

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT ART KISII

ELC CASE NO.1250 OF 2016

HARON KING'OINA BOGITA.....DEFENDANT/RESPONDENT

VERSUS

JOSEPHINE MORAA NYAMWEYA.....1ST PLAINTIFFS/APPLICANTS

CHARLES GEKONDE OTARA.....2ND PLAINTIFF/APPLICANT

RULING

This ruling is in respect of the 2nd Defendant's Notice of Motion dated 12th September 2019 in which the applicant seeks a stay of execution pending appeal. The application is premised on the grounds stated on the face of the application and the supporting affidavit of Friday Kianara sworn on the 12th September 2019.

It is opposed by the Defendant through his Replying Affidavit sworn on the 23rd October 2019.

The court directed that the application be canvassed by way of written submissions but neither the applicant nor the Respondent filed their submissions.

In the supporting affidavit the applicant has given a chronology of events but the long and short of it is that the plaintiff filed a suit against the defendants in 2004 seeking inter alia an eviction order against the defendant in respect of land parcel no Central Kitutu/DarajMbili/2603. The defendant filed and defence and Counterclaim denying the plaintiff's claim. The suit was heard and judgment was entered against the defendant on 6th October 2017. Being aggrieved by the said judgment the defendant filed a Notice of appeal in the Court of Appeal. In the meantime the plaintiff has extracted the decree and intends to execute the same against the defendant. The defendant avers the said decree was extracted irregularly.

In his Replying Affidavit the defendant has brought out some pertinent facts to the effect that the applicant had filed an application for stay in the Court of Appeal which has since been dismissed. A copy of the order of the Court of Appeal dismissing the applicant's application is annexed to the defendant's application as annexure GJMM2. The Plaintiff contends that having gone to the Court of Appeal for stay of execution which application was dismissed, the applicant cannot come back to this court seeking the same orders as this amounts to an abuse of the court process. He further avers that since the applicant filed the Notice of Appeal in 2017, he has never filed the appeal and that this application is merely intended to buy time and deny the plaintiff from enjoying the fruits of his judgment.

Issued for determination

Having considered the Notice of Motion and rival affidavits the singular issue for determination is whether the applicant is entitled to the reliefs sought.

Analysis and determination.

Even without delving into the merits of the application, it is of great concern to this court that the applicant has concealed the fact that he had filed a similar application in the Court of Appeal and the same was dismissed. This court cannot issue orders contrary to the orders of the Court of Appeal as it is bound by the decisions of the Court of Appeal. I agree with the Respondent's counsel that this application is a gross abuse of the process of the court as what the applicant seeks to do is to hoodwink the court into granting orders that the applicant does not deserve. Even though this court's discretion to grant orders of stay is unfettered, such discretion must be exercised judicially. This is a court of law and equity and he who comes to equity must come with clean hands. The applicant's hands are tainted with dishonesty and non-disclosure of material facts.

That being the position, I find absolutely no merit in the application and I dismiss it with costs to the Respondent.

Dated at Kisii this 18th day of December 2019

J.M ONYANGO

JUDGE