



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO.107 OF 2009

FILIPO FEDRINI.....PLAINTIFF

=VERSUS=

IBRAHIM MOHAMED OMAR.....DEFENDANT

RULING

1. What is before me is the Application by the Plaintiff dated 7th March, 2016. In the Application, the Plaintiff is seeking for the following orders:-

(a) THAT pending the hearing and determination of the application dated 2nd March 2016 filed in the Court of Appeal for leave to lodge the Notice of Appeal out of time, the court be pleased to grant an order of Stay of Execution of the Judgment dated 23rd October, 2015.

(b) THAT the costs of this application be provided for.

2. The Application is premised on the grounds that the Applicant has preferred an appeal against the Judgment of this court delivered on 23rd October, 2015; that the Judgment was delivered in the absence of the Plaintiff and that the Judgment has drastic consequences against the Plaintiff.

3. According to the Plaintiff, he has applied to the Court of Appeal to extend time so that the Notice of Appeal is deemed as though it was filed within the prescribed time.

4. In response, the Defendant deponed that the notice in respect of the Judgments to be delivered in the month of October 2015 was pinned on the notice board and that the same was available on-line; that the Plaintiff cannot complain that he was not aware of the date of the Judgment and that the Application is devoid of merit.

5. The Plaintiff's counsel submitted that he was not aware of the date of the Judgment of this court, that the Plaintiff is being unlawfully disposed of his property and that he has a right to await the determination of the Court of Appeal.

6. Consequently, it was submitted, the Plaintiff has satisfied all the conditions set down under Order 42 Rule 6(2) of the Civil Procedure Rules for the grant of the orders prayed for.

7. The Defendant's advocate submitted that the Applicant has not demonstrated how the enforcement of the Judgment would occasion him substantial loss; that a successful litigant should not be denied the

fruits of his Judgment and that in any event, there is no pending appeal.

8. The Plaintiff's Application is seeking for a stay of execution of the Judgment of 23rd October 2015 pending the hearing and determination of the Application dated 2nd March 2016 filed in the Court of Appeal for leave to lodge the Notice of Appeal out of time.

9. Its trite that under Order 42 Rule 6(1) and (2) of the Civil Procedure Rules, a stay of execution of a decree can only be granted where there is an appeal and once a party satisfies the court that unless the order of stay is granted, substantial loss may result to the Applicant and that the Application has been made without unreasonable delay.

10. The Plaintiff has admitted that there is no pending appeal. Indeed, the Plaintiff has filed an Application dated 2nd March, 2016 in the Court of Appeal seeking the leave of the court to file the Appeal out of time.

11. Unless the said leave to file the Appeal out of time is granted by the Court of Appeal, this court cannot issue an order for stay of execution even in a situation where the other conditions of Order 42 Rule 6(2) of the Civil Procedure Rules have been satisfied.

12. This is the position that the Court of Appeal took in the case of **Dickson Muncho Muriuki Vs timothy Kagundu Muriuki & 6 others (2013) eKLR** in which it was held as follows:-

“.....the said application is still pending for hearing and determination before us. We believe that whether the intended appeal by the Applicant will be rendered nugatory mainly depends on whether leave will be granted to him to appeal to the Supreme Court. Since the application for leave which is still pending is not directly before this court we are unable to determine whether leave will be granted to the applicant to file an appeal against this court's Judgment in the Supreme Court.....Second, we find that the applicant's current application is tantamount to him putting the cart before the horse because while the application seeking leave to appeal to the Supreme Court is still pending before this Court the applicant has no basis to anchor his application for stay of execution.....”

13. In the same breath, the application seeking leave to file an appeal out of time in respect of the Judgment of this court is still pending in the Court of Appeal. Until the Court of Appeal makes a decision on that Application, this court cannot entertain an Application for stay of execution of its Judgment.

14. For those reasons, I find the Application dated 7th March, 2016 to be unmeritorious and I dismiss it with cost.

Dated, signed and delivered in Malindi this 22nd day of **September**, 2016.

O. A. Angote

Judge