



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT KITALE**

**LAND CASE NO. 68 OF 2014**

**ALEMUSIA K. CHEMAKHOLI.....PLAINTIFF**

**VERSUS**

**PIUS P. KOTIT**

**THOMAS KILIMO**

**SAMUEL LOMOKE.....DEFENDANTS**

**RULING**

1. The applicant Alemusia Kotit filed a notice of motion dated 11/1/2014 in which he seeks orders that the respondents' application dated 23/12/2010 be dismissed for want of prosecution. The respondents had been committed to civil jail for non payment of costs which they had been ordered to pay. Their Advocate filed a notice of motion dated 23/12/2010 in which he sought among other orders release of the respondents from civil jail and stay of execution of the decree. The respondents were ordered released from civil jail pending hearing inter-partes of the application. A stay of execution of the decree was also granted pending interpartes hearing.

2. When the application came up for hearing interpartes, the Advocate for the applicant raised a Preliminary objection to the application. The preliminary objection was dismissed on 12/9/2011 and the trial magistrate directed that the application be set down for hearing. The application was never set down for hearing prompting the applicant to file this application for dismissal of the application dated 23/12/2010.

3. The applicant contends that it has been over two years since the application was last in court and that the same has remained unprosecuted. The non prosecution of the application has made execution impossible as the applicant cannot move in the face of the stay orders which were granted.

4. The application is opposed by the respondents through replying affidavit in which their advocate who is the deponent avers that there was stay of execution of the decree of the lower court. The High Court matter was concluded on 14/1/2014 and that it is barely six months since that time. The respondents also contend that the applicant's advocate is confusing the application by their advocate for leave to come on record with the application for stay.

5. I have carefully considered the applicant's application as well as the opposition to the same by the respondents. The issue which emerges for determination is whether the application dated 23/12/2010 has remained unprosecuted for over two years and whether the proceedings in the lower court file had been

stayed by the High Court.

6. The respondents advocate argued that the applicant's advocate was confusing the application for stay with the application for leave to come on record. I have looked at the record of the court and note that the respondents' advocates filed two applications on 23/12/2010. One application was for leave of court to allow him to come on record for the respondents who were then in civil jail. This was because the respondents were being represented by a different Advocate and judgement had already been entered. Their current Advocate could therefore not represent them without leave of court. The other application was for stay of execution and release of the respondents from civil jail. There is therefore no confusion on the part of the applicant's advocate as to the application in issue.

7. The respondents were directed to fix their application for hearing. This was on 12/9/2011 after the ruling dismissing the applicant's preliminary objection on the same. The application has therefore been lying unprosecuted for over two years.

8. On whether the lower court proceedings in this file had been stayed by the High Court, there is no evidence that respondents obtained stay in the High Court. The respondents had filed an application for stay of the lower court proceedings vide HCC No. 18 of 2011. This application was dismissed on 14/1/2014. There was no stay which had been granted in that application and if there was any, it was upon the respondents to bring that evidence before the court in this matter. I therefore find that there was no stay of proceedings in this case.

9. The respondents have been enjoying stay granted herein ex-parte for over two years. They are not in hurry to prosecute the application. This is unfair to the applicant who has been unable to move the court to execute the decree. The application by the respondent dated 23/12/2010 is hereby dismissed with costs to the applicant. For avoidance of doubt the application which has been dismissed is the one which was seeking stay of execution and release of the respondents from civil jail. The plaintiff is at liberty to execute the decree issued in his favour.

It is so ordered.

Dated, signed and delivered at Kitale on this 29th day of September, 2014.

**E. OBAGA**

**JUDGE**

In the presence of M/S Arunga for Mr Kaosa for applicant. Court Clerk – Kassachoon.

**E. OBAGA**

**JUDGE**

**29/9/2014**