



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 7 OF 2012

MARY WANJIKU NDICHUPLAINTIFF

VERSUS

ALLAN KIMANIDEFENDANT

RULING

1. This ruling is in respect of Chamber Summons dated 17th September 2018 filed by Joyce Wanja Kimani, the applicant. She seeks the following orders:

1. *Spent.*

2. *That this honourable court be pleased to order stay of execution of the order made on 30th May 2017 and issued on 21st June 2017 pending filing of record of appeal against the ruling made in this case on 31st July 2018 by this honourable court.*

3. *That costs of this application be provided for.*

2. The application is supported by an affidavit sworn by the applicant and opposed by a replying affidavit sworn by the respondent. The applicant filed written submissions while the respondent relied entirely on her replying affidavit.

3. So as to better appreciate the application, it is necessary to give the background. Proceedings in this matter commenced on 9th October 2012 when the plaint was filed by Mary Wanjiru, the plaintiff. The plaintiff averred that he was the registered proprietor of all that parcel of land known as Naivasha/Mwichiringiri Block 4/3567 (the suit property) and that sometime in the year 2012 the defendant (Allan Kimani) entered on to the plot without her consent, erected some buildings and structures on the suit property, interred a body on it and also cultivated it. The plaintiff therefore sought an eviction order against the defendant and an order that the remains interred on the land be exhumed.

4. In his statement of defence, the defendant denied that the plaintiff was the registered owner of the suit property and averred that any title that the plaintiff was holding was obtained through fraud. The defendant further averred that he settled on the suit property in the year 1987 and that he had developed it without any interruption for a period of 25 years. He added that he stood to suffer irreparable harm as he had built a permanent six roomed house on the plot, planted many trees on it and even buried his son on it. He therefore urged the court to dismiss the suit. That notwithstanding, there was no appearance for the defendant when the suit came up for hearing. The hearing proceeded and judgment was delivered on 30th May 2017 as follows:

(a) The defendant, his servants/agents and/or any other persons acting under him are hereby ordered to vacate and hand vacant possession in respect of the parcel of land known as Naivasha/Mwichiringiri Block 4/3567 to the plaintiff within 60 (sixty) days from the date of delivery of this judgment.

(b) The defendant, his servants, agents and/or any other persons acting under him are hereby ordered to exhume the body interred by the defendant on the parcel of land known as Naivasha/Mwichiringiri Block 4/3567 within 60 (sixty) days from the date of delivery of this judgment and bury it elsewhere. The County Public Health Officer, Nakuru County to supervise the exhumation process.

(c) In default of the defendant complying with orders number (a) and (b) above within the stated period, the plaintiff shall be at liberty to enforce compliance under the supervision of the County Public Health Officer, Nakuru County and with the aid of the police.

(d) The plaintiff is awarded costs of the suit and interest thereon.

5. As is apparent from the foregoing, the applicant herein was not party to this case from filing to judgment. She appeared on the scene for

the first time when she filed Notice of Motion dated 27th July 2017, in which she described herself as an intended defendant. She inter alia sought to be enjoined in this suit as a defendant and setting aside of the judgment. I considered the application and dismissed it in a ruling dated 31st July 2018. On that occasion, I stated:

... The applicant seeks to be joined to the case [as] a defendant or an interested party. As can be seen from the annexures to the supporting affidavit, she intends upon being joined to file a defence and counterclaim. As has already been pointed out, this court rendered a judgment on 30th May 2017 upon hearing the main suit. A decree was issued on 2nd June 2017. I have seen on record a letter dated 1st December 2017 from the Officer Commanding Naivasha Police Station seeking to verify the authenticity of the decree. The applicant was not party to the suit from inception to judgment. She wants to join at this stage. If her application is allowed, the court will have to reconsider the merits of the case. The court having delivered a judgment herein, it is functus officio and cannot re-open the proceedings; worse still at the behest of a person who was not a party to the case.

6. The applicant is unrepresented hence the wording of the prayers in the application. In essence, the applicant now seeks stay of execution of the judgment herein pending determination of an appeal against the ruling dated 31st July 2018. She states in the supporting affidavit that the respondent has threatened to evict her from the suit property and that she has filed an appeal with a high likelihood of success.

7. **Order 42 rule 6 (1) and (2) of the Civil Procedure Rules, 2010** provides:

6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under sub rule (1) unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

8. The applicant is therefore under a duty to satisfy the court that substantial loss will result to her if stay is not granted and that the application has been made without unreasonable delay.

9. A perusal of the record herein reveals that the applicant filed Notice of Appeal in respect of the ruling delivered on 31st July 2018 on 29th August 2018. Rule 75(2) of the Court of Appeal Rules, 2010 requires that Notice of Appeal be lodged within fourteen days of the date of the decision against which it is desired to appeal. The Notice of Appeal herein was filed late. There is thus no appeal. For that reason, stay of execution cannot issue pending hearing and determination of a non-existent appeal.

10. In view of the foregoing, Chamber Summons dated 17th September 2018 is dismissed with costs to the plaintiff.

11. Ruling herein was to be delivered on 20th February 2019 but was delayed since I proceeded on medical leave. The delay is regretted.

Dated, signed and delivered in open court at Nakuru this 15th day of July 2019.

D. O. OHUNGO

JUDGE

In the presence of:

No appearance for the applicant

No appearance for the plaintiff/respondent

No appearance for the defendant/respondent

Court Assistants: Beatrice & Lotkomo