



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO. 103 OF 2016**

**SALEH MUHSIN SHIGOG.....PLAINTIFF**

**-VERSUS-**

**AUGUS M. DISHI & OTHERS.....DEFENDANTS**

**RULING**

1. Coming for determination is the Notice of Motion dated 5<sup>th</sup> October 2019 by the Plaintiff/Applicant brought under Order 51 Rules 1 & 15 of Civil Procedure Rules and Section 1A and 3A of the Civil Procedure Act seeking to set aside and/or discharge the blanket interim order of stay made herein on 22<sup>nd</sup> July 2019. The Application is premised on the grounds that the stay granted is premised on an incompetent Notice of Appeal insofar as the said notice, and the application itself, have been filed contrary to the provisions of Order 9 Rule 9 of the Civil Procedure Rules as judgment had already been entered yet the counsel on record has been supplanted without leave of the court or his consent, and that notice of appeal is filed out of time and no leave to regularize the same has been sought and obtained before the appropriate forum. That the stay application is in all circumstances incompetent and sustenance of the interim orders granted thereupon will only serve to unreasonably keep the plaintiff from enjoying the fruits of his judgment.

2. The application is supported by the affidavit of Anwar Saleh Shigog sworn on 4<sup>th</sup> October, 2019 in which it is deposed that the court granted judgment to the plaintiff on 4<sup>th</sup> July 2019 whereby the plaintiff's plea for vacant possession was granted as well as against the defendants. That the defendants have at all material times been represented by M/s Okanga & Company Advocates. That the application for stay filed herein and the Notice of Appeal upon which the application is based, are both incompetent, incurably defective and ought to be struck out with costs and the orders issued thereupon set aside and/or discharged because the applicant August M. Dishi has no valid authority to represent other defendants and the Notice to Act in person coming after final judgment is a violation of the provisions of Order 9 Rule 9 of the Civil Procedure Rules. That the application is ex facie defective as the rule invoked in presenting the same, rule 22, cannot avail the remedy envisaged by the applicant; that of a stay of execution of a decree pending appeal. It is the applicant's contention that the Application stands on quick sand insofar as no valid or competent appeal process subsists with regard to the subject matter, the Notice of Appeal upon which any appeal would be hoisted having been filed out of time, and therefore the application before court is an abuse of the court process and ought to be struck out or dismissed.

3. In opposing the application, the defendants filed a replying affidavit sworn by August M. Dishi on 15<sup>th</sup> November, 2019 in which it is deposed that the same is sworn with the authority of all defendants and that though the defendants are squatters on the suit property, they are Kenyan citizens with a right to own property. It is deposed that the applicant wants to hold the court captive by trying to dictate to the court what it should do. The defendants aver that the action by the court was purely on technicalities thereby depriving them their constitutional right to a fair trial. The defendants still believe they have a triable cause and should be given an opportunity to be heard and not determine the matter on technicalities. That the cause and intended appeal constitute a public interest and meant to end or resolve a historical land injustice to the public, and that it would be fair, just and equitable that an order be granted staying execution of the judgment and or other order consequential thereto arising from the decision of the Hon. Justice A. Omollo pending the hearing and determination of the application and the intended appeal.

4. Mr. Omollo learned counsel for the applicant, submitted that there is no valid appeal against the judgment. That the judgement was delivered on 4.7.19 and the Notice of Appeal filed on 22.7.19 which was out of time. Mr. Omollo further submitted that up to the date of judgment, the defendants were represented by Mr. Okanga Advocate and that no leave of court was sought by the 1<sup>st</sup> defendant who filed a notice of intention to act in person in violation of Order 9 Rule 9 of the Civil Procedure Rules. That the 1<sup>st</sup> Defendant is purporting to represent the other defendants and filed "Authority to Plead" which is not signed by those other defendants. It was Mr. Omollo's submission therefore, that the 1<sup>st</sup> defendant has no authority to act for the other defendants and anything he purported to do for them is a nullity. He added that the application for stay is incompetent and urged the court to set aside the ex-parte orders granted.

5. The 1<sup>st</sup> defendant submitted that he represents his co-defendants and stated that they were aggrieved by the judgment delivered herein.

6. I have considered the issues raised. Order 9 Rule 9 of the Civil Procedure Rules provides as follows:

**9. When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court –**

**a. Upon an application with notice to all the parties; or**

**b. Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.**

7. In this matter, there is no dispute that the case in which the firm of Okanga & Company Advocates represented the defendant, was determined and judgment was entered for the plaintiff by Omollo, J on 4<sup>th</sup> July 2019. The defendants then got aggrieved and applied for orders to stay of execution of the said judgment and other orders consequential thereto by an application dated 10<sup>th</sup> July 2019 and filed in court on 22<sup>nd</sup> July 2019. The said application was drawn and filed by August M. Dishu, the 1<sup>st</sup> defendant. There is also a Notice of Appeal dated 22<sup>nd</sup> July 2019 filed by M/s Birir & Co Advocates.

8. Order 9 Rule 9 is clear that no new advocate and no person acting in person can take over the conduct of a suit which has finally been determined while any proceedings or related proceedings are continuing before the same court in continuation of the determined matter through notice of change of advocate or notice of intention to act in person without the leave of the court through a formal application or by consent of the outgoing advocate, or person acting in person. In the present case, the 1<sup>st</sup> defendant filed the application dated 10<sup>th</sup> July, 2019 without leave of the court. No doubt the application is in continuation of the determined matter. Order 9 Rule 10 provides that an application under Rule 9 may be combined with other prayers provided the question of change of advocate or party intending to act in person shall be determined first. In the application dated 10<sup>th</sup> July 2019, there is no such prayer sought. The provisions of Order 9 Rule 9 are couched in mandatory terms and cannot be termed as mere technicalities.

9. Accordingly, I find that the Notice of Motion dated 5<sup>th</sup> October 2019 is merited and the same is allowed. Consequently, the interim orders of stay made herein on 22<sup>nd</sup> July 2019 are set aside and discharged and the notice of motion dated 10<sup>th</sup> July 2019 is struck out with costs to the plaintiff.

**DATED, SIGNED and DELIVERED at MOMBASA this 17<sup>th</sup> day of December 2019.**

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**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

No appearance for Plaintiff

No appearance for Defendants

Yumna Court Assistant

**C.K. YANO**

**JUDGE**