



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 103 OF 2013

MICHAEL KIPCHUMBA.....PLAINTIFF

VERSUS

FESTO ASANGO.....DEFENDANT

RULING

1. The application dated 25/4/2019 and filed in court on the same date has been brought by the defendant who seeks the following orders:-
 - (a) That this application certified urgent service thereof be dispensed within the first instance.
 - (b) That the court be pleased to grant a stay of execution of the eviction order issued by this court on 1st February, 2019, pending hearing and determination of this application interpartes and the Appeal Case No. 12 of 2019 at Court of Appeal in Eldoret.
 - (c) That the court be pleased to grant a stay of execution of the eviction order issued by this court on 1st February, 2019 pending hearing and determination of the appeal.
 - (d) That costs of this application be awarded to the applicant.
2. The application is premised under provisions of **Section 3 and 3A of the Civil Procedure Act, Order 22 Rule 22 of the Civil Procedure Rules 2010.**
3. The grounds on which the said application is made are that defendant is dissatisfied with the judgement which was read and delivered on **31/2/2019**; that the plaintiff has obtained an order of eviction and has already instructed the OCS, Kwanza Police Base and the defendant is apprehensive if the eviction is left to continue; that the plot in issue herein is a source of livelihood for the defendant and being a retired civil servant, he ekes out a living together with his family by the meager earnings realised from the plot, the subject matter herein; that the intended **Appeal Case No. 12 of 2019** raises triable issues and as such it is prudent that orders sought be granted and that the plaintiff will not be prejudiced not to suffer loss of the access sought and granted since they have not been in occupation of the suit property.
4. The application is supported by the affidavit applicant sworn on **25/4/2019**. That affidavit reiterates the same matters set out in the grounds above.
5. In his response to the application, the plaintiff filed replying affidavit dated **2/5/2019**. The gist of his affidavit is that the application is *res judicata* since a similar application dated **21/2/2019** had been dismissed by the court on **8/4/2019**.
6. The applicant filed submissions on **14/5/2019** while the plaintiff filed his on **12/6/2019**.
7. The court, taking note of the ruling delivered on 8/4/2019 did not grant any stay orders but ordered the parties to file submissions on the application and reserved the ruling for **19/6/2016**.
8. The court never sat on 19/6/2019; however parties were notified by the Deputy Registrar that the ruling in this matter, among others, would be delivered on **30/7/2019**.
9. As this court was preparing this ruling it noticed three documents filed in the court record which have a bearing in this ruling. One is an undated letter received by the court registry on **18/6/2019** from the applicant indicating that execution had issued against him. The second one was the set of plaintiff's submissions reiterating the same thing. The third one was a letter dated **14/6/2019** from the Kenya Police Kwanza Sub-County Police Headquarters also indicating that the eviction order issued against the defendant had been executed on 10/6/2019.

10. From the foregoing it is clear that this application is already overtaken by events. But even if it had not been so, a perusal of the application dated 21/2/2019, also filed by the defendant shows that he had sought similar orders, that is, a stay of execution pending the hearing and determination of the appeal filed in the Court of Appeal. The instant application is therefore res judicata and I dismiss it with costs for that reason.

Dated, signed and delivered at Kitale on this 30th day of July, 2019.

MWANGI NJOROGE

JUDGE

30/7/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Collins

Plaintiff in person for the plaintiff

Defendant in person for the defendant

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

30/7/2019