



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

ELC NO. 18 OF 2015

JAMLECK MUCHIRA WANJAU PLAINTIFF/APPLICANT

VERSUS

**CHARLES MAINA MURIUKI
DEFENDANT/RESPONDENT**

RULING

Introduction

1. On **28th January, 2014** the plaintiff (Applicant) brought the notice of motion dated **24th January, 2014** praying that this court be pleased to discharge the order of stay of execution issued on 11th February, 2011 and to grant him liberty to proceed with execution proceedings.
2. The application is premised on the grounds that ever since the defendant (respondent) filed a notice of appeal (on 25th October, 2010) and obtained an order of stay of execution pending the hearing and determination of the appeal (on 11th February, 2011), the respondent has neither filed the appeal nor taken any steps to suggest that he is still interested in the appeal.
3. It is pointed out that on 22nd May, 2012 the applicant filed an application, miscellaneous Civil Application number 13 of 2013 seeking to have the notice of appeal struck out. That application was dismissed on 22nd May, 2013 for non-attendance and contended that despite having obtained typed proceedings on 5th July 2012, the applicant has not taken any steps towards filing the record of appeal.
4. Continued sustainance of the order of stay of execution is said to be causing the applicant undue hardship. For the foregoing reasons, it is contended that it is in the interest of justice and fair play to allow the application.
5. The application is supported by affidavit of the applicant sworn on 24th January, 2014 and a further affidavit filed on 16th October, 2014. In the affidavit sworn on 24th January, 2014 the grounds on the face of the application are reiterated while in the further affidavit it is pointed out that the respondent's application for extension of time within which to file the appeal was dismissed and contended that there are no proceedings in the court of Appeal to justify the continued subsistence of the orders sought to be discharged.
6. The application is opposed through the grounds of opposition dated 30th June, 2014 and a replying affidavit sworn on 1st July, 2014 in which it is contended that the application is premature; that the respondent should not suffer because of a mistake on the part of his advocate and that no prejudice will be

occasioned on the applicant if the orders sought are denied.

Analysis and determination

7. Given the applicant's contention that the respondent's application for extension of time to file the appeal was dismissed, the sole issue to determine is whether that averment is correct. This is so because, if the respondent was denied leave to file the appeal out of time, it means that there exists no appeal which can form the basis of continued existence of the orders of stay.

8. In determining whether or not there exists an appeal in this matter, I take note of the ruling annexed to the applicant's further affidavit and marked exhibit **JMW-1**.

In that ruling, the presiding judge **Otieno-Odek JA**, concerning the respondent's application dated 25th September, 2014 rendered himself thus:-

"In total, I am not satisfied that the over two (2) year period of delay has been reasonably explained. I decline to exercise my discretion in favour of granting leave to file the appeal out of time. The notice of motion application dated 25th September, 2014 is hereby dismissed with costs."

9. In the respondent's notice of motion under reference, the respondent sought the following orders:-

a) That time to file the appeal be extended.

b) Costs of the application be provided for.

10. It is clear from the above factual situation that the respondent's intended appeal did not see the light of the day. There being no appeal, the existing order of stay of execution is without substratum and/or any basis either factual or legal. Consequently, I find and hold that the applicant has made up a case for grant of the orders sought and I allow the application as prayed.

Dated, signed and delivered at Nyeri this 24th day of June, 2015.

L N WAITHAKA

JUDGE

In the presence of:

Mr. Gori h/b for Ms Mwai for the applicant

N/A for the respondents

Court assistant - Lydia