



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC APPEAL CASE NO. 01 OF 2018

KITHAKUMU NGALA MOKO.....APPLICANT

VERSUS

JOSEPH MUTUA KITETE.....1ST RESPONDENT

FREDRICK KITETE MUSEMBI.....2ND RESPONDENT

RULING

1) What is before this court for ruling is the Applicant's Notice of Motion application expressed to be brought under Section 80, 1A, 1B and 3A of the Civil Procedure Act, Order 51 Rule 10, Order 50 and Order 45 of the Civil Procedure Rules and any other enabling provisions of the law for orders;

1. Spent

2. That this honourable court do issue an order of stay of execution of judgement dated 7/6/2007 of Makueni SRM Court LDTC No. 17 of 2006 Fredrick Kitete Musembi Vs Kithakumu Ngala Moko till this application is heard and determined.

3. That this honourable court do issue an order of stay of execution of judgment dated 7/6/2007 of Makueni SRM Court LDTC No. 17 of 2006 Fredrick Kitete Musembi Vs Kithakumu Ngala Moko till the appeal hereto is heard and determined.

4. That this honourable court do review the ruling made by Hon. Justice C.G Mbogo dated 22nd January, 2019 and allow the application dated 17th October, 2016.

5. That the costs of this application be borne by the Respondents.

2) The application is dated 30th January, 2019 and was filed in court on 31st January, 2019. It is predicated on the grounds on its face and is supported by the affidavit of Jonathan Kithakumu Ngala, the Applicant herein, sworn at Machakos on 30th January, 2019.

3) The Respondents have opposed the application vide their grounds of opposition dated 8th February, 2019 and filed in court on 11th February.

The Respondents contend that:

1. The appeal herein having abated, there is no appeal on the basis of which orders of stay can be issued.

2. The Appellant herein, Kithakumu Ngala Moko, having died on 7/10/2015, and the appeal herein having abated before the filing of any application for substitution, there is nothing on the basis of which this honourable court can entertain the application.

3. Orders of review sought by the Applicant are not capable of being granted.

4. The honourable court cannot sit on appeal over its own orders.

4) Directions to dispose off the application by way of written submissions were issued on the 14th February, 2019.

5) The Applicant's counsel in his submissions pointed out that in order for the court to order a stay of execution, there must be:-

i. Sufficient cause

ii. Substantial loss

iii. Unreasonable delay

iv. Security and the grant of stay is discretionary.

6) On the application having been filed without unreasonable delay, the Applicant counsel submitted that whereas the ruling that the Applicant seeks to stay was delivered on 22nd January, 2019, the instant application was filed on 31st January, 2019 which is a mere 9 days. Arising from the above, the counsel submitted that there was no unreasonable delay in filing the application.

7) On the principle that the Applicant must show that he will suffer irreparable harm if the application is not granted, the Applicant's counsel submitted that the subject matter of the suit is land and that if stay is not granted and the land is transferred to the Respondents, the Applicant's rights will be extinguished. That should the property be transferred to the Respondents and thereafter disposed off to a third party, the application will be rendered nugatory.

8) Although the Applicant's counsel has cited several authorities, he did not supply them to the court and therefore this court will not rely on the said authorities.

9) The Applicant's counsel further submitted that by virtue of Order 45 Rule 1 of the Civil Procedure Rules, 2010 and Section 80 of the Civil Procedure Acts, the court's ruling of 22nd January, 2019 should be reviewed.

10) On the other hand, the Respondents' counsel submitted that the grounds on which the Applicant seeks review of the court's ruling delivered on 22nd January, 2019 can be collapsed into one sentence namely that this court misapplied and/or failed to apply the relevant law in arriving at its orders dated 22nd January, 2019.

11) The counsel was of the opinion that the Applicant is asking the court to sit on appeal over its own orders and/or ruling. The counsel pointed out that an allegation by a party that a court of law has either misapplied the law or has not taken into consideration a particular law or matter can only be ground of appeal.

12) It was also the counsel's submissions that the provision for reviewing court orders is meant to address and correct errors and/or mistakes that are apparent on the face of the record as is provided for under Order 45 Rule 1 of the Civil Procedure Rules. That from the foregoing, the prayer for review ought to fail and the counsel urged the court to dismiss the same.

13) The counsel further submitted that the prayer for stay of execution of the lower court's judgment (decree) has no basis and the same should be dismissed. The counsel submitted that the case law cited by the Applicant in his submissions are distinguishable from the facts of the case herein and are of no relevance.

14) Having read the application, the grounds of opposition as well as the submission filed by the counsel on record for the parties herein, I do agree with the counsel for the Respondents' counsel that a reading of the grounds upon the application is predicated clearly show that the Applicant seems to say that this court misapplied and/or failed to apply the relevant law in arriving at its decision dated 22nd January, 2019, The above being the case, the only avenue available to the Applicant is to appeal against the said ruling that was delivered by this court on 22nd January, 2019.

15) It is also clear that the Applicant has not shown the errors or mistakes that are apparent on the face of the record to warrant the invocation of review orders. As was correctly pointed out by the Respondents' counsel, no basis for staying of the lower court's judgment and decree was placed before this court.

16) The upshot of the foregoing is that the application herein lacks merit and same is dismissed with costs to the Respondents.

Signed, Dated and Delivered at Makueni this 6th Day of September, 2019

Mbogo C.G

Judge

In the presence of:

Applicant

1st Respondent

No appearance for the Applicant

No appearance for the Respondent

Mbogo C.G, Judge

6/9/2019