



**REPUBLIC OF KENYA**

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

**E & L CASE NO. 113 of 2016**

**PRISILA JESONDIN CHUMO.....PLAINTIFF/RESPONDENT**

**VERSUS**

**NELLY JEBOR ALIAS NELLY CHEBOR.....DEFENDANT/APPLICANT**

**RULING**

This ruling is in respect of the defendant/Applicant's application dated 24<sup>th</sup> May, 2017 brought by way of notice of motion seeking for the following orders:

- a) Spent.
- b) THAT there be stay of execution of the orders issued by the trial court on 17<sup>th</sup> April, 2017 pending the hearing and determination of this application.
- c) THAT there be stay of execution of the orders issued by the trial court on 17<sup>th</sup> April, 2017 pending the hearing and determination of the objection proceedings filed by the Defendant/Applicant whose outcome will have a great impact on the decree issued in this matter.
- d) THAT the LAND REGISTRAR, UASIN GISHU COUNTY be restrained from sub-dividing, transferring, charging, and/or dealing in any other manner detrimental to the Defendant/Applicant's legal rights with the register of the suit parcel of land known as L.R NO. TURBO EAST/SOSIANI BLOCK1 (SUGOI)/12 pending the hearing and determination of this application inter-parties and/or thereafter pending the hearing and determination of the objection proceedings filed by the Defendant/Applicant vide ELDORET HIGH COURT P NO. 226/2013 and/or further orders of this honourable court.
- e) THAT the costs of this application be provided for.

The applicant brought this application under certificate of urgency whereby the court ordered that the application be served for inter partes hearing. Counsel later agreed to canvass the application vide written submissions.

Counsel for the applicant submitted that the gist of the application is to set aside the decree issued by the trial court on 17<sup>th</sup> April, 2018 in which the trial court ordered inter alia that the Defendant/Applicant be evicted from all that parcel of land known as L.R NO. TURBO EAST/SOSIANI BLOCK 1 (SUGOI)/12 within 45 days of the date of the judgment and pay costs of the suit.

Counsel gave brief facts of the case and stated that there was misrepresentation of material facts by the Plaintiff/Respondent to the effect that she has filed objection proceedings in the succession proceedings (High Court P&A No. 226/2013) but was unsuccessful, a fact she knew to be untrue.

Counsel further submitted that Order 45 Rule 1 of the Civil Procedure Rules allows an aggrieved party to apply for review where there is discovery of new and important matter or evidence which, after the exercise of due diligence was not within the applicant's knowledge or could not be produced by him/her at the time when the order was made, or on account of mistake or error apparent on the face of the record, or for any other sufficient reasons. Counsel admitted that the Applicant was legally represented, but her then Counsel on record did not

disclose that indeed no objection proceedings had been filed by the Applicant and that the Applicant should not be condemned for the mistakes of her Counsel.

Miss Isiaho also submitted that there should be stay of execution pending the determination of the objection proceedings in a succession cause. She therefore urged the court to allow the application.

The plaintiff opposed the application whereby Counsel submitted that the application is an afterthought and should be dismissed with costs as it has no merit. The applicant was afforded the opportunity to be heard and presented her

Counsel submitted that the orders as sought by the applicant for stay are indefinite and defeats the rule of law, natural justice and further that no appeal is intended to peg the application for stay on. The orders sought cannot issue since no appeal has been preferred against the judgment. He urged the court to dismiss the application with costs to the plaintiff.

### **Analysis and determination**

To be honest, the court is at a loss as to what the applicant is seeking for in this application. First of all, it was brought under Order 46 Rule 2 which deals with arbitration but in the body of the application it deals with review but not comprehensively. On the issue of being brought under the wrong provision, the same can be forgiven and the court can turn a blind eye and assume that it is a typographical error.

Going to the application itself the applicant seeks for stay of execution of the decree of this court pending the hearing of objection proceedings in a succession Cause which the court has not been told how far it has gone. This is also not very relevant at this stage. Counsel proceeded as if she was either arguing an appeal, an application for review or submitting on the case that has already determined.

It should be noted that the defendant was represented in this case fully by an Advocate of her choice whereby she filed a defence and participated fully in the proceedings and a judgment was delivered. The defendant had an opportunity to instruct her advocate on all the issues relating to this case and not piecemeal.

The defendant thereafter instructed the current firm of advocates to file this application for stay of execution. The defendant has not preferred any appeal against the judgment of this court to warrant a stay since the issues she is raising were within her knowledge during the hearing of the main suit.

If the defendant has an objection in a Succession Cause, there is nothing stopping her from pursuing the same without staying a valid judgment which she has not appealed against or intends to appeal against. If she succeeds in the Objection proceedings then she will be vindicated but I see no proper ground for me to stay the enforcement of a decree that has been issued. If the defendant was aggrieved with the decision of the court, she could have filed an appeal against the judgment and not the current application. It seems the defendant is trying her luck in two different forums, through this case and the succession Cause.

From the above, I find that the application lacks merit and is therefore dismissed with costs to the plaintiff.

Dated and delivered at Eldoret this 19<sup>th</sup> day of December, 2018.

**M. A. ODENY**

**JUDGE**

Ruling read in open court in the presence of Mr. Ngetich holding brief for Miss Isiaho for Defendant/Applicant and Mr. Tororei holding brief for Mr. Omusundi for Plaintiff/Respondent.

Mr. Koech: Court Assistant