



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT EMBU

E.L.C. APPEAL NO. 1 OF 2019

(FORMERLY HCA NO. 72 OF 2017)

FAUSTINO MUNDIGI.....APPELLANT

VERSUS

SIMON MUNYI MUTURIO.....RESPONDENT

RULING

1. On or about 13th December 2017 the Appellant filed a memorandum of appeal dated 13th December 2017 at Embu Law Courts. Although the appeal was titled as ELC Appeal No. 77 of 2017, it was apparently received and stamped at the High Court Registry.
2. The said appeal was listed either for mention for directions or notice to show cause before the High Court on 26th October 2018 when it was dismissed for want of prosecution in the absence of the Appellant's advocate. The record shows that the Appellant's advocate had requested another advocate to hold his brief and have the file placed aside until 10.30 am. When he failed to show up by 11.00 am the appeal was dismissed.
3. By a notice of motion dated 26th October 2018 brought under **the court's inherent and residual jurisdiction, Article 48, 159(2) (d) and 165 (5) (b) of the Constitution of Kenya, 2010 and Order 51 Rule 1 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law** the Appellant sought the setting aside of the dismissal order on the grounds stated on the face thereof. It was contended that the appeal was an Environment and Land Court (hereinafter *ELC*) appeal hence it had been dismissed in error by the High Court which was not seized of the appeal.
4. It would appear from the material on record that when the said application was listed before the High Court on 8th November 2018 it was dismissed for non-attendance on the part of the Appellant's advocate. The Appellant then filed a notice of motion dated 7th December 2018 seeking the setting aside of the dismissal order made on 8th November 2018 and reinstatement of his earlier notice of motion dated 26th October 2018.
5. Not content to simply pursue the said application for reinstatement, by a notice of motion dated 28th December 2018 brought under **Section 13(4) (7) (a) of the Environment and Land Court Act, 2011, Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, 2010 and all other enabling laws** the Appellant sought a stay of the judgement and decree the subject of the original memorandum of appeal dated and filed on 13th December 2017.
6. It was contended that upon delivery of the said judgement there was a gentleman's agreement between the advocates for the parties that the decree would not be executed pending the hearing and determination of the appeal. It was further contended that in complete disregard of the said agreement, the Respondent had taken steps to execute the decree and evict the Appellant from the suit property. It was further contended that unless a stay was granted then the appeal might be rendered nugatory.
7. The Respondent filed a replying affidavit sworn by his advocate on record on 4th February 2019. It was contended that the pending applications were frivolous, a sham and an abuse of the court process. Mr. Guantai doubted the genuineness of the copy of the diary of the Appellant's advocate which was exhibited to explain his failure to attend court on 8th November 2018. He also denied that there was a gentleman's agreement to hold execution of the decree in abeyance. The Respondent, therefore, urged the court to dismiss the said applications.
8. The Appellant filed a further affidavit sworn on 1st April 2019 in response to the Respondent's said replying affidavit.

9. When the said applications were listed for hearing on 13th February 2019, the advocates for the parties agreed to canvass them through written submissions. The Appellant was granted 30 days to file and serve his submissions whereas the Respondent was to file and serve his within 30 days thereafter. The record shows that the Applicant filed his submissions on 10th May 2019 whereas the Respondent filed his on 27th March 2019.
10. The court has considered the Appellant's said applications, the replying affidavit in opposition thereto as well as the two further affidavits filed on behalf of the Appellant. The court has also considered the respective written submissions filed by the parties.
11. The court is of the view that the following three issues fall for determination:
- a. Whether the Appellant has made out a case for setting aside of the dismissal order made on 8th November 2018.
 - b. Whether the Appellant has made out a case for reinstatement of the Appeal which was dismissed on 26th October 2018.
 - c. Whether the Appellant has made out a case for a stay pending appeal.
12. The court has fully considered the material on record on the first issue. The court is satisfied on the basis of the material on record that a just cause or excuse for non-appearance by the Appellant's advocate has been demonstrated. He exhibited a copy of his diary for 8th November 2018 and it would appear that the matter was not diarized. The Respondent doubted the genuineness of the diary but he did not tender any evidence to demonstrate his misgivings.
13. The court has also fully considered the material on record on the second issue. It is not in doubt that the appeal arose from a land matter which was handled by the Magistrate's court. There is no doubt that the memorandum of appeal was properly titled as an ELC appeal at the time of filing. If the appeal file was directed to the wrong court by the court registry, then there is no way the Appellant can be faulted for that.
14. The court is of the view that the appeal file was erroneously listed before the High Court and that it was dismissed in error by that court. There is no indication that the court's attention was drawn to the fact that the appeal was an ELC appeal emanating from the Magistrate's court. Had the High Court been alerted of that fact, it would obviously have referred the appeal to the ELC for disposal.
15. The third issue is on stay of execution pending appeal. The Appellant contended that the trial magistrate had no jurisdiction to entertain the suit since he was not gazetted by the Chief Justice to handle ELC matters. It was further submitted that execution of the resultant void decree would result into substantial loss within the meaning of the law.
16. The court is of the view that the Appellant has demonstrated the risk of substantial loss in two ways. First, if the Appellant is evicted from the suit property before his appeal is concluded, it might be impossible to restore him. Even if restoration were possible, uprooting an Appellant from his abode may cause serious disruption of his family life whilst his appeal is pending. Second, should the Appellant ultimately demonstrate that the trial magistrate had no jurisdiction to try the original suit, then its execution would definitely result into substantial loss within the meaning of **Order 42 Rule 6(2) of the Rules**.
17. The court is further of the view that no security for due performance of the decree would be required in the circumstances since the Appellant may still be evicted in execution of the decree upon conclusion of the appeal.
18. It would appear that there was substantial delay in making the application for stay since the date of the judgement. The Appellant's explanation was that he was relying on the gentleman's agreement between the advocates for the parties. The Respondent's advocate, however, denied the existence of any such understanding. Assuming that the Appellant was mistaken as to the existence of such gentlemen's agreement, it appears to have had some effect in that no execution took place for about one year from the date of judgement. The court takes the view that such mistaken belief may constitute a reasonable explanation for the delay.
19. The upshot of the foregoing is that the court finds merit in the Appellant's applications and the same are hereby allowed in the following terms;
- a. The notice of motion dated 7th December 2018 is hereby allowed in terms of order No. 3 thereof and the notice of motion dated 26th October 2018 is hereby reinstated.
 - b. The notice of motion dated 26th October 2018 is hereby allowed in terms of order No. 3 thereof and the appeal is hereby reinstated.
 - c. The notice of motion dated 28th December 2018 is hereby allowed in terms of order No. 3 thereof.
 - d. Costs of the said applications shall be in the cause.
 - e. The Appellant shall file and serve a record of appeal within 30 days, in default of which the appeal shall stand dismissed without further order.
 - f. The Appeal shall be mentioned on 18th July 2019 for directions on the hearing of the appeal.

20. Orders accordingly.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **13TH** day of **JUNE, 2019**.

In the presence of Mr. Omwega holding brief for Mr. Gachuba for the Appellant and Mr. Yusuf holding brief for Mr. Guantai for the Respondent

Court Assistant Mr. Muinde

Y.M. ANGIMA

JUDGE

13.06.19