



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

CIVIL APPEAL NO. 5 OF 2018

DENNIS NAISHO.....APPELLANT

-VERSUS-

ANWARALI KASSAM ISMAEL.....1ST RESPONDENT

ABDULGANI KASSAM ISMAEL.....2ND RESPONDENT

RULING

By an Application dated 21st May, 2018 which was brought under order 42 Rule 6 (1) of the Civil Procedure Rules and Section 3 and 3A of the Civil Procedure Act the Applicant sought for orders of stay of execution and setting aside the Judgement of the Narok Chief Magistrate in Civil case No. 21 of 2011 pending the hearing and determination of the appeal.

The Application was based on the grounds that the Applicant is dissatisfied with the aforesaid Judgment which effectively vested ownership of the Plot No. 113A and 113B Block 7 Narok Township to the Respondent herein and if the order of stay is not granted the Applicant will risk suffering substantial loss as his property may be sold to a third party and that the Application was made on time and the Applicant is ready to provide such security so as to preserve the subject matter from any witness.

The Application was supported by the Affidavit of the Appellant where he avers that he is the proprietor of the suit land and the intended appeal has overwhelming chances of success since Plot No. 113A belongs to him. However, the learned magistrate awarded them Plot No. 113B and he is apprehensive that the Respondent may transfer the suit property to a third party.

The Appellant further averred that it may take time for the entire proceedings of the lower court to be typed and in the intervening period the Respondent may alienate the subject plot as the 30days stay granted by the lower court had lapsed and the Respondent may proceed.

The Application was opposed by the Respondent through a replying affidavit filed by one Mumtaz Anwarali who is the widow of the 1st Respondent.

The Respondent depones that she is the administrator of the estate of the 1st Respondent who is deceased and who was the Plaintiff in Narok CMCC No. 21 of 2011. She stated that she obtained letters of administration on 26th February, 2013 in succession cause No. 2953 of 2012 and she filed an amended plaint on the 1st Plaintiff and thus the pleadings as filed are fatally defective.

The Respondent further averred that the appellant has not filed or effected service upon the Respondent. A Notice of Appeal as provided by law and the Memorandum of appeal file was filed outside the statutory period of Appeal which lapsed on 3/5/18 a judgment in the suit was rendered on 21/8/18.

The Respondent further contended in her Replying Affidavit the circumstances under which the suit land was allocated to the Respondent which in my view falls outside the realm of the instant application.

Counsel for the parties filed their submissions upon consent that the application shall be disposed off by way of written submissions.

The Applicant/Appellant pointed out that in the event that orders sought are not granted then he shall suffer substantial loss if the suit land is either transferred to a 3rd party or if he is evicted from the suit land.

The Respondent contended in his submissions that the appeal is fatally defective as the appellant seeks to sue a deceased person and he further states that the Appellant has not filed any memorandum of appeal as required by law.

I have read the Application before me and the submissions filed by counsel for the Plaintiff. From the record there is a memorandum of

appeal which was filed in court on 21/5/18 which though it was filed outside the prescribed time there was no inordinate delay by the Appellant to have the same filed within the prescribed time. Furthermore the respondent have not demonstrated to me what prejudice they will suffer.

On the issue of whether the appellant has sued the right party, it is not indispute the first respondent died and an amended plaint filed to have the administrators of his estate. The Applicant in my opinion ought to have sued the right person and as the application before me continues to relate to the deceased, I find the same as defective since I may not be able to issue orders against a deceased person.

The upshot of the above is that the Application before me is defective to the extent that the Appellant/Applicant has sued the wrong party and for this reason, I dismiss the Application dated 21st May, 2018 with costs.

DATED, SIGNED and DELIVERED in open court at **NAROK** on this **2nd day of November, 2018.**

Mohamed N. Kullow

Judge

2/11/18

In the presence of:

Mr Kiptoo for the respondent

Mr Kamwaro for the appellant

CA:Kimiriny