



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

E.L.C.A. CASE NO. 6B OF 2017

(FORMERLY KERUGOYA E.L.C.A. 23 OF 2013)

SIMON GACHOKI MUNYI.....APPELLANT

VERSUS

ALICE NYAWIRA MWANGI.....1ST RESPONDENT

PETER MWANGI KINYUA.....2ND RESPONDENT

RULING

1. By a notice of motion dated 25th January 2017 brought under **Order 42 Rule 6(1) of the Civil Procedure Rules and all the enabling provisions of the law**, the Appellant sought a stay of execution of the orders made 20th December 2016 pending the hearing and determination of the pending appeal against the said order.
2. The said application was based upon the grounds set out on the face of the motion. It was contended that the Appellant is the registered proprietor of the suit property; that he was still in possession thereof; and that he may suffer substantial loss unless the stay is granted. It was also contended that unless the stay is granted, the pending appeal may be rendered nugatory.
3. The said application was supported by an affidavit sworn by the Appellant on 25th January 2017 which reiterated the grounds set out in the notice of motion. The Appellant stated that by its order dated 20th December 2016 the court struck out his appeal with costs to the Respondents. He further stated that he had appealed against the order hence the *status quo* should be maintained pending the determination of the appeal.
4. The 1st Respondent filed a replying affidavit sworn on 27th February 2017 in opposition to the said application. The 1st Respondent disputed that the Appellant was in possession of the suit property. It was stated that the Appellant would not suffer any substantial loss unless the stay was granted since he was not in possession.
5. The 1st Respondent contended that the Appellant's intended appeal had no chances of success and that it was a sham and an abuse of the court process. The court was urged to dismiss the application with costs.
6. It would appear that when the parties appeared before the Deputy Registrar for mention on 28th August 2017 they agreed to canvass the said application through written submissions. The record shows that the Appellant filed his written submissions on 12th October 2017 whereas the 1st Respondent filed her submissions on 18th June 2019. There is no indication of the 2nd Respondent having filed any written submissions.
7. The main question for consideration is whether or not the Appellant has made out a case for stay of execution pending appeal. The court has perused the ruling dated 20th December 2016 by the Hon. Justice Boaz Olao. It is evident that the court simply struck out the Appellant's appeal with costs to the Respondents. It is against the said order that the Appellant appealed to the Court of Appeal. It is quite evident that the court did not make any positive order capable of being executed apart from the order regarding costs.
8. In the case of **Western College of Arts & Applied Sciences Vs Oranga & Others [1976-80] KLR 78** the Court of Appeal held, *inter alia*, that;

“But what is there to be executed under the judgement the subject of the intended appeal? The High Court has merely dismissed the suit, with costs. Any execution can only be in respect of costs.

In Wilson Vs Church the High Court had ordered the trustees of a fund to make a payment out of that fund. In the instant case, the High Court has not ordered any of the parties to do anything, or refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court judgement for this court, in an application of a stay. It is so ordered.”

9. That holding has been followed in various subsequent cases such as **Kilindini Warehouses (K) Ltd & Another Vs Omar Saleh Said & Another [2014] eKLR** and **Nairobi Civil Application No. Nai 219 of 2007 Sonalux Limited & Another Vs Barclays Bank of Kenya Ltd & 2 Others.**

10. The court is thus of the opinion that an order for stay of execution is not available with respect to the striking out order dated 20th December 2016. There is simply nothing to be stayed in the circumstances since a striking out order cannot be stayed pending appeal.

11. The upshot of the foregoing is that the court finds no merit in the Appellant’s notice of motion dated 25th January 2017 and the same is hereby dismissed with costs to the 1st Defendant only.

12. Orders accordingly.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 14TH DAY of NOVEMBER, 2019.

In the presence of Mr. Njage holding brief for I. Muchiri for the Appellant, 1st Respondent in person and in the absence of the 2nd Respondent.

Court Assistant Mr. Muinde

Y.M. ANGIMA

JUDGE

14.11.19