



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC.APPEAL NO.72 OF 2015

KIVIU VATA.....1ST APPELLANT/APPLICANT

MUSINGI VATA..... 2ND APPELLANT/APPLICANT

-VERSUS-

KASIKI MAKAYA.....DEFENDANT/RESPONDENT

Being an Appeal from the Ruling and Order of Honourable J. Nyakundi in Mutomo in PMCC Number 29 of 2014 and dated the 8/4/2015)

RULING

The matter for determination is the Appellants'/Applicants' *Notice of Motion* dated 29th June 2015, brought under Order 10 Rule 11, Order 22 Rule 25 and all other enabling provisions of the law.

The Appellants/Applicants have sought for the following orders:-

i. Spent

ii. Spent

iii. That execution in the said matter be stayed pending the hearing and determination of Machakos High Court, Civil Appeal No.72 of 2015, Kiviu Vata & Ano... Vs.. Kasiki Makaya.

iv. That OCS Mutomo Police Station be served with a copy of the intended order for stay of execution.

v. That further orders as the ends of justice may require be made.

The application is premised on the grounds stated on the face of the application and on the *Supporting Affidavit of Kiviu Vata*. These grounds are:-

a) The Judgement herein was entered against the Defendants while the Defendants had appeared through their Counsel but not served with the hearing notice.

b) The Counsel for the Defendant's filed formal application dated 17/2/2015, for setting aside Judgement but the same was dismissed on 8/4/2015.

c) That the Appellants/Applicants being dissatisfied with the said Ruling have preferred an Appeal and filed a Memorandum of Appeal at the High Court of Kenya at Machakos vide Civil Appeal no.72 of 2015.

d) That orders for eviction had already been issued and is pending execution anytime after expiry of 30 days from 8th April 2015.

e) The proceedings to formally prove the case and all the consequential orders were irregular for failure to serve notice upon the Defendants who had appeared.

f) The Applicants would suffer great injustice if the orders sought are not granted as they would be evicted from their homestead and be rendered homeless and their appeal would be rendered nugatory.

The Applicants case is that an interlocutory Judgement was entered against the Appellant after they failed to file their Defence and their application to set aside the said interlocutory Judgement was dismissed. It was their contention that the Judgement was entered in default of filing the Defence within the prescribed time. The Deponent further contended that failure to file the Defence was caused by their advocate who was acting for them. It was alleged that if Stay of Execution is not granted as prayed and execution proceeds, then their Appeal would be rendered nugatory. Further that if execution is allowed to proceed, the Applicants would suffer injustice and irreparable loss. The deponent also alleged that the Respondent would not suffer any prejudice if the orders sought are granted and it would be for the interest of justice to allow the application.

This application is **opposed**. **Kasiki Makaya** filed a **Replying Affidavit** on **16th February 2016**, and averred that the Appellants/Applicants were **evicted** from the suit land on **4th July 2015**. She alleged that in view of the said eviction, the application dated **29th June 2015**, has been overtaken by events because there is nothing to stay. She averred that the prayers sought are untenable and the application should be dismissed with costs.

The application was **canvassed** by way of **Written submissions** which this Court has carefully considered. The Court will render itself as follows;

The application is premised under Order 10 Rule 11 which provides that:-

“Where Judgement has been entered under this Order, the Court may set aside or vary such Judgement and any consequential decree or order upon such terms as are just”.

Further Order 22 Rule 25 of the Civil Procedure Rules provides that:-

“Where a suit is pending in any court against the holder of a Decree of such court, in the name of the person against whom the Decree was passed, the court may on such terms as to security or otherwise as it thinks fit stay execution of the Decree until the pending suit has been decided”.

The Appellants herein have alleged that there is in existence a Ruling delivered by **Mutomo Law Courts** in **SRMCC No.29/2014**, on **8th April 2015**, in which the Appellants were dissatisfied with. The Appellants subsequently filed **Machakos HCC Appeal No.72 of 2015**, and thus they seek for stay of the said Ruling.

However, the Respondent has alleged that there is nothing to stay as the **Decree was executed** on **18th February 2015**, as evident from **annexture KM3**. The said annexure contains an **Eviction Order** which was allegedly executed by **OCS Mutomo Police Station** on **18th February 2015** and **20th June 2015**. If that is the case, then there is nothing to stay.

The principles to be considered while determining an application for stay of execution have been elucidated in many judicial pronouncements. In the case of **Consolidated Marine..Vs...Nampijja & Another, Civil Application No.93 of 1989**, the Court held that:-

“The purpose of the application for stay for execution pending; Appeal is to preserve the subject matter in dispute so that the right of the Appellant who is exercising his undoubted right of appeal are safeguarded and the Appeal if successful is not rendered nugatory”.

Further, in the case of **Council of Legal Education & Another..Vs..Ritta Biwott, Civil Appeal NO.238 of 1994**, the Court held that:-

“The conditions for grant of stay of execution pending Appeal: arguable appeal and whether the appeal would be rendered nugatory”.

The Court has considered the **Ruling** that was delivered by **Mutomo Magistrate’s Court** on **8th April 2015**. The said Ruling dismissed an application dated **17th February 2015**, by the Appellants herein. The said Ruling did not give any positive order that warrant any stay. The said Ruling was a dismissal order and this Court cannot stay the said dismissal order. From the proceedings, the Court discerns that there was an *ex parte* Judgement entered against the Appellants herein. However, the Appellants/Applicants have not sought to stay that *ex parte* Judgement but have sought to stay the Ruling of the Lower Court that was delivered on **8th April 2015**, which dismissed the Appellants application dated **17th February 2015**. As the Court stated earlier, that was not a positive order as it never granted anything apart from dismissing an application. There is therefore nothing to stay.

For the above reasons, the Court finds that the Appellants/Applicants’ application dated **29th June 2015**, is **not merited**. Consequently, the said application is **dismissed entirely with costs being in the cause**.

Further, the Appellants are directed to set this Appeal down for hearing expeditiously and not later than **30 days** from the date hereof.

Further, this Court has noted that this is a matter falling under the **Jurisdiction of Machakos, Environment and Land Court**. The Court therefore directs that this matter be transferred to **Machakos, Environment and Land Court** forthwith for the final hearing and determination of the Appeal herein.

It is so ordered.

Dated, Signed and Delivered at Nairobi this **31st** day of **August**, 2017.

L. GACHERU

JUDGE

31/8/2017

In the presence of

No appearance for Plaintiff/Applicant though served.

No appearance for Defendants/Respondents though served.

Catherine - Court clerk.

L. GACHERU

JUDGE

31/8/2017