



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC. CASE NO. 150 OF 2008 (O.S)**

**DAVID OYIARE NTUNGANI.....PLAINTIFF/APPLICANT**

**VERSUS**

**MATUIYA OLE NAISUAKU ORKET.....DEFENDANT/RESPONDENT**

**RULING**

1. The Application dated 28<sup>th</sup> November, 2018 by the Plaintiff is seeking for the following orders:

- a. That the Defendant do give the Plaintiff vacant possession within seven (7) days of the court's orders.***
- b. That in default of giving vacant possession within seven (7) days of the court's orders the Defendant be evicted.***
- c. That the Officer Commanding Station (OCS) Namanga Kajiado County do assist in the eviction for purposes of order and peace.***
- d. That the Honourable Court do issue any other and or further orders, and or directions in the interest of justice and fairness.***
- e. That the Defendant do pay costs.***

2. The Application is supported by the Affidavit of the Plaintiff who has deponed that he has been deprived of the use of his land known as Kajiado/Lorngosua/1298 (*the suit land*) for more than seventeen (17) years; that the Application by the Defendant for stay of execution pending Appeal was granted by the court on condition that the Appeal is filed expeditiously and that since the date of the Ruling of stay of execution pending Appeal, the Defendant has not filed his Record of Appeal as directed by the court.

3. The Plaintiff has deponed that the proceedings for purposes of Appeal were ready on 13<sup>th</sup> March, 2018 and that the Defendant has never paid for or collected the said proceedings. According to the Plaintiff, the Defendant's use of the order of stay pending Appeal, indolence and indifference is gravely prejudicial to him; that the Defendant has continued to subject the suit land to damage, waste and injury and that the Defendant will not be prejudiced if the Application is allowed.

4. The Plaintiff finally deponed that he is ready to undertake, upon receiving the land, to keep it unalienated and unencumbered for upto six (6) months to enable the Defendant to exhaust any rights of Appeal that he intends to pursue and that the Defendant continues to enjoy two parcels of land namely, the suit land measuring 72 Ha and land known as Kajiado/Lorngosua/1292 measuring 33.50 Ha.

5. In response, the Defendant deponed that he filed a Notice of Appeal on 19<sup>th</sup> May, 2017; that save for the certified Judgment; the certified proceedings have to date not been supplied to his advocate and that his advocate has on several occasions requested for the court file so as to peruse it or obtain the certified typed proceedings to no avail.

6. According to the Defendant, the Plaintiff's Application is tailored at stealing a match on him out of a delay not attributed to either himself or his advocate and that the Ruling of the court for a stay of execution was delivered without a notification to his advocate. According to the Defendant, if this Application is allowed, he shall suffer immense prejudice given that he shall have been condemned unheard, an act which is unconstitutional.

7. In his submissions, the Plaintiff's advocate submitted that the eviction of the Defendant should be allowed in view of the default on the conditional stay of execution of the Judgment pending Appeal; that this court is *functus officio* after it issued its orders of 4<sup>th</sup> July, 2017 and that the Defendant has neither appealed against the court's Judgment nor applied for extension of time for stay of these proceedings.

8. Counsel submitted that the Defendant has had over eighteen (18) months to prosecute his Appeal; that the Respondent has not bothered to file his Record of Appeal even after certified copies were ready over twelve (12) months ago and that the Defendant is co-opting the court into his scheme of indolence.
9. The Plaintiff's counsel submitted that as the Decree holder, the Plaintiff should be allowed to execute the Decree since the order staying execution has lapsed; that the propriety of the Plaintiff's title has already been determined and that the mere notice of Appeal cannot preclude the Plaintiff from seeking to enforce a valid Judgment of the court. Counsel relied on numerous authorities which I have considered.
10. The Defendant's advocate submitted that if the Defendant gives the Plaintiff vacant possession as prayed in the Application, the Defendant and his family will be rendered homeless and the intended Appeal rendered nugatory.
11. According to the Defendant's advocate, they requested for certified typed proceedings and that the delay in the processing of the typed and certified proceedings was not caused by the Defendant or his advocates on record.
12. Counsel submitted that it is only just and equitable that the Defendant be allowed to file his Appeal out of time; that the Application be dismissed and the Respondent be allowed to file his Appeal and that the main concern of the court is to do justice to parties. Counsel relied on several authorities which I have considered.
13. This suit was filed by the Plaintiff on 23<sup>rd</sup> September, 2008. However, it was not until 24<sup>th</sup> October, 2016, eight (8) years down the line, that the court heard the matter. After hearing both parties, the court delivered its Judgment on 12<sup>th</sup> May, 2017.
14. In the Judgment, the court allowed the Plaintiff's suit and ordered the Defendant to give vacant possession of land known as Kajiado/Lorngosua/1298 to the Plaintiff within sixty (60) days from the date of the Judgment.
15. Before the sixty (60) days could expire, the Defendant filed in this court an Application dated 4<sup>th</sup> July, 2017 seeking for an order of stay of execution of the Decree of 12<sup>th</sup> May, 2017 pending Appeal. The Defendant's Application for stay of execution was filed pursuant to the provisions of Order 42 Rule 6(2) of the Civil Procedure Rules. Although the Ruling of the court was initially reserved on 13<sup>th</sup> October, 2017, it was not until 23<sup>rd</sup> November, 2017 that the said Ruling was delivered by the court. In the said Ruling, the court allowed the Defendant's Application for stay of execution as follows:
- a. Pending the hearing and determination of the intended appeal, an order be and is hereby issued staying execution of the Judgment of 12<sup>th</sup> May, 2017 on condition that the Applicant files the Record of Appeal within six (6) months from the date of this Ruling.**
- b. Pending the hearing and determination of the intended appeal, the Applicant is restrained from engaging in any acts of wasting, leasing, alienating the suit land or putting up any new structures on the suit land.**
- c. Each party to bear his own costs.**
16. It is clear from the orders that the court issued that the stay of execution of the Judgment of 12<sup>th</sup> May, 2017 was on condition that the Defendant files the Record of Appeal in the Court of Appeal within six (6) months from the date of the Ruling.
17. The effect of the Ruling of 23<sup>rd</sup> November, 2017 was that in addition to the sixty (60) days that the Defendant had from the date of the Judgment, the court gave the Defendant another period of six (6) months to file the Record of Appeal. Cumulatively, the Defendant had a period of eight (8) months to file his Record of Appeal from the date when the Judgment of this court was delivered.
18. The Defendant has conceded that to date, he has never filed the Record of Appeal in the Court of Appeal. It is the Defendant's deposition that despite requesting the Deputy Registrar of this court to avail him with certified copies of the proceedings, the same were never availed to him. That, according to the Defendant, is the only reason that has incapacitated him from filing the Record of Appeal, either within or outside the six (6) months as directed by this court.
19. The record shows that immediately after the delivery of the Judgment in this matter on 15<sup>th</sup> May, 2017, the Defendant's advocate applied for the certified copies of the proceedings and Judgment vide a letter dated 11<sup>th</sup> May, 2017 (*sic*). The said letter was received in the registry on 15<sup>th</sup> May, 2017. Indeed, the Defendant has annexed on his Affidavit four (4) other letters that were authored by his advocate in the year 2017 requesting for certified copies of the proceedings. The letters are dated 31<sup>st</sup> May, 2017, 23<sup>rd</sup> June, 2017, 24<sup>th</sup> July, 2017 and 15<sup>th</sup> September, 2017. However, after the Ruling of 23<sup>rd</sup> November, 2017, the Defendant did not make a follow up with the Deputy Registrar for certified copies of the proceedings. Indeed, there is no evidence before the court showing that between 23<sup>rd</sup> November, 2017 until 28<sup>th</sup> November, 2018, when the current Application was filed, the Defendant requested for the certified copy of proceedings.
20. Although it is the function of the court to supply to parties certified copies of proceedings for the purpose of filing the Record of Appeal, the order of this court of 23<sup>rd</sup> November, 2017 was meant to keep on their toes, not only the Defendant, but also the court registry, on the need to have the Record of Appeal prepared and filed expeditiously. That seems not to have happened on the part of the Defendant.
21. Indeed, the record shows that this file was returned in the registry with typed and proof-read proceedings on 13<sup>th</sup> March, 2018. That notwithstanding, the Defendant seems not to have done any letter in the year 2018 requesting for the proceedings.

22. Even if it is true that the Record of Appeal could not have been filed within six (6) months as ordered by the court due to lack of court proceedings, the Defendant should have moved the court for the extension of time to allow him to file the said Record of Appeal. However, he never did so.

23. Considering that the order of stay of execution was on condition that the Record of Appeal should be filed in the Court of Appeal within six (6) months, and in view of the fact that the Defendant has never sought for an extension of time in respect to the said six (6) months, I find and hold that the conditional stay of execution of the Judgment lapsed by effluxion of time. Indeed, even upto the time of hearing the Plaintiff's Application dated 28<sup>th</sup> November, 2018, the Defendant had not filed an Application for extension of time.

24. If indeed the timelines that this court granted to the Defendant in its Ruling of 23<sup>rd</sup> November, 2017 were not achievable, other than filing an Application for extension of time, the Defendant also had the option of filing an Appeal against the said order. Having not done so, this court has no alternative but to allow the Plaintiff's Application dated 28<sup>th</sup> November, 2018. Indeed, even without the Notice of Motion dated 28<sup>th</sup> November 2018, the Plaintiff would still have proceeded with the eviction of the Defendant from the suit land pursuant to the Decree of 12<sup>th</sup> May, 2017.

25. Although the Defendant has deponed that he will be rendered homeless in the event the order of stay is vacated, the uncontroverted evidence before the court shows that he owns a parcel of land known as Kajiado/Lorngosua/1292 measuring 33.50 Ha (*approximately 83.75 acres*) which neighbours the suit land. It is therefore not true that the Defendant does not have another piece of land to settle on.

26. For the reasons I have given above, I allow the Plaintiff's Application dated 28<sup>th</sup> November, 2018 as follows:

*a. That the Defendant do give the Plaintiff vacant possession of parcel of land number Kajiado/Lorngosua/1298 within seven (7) days of the court's orders.*

*b. That in default of giving vacant possession within seven (7) days of the court's orders, the Defendant be evicted.*

*c. That the Officer Commanding Station (OCS) Namanga Kajiado County do assist in the eviction of the Defendant from parcel of land known as Kajiado/Lorngosua/1298 for purposes of order and peace.*

*a. Each party to pay his own costs.*

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 26<sup>TH</sup> DAY OF JULY, 2019.**

**O.A. ANGOTE**

**JUDGE**