



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERY

ELC CASE NO. 15 OF 2018

JOSHUA NGATUPLAINTIFF/APPLICANT

VERSUS

JANE MPINDA1ST DEFENDANT/RESPONDENT

REHEMA RAIBUNI2ND DEFENDANT/RESPONDENT

MARY ALIMA RAIBUNI.....3RD DEFENDANT/RESPONDENT

SALPRO KENYA LTD4TH DEFENDANT/RESPONDENT

RULING

1. In the application dated 3.7.2019, applicant seeks the following orders:

- (i) That this application be certified as urgent and service be dispensed within the first instance.
- (ii) That the court be pleased to stay execution of the ruling delivered at Meru on 20th day of February 2019 by Honourable Lucy N. Mbugua Judge herein pending the hearing and determination of this application.
- (iii) Costs.

2. The grounds in support of the application are that;

- (a) The counsel for the 1st, 2nd and 3rd respondents has served the applicant with a notice of taxation and has fixed date 22.7.2019 as a day for assessment of costs.
- (b) That following the ruling delivered at Meru on 20.2.2019 by Honourable Lucy N. Mbugua Judge, the applicant has sought leave to appeal out of time via court of appeal at Nyeri civil application no. 83 of 2019.
- (c) The same has been served to the advocates on record.
- (d) The existence of an application for leave to appeal out of time is a demonstration by the applicant that an appeal is intended.
- (e) Despite the service aforementioned the 1st, 2nd and 3rd respondents have fixed a date for a notice of taxation.
- (f) The application has been made without unreasonable delay
- (g) The applicant therefore fears that unless the orders sought are granted the respondents may proceed to execute.
- (h) The applicant herein is ready and willing to abide by any conditions set by the court.

3. The applicant has also sworn an affidavit in support of his application where he has reiterated the grounds set forth in the body of the application.

4. The application has been opposed via the replying affidavit of 1st defendant where she contends that there is nothing to be stayed as this

suit was dismissed and hence there are no orders to be implemented.

5. Further it is contended that there is an appeal pending in Nyeri Civil Application no. 4 of 2019 filed by plaintiff/applicant for stay of execution arising out of the ruling of 28.11.2018 in Meru ELC No. 132 of 2007.

6. The 4th respondent has also sworn an affidavit in opposition to plaintiff's application. He avers that applicant has not met the criteria set out in order 42 rule 6 of the Civil procedure rules and that applicant has not demonstrated that he has an arguable appeal. He further states that applicant is guilty of inordinate delay of more than 5 months.

7. The 4th respondent also states that the notice of appeal was lodged on 26.4.2019 which was more than 30 days after the decision was made.

8. On the issue taxation, the 4th respondent avers that applicant should file his objection to oppose the same as provided for in order 11 of Advocates Remuneration order.

9. I have considered all the arguments raised herein. I find that in my ruling dated and delivered on 20.2.2019, the court dismissed the suit.

10. It is trite law that stay orders can only be issued in respect of positive orders. In the case of **Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya) [2015] eKLR**, Kantai JA stated that:

“An order for stay of execution [pending appeal] is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a Judgment. The delay of performance presupposes the existence of a situation to stay – called a “positive order” – either an order that has not been complied with or has partly been complied with.”

11. Furthermore, any execution herein can only be in respect of costs. Execution is a lawful process and no appeal or second appeal shall operate as a stay of execution – see **Bonface Kariuki Wahome vs Peter Nziki Nyaudi & another (2019) eKLR**.

12. Finally, I note that even on 20.2.2019, when the court dismissed the suit, plaintiff did seek for a stay of execution whereby I declined to grant any such orders noting that there was no evidence that plaintiff is in occupation or was the registered owner of the suit parcels.

13. In the circumstances, I hereby dismiss the application dated 3.7.2019 with costs to respondents.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 13TH DAY OF NOVEMBER, 2019 IN THE PRESENCE OF:-

C/A: Kananu

Muthomi holding brief for Otieno C. for plaintiff/applicant

Rimita D for 1st, 2nd & 3rd defendants

Kirimi for 4th defendant

Plaintiff

1st defendant

HON. LUCY. N. MBUGUA

ELC JUDGE