Kaikai v Kalasinga (Civil Application E019 of 2024) [2024] KECA 676 (KLR) (12 June 2024) (Ruling)

Neutral citation: [2024] KECA 676 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPLICATION E019 OF 2024

JM NGUGI, JA

JUNE 12, 2024

BETWEEN

JAMES KAYIONI KAIKAI .... APPLICANT

AND

DANIEL LEURU KALASINGA .... RESPONDENT

(Being an application for stay for Execution from the Judgment of D.K. Matutu (Principal Magistrate in Kilgoris MCL & E No. 21 Of 2018 dated 19.11.2019) pending the hearing and determination of an intended Appeal against the Judgment and Decree of the High Court of Kenya at Kilgoris (Washe, J.) delivered on 6th of March, 2023inELCA NO. 1 OF 2022(NAROK ELC NO. 31 OF 2019)

RULING

1. The Certificate of Urgency and Application before me are undated. They were first placed before me for certification of urgency under Rule 49 of the *Court of Appeal Rules* on 24th May, 2024. I declined to certify the matter urgent. When the Honourable Deputy Registrar conveyed this ruling to the counsel for the Applicant vide a letter dated 6th June, 2024, counsel requested for an inter partes hearing under Rule 49(5) of the *Court of Appeal Rules* on the question of certification of urgency. The inter partes hearing was scheduled for today. Mr.Mukoya Kassamani, learned counsel for the applicant, appeared while Mr. Mulisa, learned counsel, was present for the respondent.

2. Counsel for the applicant insists that the matter is urgent because his client faces eviction following the judgment delivered by the Environment and Land Court on 6th March, 2023. It is worth noting that in that judgment, the learned Judge dismissed the appeal preferred by the applicant against a judgment from the magistrate's court in which the respondent prevailed. Apparently aware that one cannot obtain a stay of execution against a judgment dismissing the appeal, the applicant has couched his present application as one seeking a stay of execution against the judgment and decree of the trial

court (Hon. D.K. Matutu) delivered on 19th November, 2022. In addition to a declaratory order that the suit property, to wit, LR No. Transmara/Olomismis/1329 belongs to the respondent, the learned magistrate issued a permanent injunction restraining the applicant from trespassing on, interfering with, or in any manner dealing with the suit property. The learned magistrate, also, granted the respondent a right to apply for eviction within 45 days of the judgment.

3. Mr. Kassamani insists that any deficiencies in the application are "technicalities" which the Court can cure under Article 159(2) of *the Constitution*. He appeals to the inherent jurisdiction of the Court; urging that the Court can appraise itself of all the evidence in a matter and make appropriate orders to avoid a miscarriage of justice.

4. Mr. Mulisa took the opposite stance. He urges that Article 159(2) of *the Constitution* is not a panacea for all ills and misdeeds of a litigant; and that the issue goes to the jurisdiction of the Court: the applicant has sought to stay a judgment of the magistrate's court, jurisdiction which this Court does not have.

5. There are two obvious difficulties with the applicant's application. The first one is that his delay in bringing the present application is unexplained. Judgment in the ELC was delivered on 6th March, 2023. That is more than 15 months ago. The applicant has not explained why he waited for so long only for him to bring the present application. Mr. Kassamani says that an earlier application was dismissed by this Court; but that explanation nary appears in the two affidavits filed in support of the Certificate of Urgency and the Application itself.

6. The second difficulty is more substantial: the application, as couched, seeks a stay against a judgment and decree of the magistrate's court. This court, most obviously, does not have jurisdiction to stay a decision of the magistrate's court. As a matter of policy, this Court does not certify urgent an application that seems on its face to be fatally incompetent. An additional factor is that even if the applicant had phrased his application to be for stay against the superior court's judgment, it would not fare any better because one cannot obtain a stay against a negative order.

7. For these two reasons, I decline to certify the application urgent. I further order that the applicant shall pay the costs of this inter partes hearing. The same must be paid before the application is set for hearing before a full bench.

DATED AND DELIVERED AT KISII THIS 12TH DAY OF JUNE, 2024.

JOEL NGUGI

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR