think the Appellant has prematurely filed both the appeal and the application.

For this reason, I do hereby strike out the application dated 30th October 2018 with costs to the Respondent. The court in exercise of its discretion shall direct that the orders of temporary stay of execution in force are extended for a period of 21 days from this date to enable the applicant mover the appropriate court.

In default, the orders issued on 31st October 2018 and extended are discharged.

DATED, SIGNED and DELIVERED at Mombasa this 14th day of June 2019.

A. OMOLLO

JUDGE.