



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT KISII**

**ELC NO. 297 OF 2019**

**RAMADHAN ABDULLAI ODHIAMBO.....PLAINTIFF**

**VERSUS**

**MARY ALIMA AKONG'O RACHIER (suing as the Legal representative of the estate of**

**ADIJA ONYICHA SAT).....DEFENDANT**

**R U L I N G**

1. Before me for determination are two applications. The first application is the one dated 22<sup>nd</sup> March 2019 filed by the plaintiff /applicant on 25<sup>th</sup> March 2019. By this application the plaintiff seeks the following substantive orders:-

**3. Pending the Inter-parties hearing of this application, the Honourable Court be pleased to grant Interim orders of injunction for stay of execution of the Court Judgment and Degree dated the 6<sup>th</sup> day of October 2017.**

**4. That the Honorable Court be pleased to grant leave to the applicant to file Notice of Appeal and Record of Appeal out of time in the intended appeal from the judgment of S.O Okongo at the High Court of Kenya at Kisii being ELC No.297 of 2010.**

2. The second application dated 23<sup>rd</sup> April 2019 filed on 24<sup>th</sup> April 2019 is by the defendant and seeks orders for the forceful eviction of the plaintiff from the land parcel **LR Kanyamwa/Kayambo/Kwamo/2101** in execution of the judgment and the decree of the court given on 6<sup>th</sup> October 2018.

3. The parties on 13<sup>th</sup> May 2019 agreed, to canvass both applications by way of written submissions. Both parties filed their submissions on 8<sup>th</sup> July 2019.

4. The plaintiff in support of his application averred that following the delivery of the judgment in this matter he instructed his former advocates M/s Zablom Mokuia & Company Advocates to file an appeal against the judgment and to also make an application for stay of execution of the decree and judgment.

5. He stated the said advocates did not file a Notice of Appeal or file any application for stay of execution though he had paid the requisite fees to them. The plaintiff further stated the defendant had taken out warrants of attachment in execution of the decree yet he had proper grounds of appeal with chances of success. The plaintiff vide the affidavit sworn in support of the application stated that he came to discover that his advocates had not filed the appeal as he had instructed them to do, when he was served with the proclamation notices issued in execution of the decree which prompted him to peruse the Court file.

6. The plaintiff averred that he had acted promptly in giving his advocate instructions to lodge an appeal and that he was let down by the advocates who failed to act on his instructions. The plaintiff pleaded that the mistakes of his counsel ought not to be visited on him. In regard to stay of execution the plaintiff averred that he had an arguable appeal that had high chances of succeeding .

7. The defendant decree holder in response to the plaintiff's application for enlargement of time to file a Notice of Appeal and for stay of execution filed a replying affidavit sworn on 23<sup>rd</sup> April 2019 in opposition. The defendant averred that this court lacked jurisdiction to extend or enlarge time for filing of Notice of Appeal, memorandum or Record of Appeal as that was the preserve of the Court of Appeal. I might as well dispose the issue whether this court has jurisdiction to enlarge time for filing of a Notice of Appeal at this point as it is rather straight forward that indeed the court had jurisdiction by virtual of section 7 of the Appellate Jurisdiction Act, Cap 9 Laws of Kenya which provides as follows: -

**“ The high Court may extend the time forgiving notice of intention to appeal from a judgment of the High court or for making an application for leave to appeal or for a certificate that the case is but for appeal, notwithstanding that the time forgiving such notice or making such appeal may have already expired. Provide that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence”**

8. The power to extend time is discretionary and must be weighed against the circumstances of each case. The considerations in exercising the discretionary would include the reasons for any delay and whether the applicant acted diligently. If the delay is inordinate and unexplained the court will refuse to allow extension. Equally if the applicant failed to exercise diligence in the pursuit and /or conduct of his case the court will decline to allow extension of time.

9. In the present matter the plaintiff/applicant merely states following the delivery of the judgment on 6<sup>th</sup> October 2017 he instructed his advocate to lodge an appeal against the judgment and on 13<sup>th</sup> October 2017 he paid a deposit of Kshs20,000/= to his advocates allegedly for appeal purposes. The copy of the receipt annexed as **“RA01”** denotes the payment as being an account of **“case 297/2010”** and does not indicate it was for purposes of appeal meaning it could as well been payment on account of balance of fees. The plaintiff did not give the advocates written instructions to lodge an appeal. The judgment that had been rendered had required the plaintiff to vacate and deliver vacant possession of plot No.2101 to the defendant within a period of 90 days from the date of judgment failing which the defendant was granted liberty to apply for warrants for the forceful eviction of the plaintiff from the property. The plaintiff was thus aware of the consequences that awaited him if there was noncompliance with the judgment barring any stay of execution and/or appeal.

10. If the plaintiff had indeed instructed his previous advocates to file an appeal he never made any follow up with them as he deponed that he realized nothing was done by the advocates when the auctioneers proclaimed his movable properties in execution of the judgment. The proclamation was effected on 15<sup>th</sup> March 2019 well over 1½ years from the date the judgment was delivered. It is clear that the plaintiff was only awoken from his slumber by the execution proceedings that the defendant had initiated as she was entitled to do. The court record does not show that any action was taken by the plaintiff’s advocates to initiate the process of appeal like applying for copy of proceedings and or filing a Notice of Appeal. It appears to me that the plaintiff’s action in filing the present application was a reaction to the execution proceedings and/or was an afterthought.

11. I do not consider that the plaintiff has given the court reason to justify the delay in taking the appropriate action to initiate the process of filing of his appeal in the Court of Appeal. The plaintiff’s conduct after the delivery of the judgment is not that of a person who had acted diligently in pursuing the conduct of his case which he had entrusted to an advocate .

12. In the plaintiff’s case he was aware of the judgment delivered on 6<sup>th</sup> October 2017 which had far reaching consequences against him yet for 1½ years he never bothered to find out the status of the appeal that he alleged had instructed the advocates to file on his behalf. One is let wondering what would have happened if the defendant had not taken steps to execute the judgment. The plaintiff had a duty and indeed obligation to pursue his advocates to ensure they executed his instructions. That he failed to do so, he has only himself to blame and/or he can pursue his erstwhile advocates in a negligence claim if indeed he can establish such a cause of action.

13. On the basis of the material placed before me I am not persuaded I should exercise my discretion in favour of the plaintiff to extend time for filing a Notice of Appeal. Consequently I find no merit in the notice of Motion dated 22nd

March 2019 and I accordingly order the same dismissed with costs to the defendant.

14. Having found no merit in the plaintiffs application dated 22<sup>nd</sup> March 2019 which sought stay of execution of the judgment and Decree of the Court dated 6<sup>th</sup> October 2017, it follows I have to allow the defendant’s application dated 23<sup>rd</sup> April 2019 which seeks execution of the court’s judgment and decree. The defendant’s said application merely seeks enforcement of the judgment of the Court and there being no order staying the execution of the judgment and decree, the defendant is entitled to the fruits of the judgment made in her favour. I allow the defendant’s application in terms of prayers 1, 2, and 3 of the Notice of Motion dated 23<sup>rd</sup> April 2019.

15. Orders accordingly.

**JUDGMENT DATED AND SIGNED AT NAKURU THIS 29<sup>TH</sup> DAY OF OCTOBER 2019.**

**J. M. MUTUNGI**

**JUDGE**

**JUDGMENT DELIVERED AT KISII THIS 7<sup>TH</sup> DAY OF NOVEMBER 2019.**

**J M ONYANGO**

**JUDGE**