



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC CASE NO. 105 OF 2015

BETTY KAJUJU AND GEORGE KIREMU MUTWIRI

(Through the Donee of the Power of Attorney)

JANET KAREGI MWORIA.....PLAINTIFF

VERSUS

RICHARD MUNENE MWORIA.....DEFENDANT/APPLICANT

RULING

1. Before me is a Notice of Motion application dated 31st July 2018, brought pursuant to the provisions of Order 51 Rule 1, Order 40 of the Civil Procedure Rules, Sections 1A, 1B, 3A of the Civil Procedure Act CAP 21 Laws of Kenya and all other enabling provisions of the law. The applicant seeks an order of stay of execution of the judgment, orders and decree of 23rd May 2018 pending the hearing and determination of the intended appeal. He further seeks an order lifting the warrant of court bailiff to give vacant possession against the defendant undertaken by John Mbijjwe T/A Bealine Kena Auctioneers and an order for the unconditional discharge and/or cancellation of the warrants issued herein on 26th July 2018. He also wants the court to declare that the execution process was irregular, unlawful and illegal.

2. The gist of the application is that this court had entered judgment against the Applicant on 23rd May 2018 with effect that the applicant was to be evicted from the suit land and the applicant being aggrieved by the said judgment had filed a notice of appeal against the entire judgment dated 5th June 2018.

3. The application was opposed via a replying affidavit sworn by the plaintiff herein who deposed inter alia that judgment was delivered on 23rd May 2018 whereupon execution commenced after expiry of the period granted for the defendant to get out of the plaintiff's land and that indeed the defendant was completely evicted from the plaintiffs land, but many days thereafter, he started to make a comeback which was contrary to the judgment and orders of the court and as such there was nothing to stay.

4. It was argued for the applicant that there is an appeal against the Judgment, that the applicant had never been in contempt of any orders given by the court and that the order was extracted out on 26th July 2018 and executed on 28th July 2018 which was a Saturday in absence of the applicant.

5. On the other hand it was submitted by Mr. Gikunda for the plaintiff that the applicant had defied eviction orders and had forcefully entered the suit property and that no appeal had been filed as alleged and that the same ought to have been filed within 60 days.

6. I have carefully considered this application and the rival contentions by the parties. The applicant is essentially seeking an order of stay of execution of the judgment and decree of 23rd May 2018, pending the hearing and determination of the intended appeal. It is indeed not in dispute that on 23rd May 2018, this court inter alia issued an order for the eviction of the defendant, his agent's servants or anyone claiming under the defendant from the plaintiff's property known as L.R Ntima/Igoki/451. The then advocate for the defendant had requested the court for a stay of eviction for a period of 60 days to enable the defendant comply with the order and move out of the plaintiffs land.

7. It is contended by the respondent that there is nothing to stay since execution has already taken place. Indeed the plaintiffs assertion that execution has already taken place are confirmed by the defendant at paragraph "e" in his grounds in support of the Application where he asserts that; **"the said execution process as initiated by the plaintiff/respondent is irregular, unlawful and illegal and the same ought to be lifted and the warrants of attachment and sale issued therein ought to be cancelled, vacated and/or discharged."** He reiterates the same averment at paragraphs 6, 8 12 and 13 of his supporting affidavit.

8. During the hearing of the application, applicant's counsel had stated that execution occurred on 28.7.2018 and that his client was called when execution was on going. No explanation has been advanced by the applicant as to how he came back unto the suit land. I am therefore inclined to believe the averments advanced by the respondent that applicant misled the court when he sought temporary orders of stay which orders he misused to re-enter the premises. Such a litigant who has no qualms in misleading the court does not deserve the orders he is seeking.

9. I also note that when Judgment was delivered on 23.5.2018, a stay of 60 days was sought by the applicant in order to move out of the property. At what point did he change his mind. It is not lost to this court that execution took place after the lapse of the 60 days.

10. Further, I note that in ground (d) of the application, applicant laments that plaintiff did not notify him on the issue of delivery of the Judgment. This is another move to mislead the court and to distort the proceedings since applicants counsel was present on 23.5.2018 when Judgment was delivered. The said counsel is even the one who sought for a stay for 60 days.

11. I have also considered the issue of delay. When Judgment was delivered on 23.5.2018, the applicant subsequently filed a notice of appeal against the entire judgment of the court and thereafter took no action until 31st July 2018 when he filed the instant motion.

12. **Rule 82 of the Court of Appeal Rules provides** as follows:-

“82 (1) Subject to rule 115, an appeal shall be instituted by lodging in the appropriate registry within sixty days of the date when the notice of appeal was lodged –

a. a memorandum of appeal, in quadruplicate;

b. the record of appeal in quadruplicate;

c.

13. The above provisions are self explanatory and I need not expound on the same. Applicant has not demonstrated that there is an appeal which is live since June 2018 when the Notice of Appeal was lodged.

14. Finally, I find that applicant is averring that he has nowhere to go. That however does not entitle him to stay on his sisters and brother in laws land.

15. In the case of **James Wangalwa & Another vs. Agness Naliaka Cheseto (2012)eKLR Gikonyo J** observed as follows;

“No doubt in law, the fact that the process of execution has been in motion or is likely to be put in motion, by itself does not amount to substantial loss.....This is because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal..”

16. In the present matter, applicant has proceeded as if execution is not a lawful process. Applicant had a grace period of 60 days to organize his affairs from the time Judgment was delivered. He cannot turn round to say that he has nowhere to go. In conclusion, I find that there is nothing to stay as execution has taken place. In the circumstances, I find that the application dated 31st July 2018 is without merit and the same is dismissed in its entirety with costs to the plaintiff/respondent.

17. The interim orders issued by this court on 15th August 2018, are hereby vacated.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 17TH DAY OF JULY, 2019 IN THE PRESENCE OF:-

C/A: Kananu

Anampiu for plaintiff

E. Kimathi holding brief for Thangicia for defendant

Plaintiff

HON. LUCY. N. MBUGUA

ELC JUDGE