



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO. 143 OF 2008

ATANASIO M'EKANDI.....PLAINTIFF

VERSUS

ANTONY KAUNGA.....DEFENDANT

RULING

1. This ruling is in respect of two applications dated 12/07/2019 and 19/7/2019, both arising out of the Judgment delivered by this court on 8.11.2018.

Application dated 12.7.2019

2. This notice of motion was filed by an auctioneer who trades in the name of M/S CLEAR REAL AUCTIONEERS and is brought pursuant to **Rule 9(1) & (2) of the Auctioneers Rules, 1997 and Order 51 Rule 1 of the Civil Procedure Rules (CAP 21)**, whereby, the applicant seeks orders that the OCS Ngundune Police Station be authorized to provide security to Samwel Mugendi t/a Clear Real Traders in executing the warrants of eviction of the judgment debtor.

3. The grounds in support of the application are set out in the application itself and the supporting affidavit of Samwel Mugendi sworn on 12/7/2019. It is contended that the judgment-debtor being notified of the warrants of eviction and attachment and after the lapse of the grace period, he has made it difficult for the auctioneer to execute the warrants as he has become violent and vowed not to allow execution.

4. Defendant/ Respondent opposed this application through his replying affidavit sworn on 19/7/2019, where he has deponed that he has filed an appeal against the judgment of this court, that the eviction sought by the plaintiff will entail complete demolition of his duly constructed timber building premises and he stands to suffer massive irreparable loss if the decree is executed.

Application dated 19.7.2019

5. This second application was filed by the defendant /Judgment debtor and is brought under **Order 41 Rule 6(1) & (2) of the Civil Procedure Rules**. The defendant is essentially seeking for a stay of execution of the judgment delivered on 8/11/2018 and subsequent orders pending the hearing and determination of his appeal in Court of Appeal Nyeri Civil Appeal No. 120 of 2019.

6. The grounds in support of this application are set out in the body of the application and the supporting affidavit of Antony Kaunga, the defendant. He argues that he stands to suffer loss if the judgment is executed before his appeal is heard and determined. He is ready and willing to provide reasonable security as the court may direct. Moreover, the plaintiff will not be prejudiced in any way if the orders sought are granted.

7. This application was opposed by the plaintiff, Atanasio M'ekandi, through his replying affidavit where he avers that the application is not merited for it was filed in response to his application dated 12/7/2019. He contends that the defendant has frustrated the execution of the judgment, that the application has been brought after inordinate and unexplained delay and only after execution of the decree has commenced. Plaintiff states that he will suffer loss for he would be denied use of his land if the application of defendant is allowed.

8. Basically, the issue for determination is **whether to allow enforcement of the judgment or whether to grant a stay of execution of which I deem it fit to deal with both issues simultaneously**.

9. **Order 42 Rule 6 of the Civil Procedure Rules** stipulates that no order for stay of execution shall be made unless, the court is satisfied that substantial loss may occur unless the order is made, that the application has been made without unreasonable delay and such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given by him or her.

10. This power bestowed upon the court is discretionary and ought to be exercised in a way as not to render an appeal nugatory. See **Butt v**

Rent Restriction Tribunal [1982] KLR 417.

11. The Judgment delivered on 8/11/2018 was entered in favour of the plaintiff. The defendant dissatisfied by the decision has already initiated an appeal. If eviction is carried out and the defendant's buildings are destroyed and his appeal succeeds it would render his appeal nugatory. He would end up suffering substantial loss. Therefore, I am of the view that the stay of execution pending appeal is merited.

12. Nevertheless, the court has taken into consideration the fact that the application for stay was filed on 22.7.2019, a period of over 8 months from the time the judgment was delivered yet the proceedings were ready by 3.4.2019. Further, the court has also taken cognizance that defendant filed his application only after the application for his eviction had been filed and served on him.

13. Accordingly, I grant a conditional stay in the following terms;

1) A stay of execution of the judgment delivered on 8/11/2018 and all subsequent orders is granted for a period of ONE YEAR from the date of delivery of this ruling.

2) Defendant is to deposit security amounting to Ksh.200 000 into this court within 30 days from the date of delivery of this ruling failure to which the order for stay of execution shall lapse and execution shall proceed in terms of the prayers sought in the application dated 12.7.2019.

3) The defendant is to meet all costs appertaining to and incidental to the application dated 12.7.2019 including auctioneer's fees as well as the costs of the application dated 19.7.2019.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 27TH NOVEMBER, 2019 IN THE PRESENCE OF:-

C/A: Kananu

Gatari R. for plaintiff

Ayub A. holding brief for H. Gitonga for defendant

HON. LUCY. N. MBUGUA

ELC JUDGE