



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

CIVIL APPEAL NO. 9 OF 2013

KADZO MWANDOR IHA.....APPELLANT

=VERSUS=

CHRISTINE SAMINI.....RESPONDENT

RULING

Introduction:

1. The Application before me is the one dated 5th September, 2013 by the Appellant/Applicant seeking for the following orders:
 - (a) **THAT the time for filing a Memorandum of Appeal be and is hereby enlarged and leave and is hereby granted to the Applicant to file Memorandum of Appeal out of time.**
 - (b) **THAT the Draft Memorandum of Appeal annexed herewith be deemed as duly and properly filed upon payment of the requisite filing fees.**
 - (c) **THAT there be a stay of execution of the decree dated 16th April 2010 in the Senior Resident Magistrate's Court at Kilifi CMCC No. 62 of 2009 and all consequential orders pending hearing and determination of the intended appeal**
 - (d) **THAT the costs of this Application be provided for.**

The Appellant's/Applicant's case:

2. According to the Affidavit of the Applicant, Judgment was entered in favour of the Respondent in Kilifi SRMCC No. 62 of 2009 on 14th April 2010 and that he applied for certified copies of the proceedings to enable him lodge an appeal.
3. The Applicant has deponed that on 9th June 2010, he applied in the subordinate court for a stay of execution and leave to lodge an appeal out of time which application was allowed for 60 days; that he thereafter instructed the firm of Lughanje & Co. Advocates to take up the appeal and that all along he has believed that the said firm of advocates filed the appeal until 2nd September, 2013 when warrants of eviction were served upon him.
4. It is the Appellant's/Applicant's case that without his authority, his advocate entered into a consent with the Respondent for his eviction from the suit property and that the mistake of his previous

advocate should not be visited upon him.

5. The Appellant/Applicant finally deponed that he stands to suffer irreparably if the orders of eviction are executed because he depends on the suit land for his livelihood together with his young family.

The Respondent's case:

6. The Respondent filed her Replying Affidavit and deponed that she will be prejudiced if the current application is allowed; that the applicant cannot blame her former advocate because she has a personal obligation as a litigant to follow up her matter and that the Applicant was aware of the notice of entry of Judgment.
7. The Respondent finally deponed that the consent that was entered into by their respective advocates has not been challenged by the Applicant and that he is not entitled to the orders sought.

Submissions:

8. The Appellant's/Applicant's counsel submitted that the delay in filing the current application was caused by the Applicant's previous advocate and that the mistake of the advocate should not be visited on a litigant; that both the Applicant and the Respondent are squatters on the suit property and that the lower court did not have jurisdiction to deal with the matter by virtue of section 3(1) (b) of the Land Disputes Act.
9. The Respondent's Advocate submitted that it is now more than three (3) years since the Judgment of the lower court was delivered and that the current application is meant to delay and defeat justice.

Analysis:

10. The lower court granted to the Applicant a stay of execution for 60 days on 16th September 2010. Within those 60 days, the Appellant/Applicant was required to obtain the typed proceedings, file an appeal and apply for an order of stay of execution in the High Court.
11. The Appellant never filed an Appeal within the said 60 days as directed by the lower court. The Appellant is now blaming his former advocate for the said lapse which is four years down the line.
12. It is trite law that a suit always belongs to a litigant and not an advocate. It is the responsibility of a litigant to pursue his suit or appeal and more so when he does not receive any communication from his advocate. In the case of **B1 MECH ENGINEERS LTD VS JAMES KAHORO MWANGI (2001) e KLR**, WAKI JA held as follows:

“The Applicant had a duty to pursue his advocate to find out the position on the litigation but there is no disclosure that the Applicant bothered to follow up the matter with his erstwhile advocates. It is not enough simply to accuse the advocate for failure to inform as if there is no duty on the client to pursue his matter. If the advocate was simply guilty of inaction, that is not an excusable mistake which the court may consider with some sympathy. The client has a remedy against such an advocate.....there must be an end of litigation and the 12 years delay in concluding the litigation is sufficiently prejudicial to the respondent.”

13. Having been granted a stay of execution by the lower court for 60 days, it was upon the Applicant to find out if the Memorandum of Appeal had been filed and if not to take appropriate measures, which he did not do.
14. There is also consent in the lower court allowing the eviction of the Appellant from the suit property.
15. Although the Appellant has deponed and said that he did not authorize his advocate to sign the consent, the said consent has not been set aside on the ground that it was fraudulently procured or on any other ground. A consent is an order of the court and unless it is set aside, either by the lower court or this court, the prayer for a stay of execution of the said consent order cannot be granted.

16. In view of the fact that the Applicant has not given a plausible explanation as to why he did not file the current application within a reasonable period and considering that the consent order that was entered into by the advocates has not been set aside, I find that the Applicant's Application is unmeritorious.
17. For the reasons I have given above, I dismiss the Application dated 5th September, 2014 with costs.

Dated and delivered in Malindi this **17th** day of **October**, 2014.

O. A. Angote

Judge