



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI

ELC CASE NO. 332 OF 2012

GRACE WANJA NJUGUNA.....PLAINTIFF

=VERSUS=

ANDREW KINGORI.....DEFENDANT

RULING

(Notice of Motion 13th July 2021)

Introduction.

1. The Notice of Motion dated 13th July 2021 was filed by the Plaintiff under the provisions of Order 42 Rule 6 and Order 51 of the Civil Procedure Rules 2010 and Section 80 of the Civil Procedure Act. The Plaintiff pray for orders:

1) Spent

2) Spent

3) Spent

4) That this Honourable Court be pleased to order a stay of execution of the Judgement of Hon. L Gacheru in ELC No.138 of 2017 (formerly ELC 332 of 2012, Nairobi). Grace Wanja Njuguna versus Andrew Kingori dated 27th July 2017 pending the hearing and determination of the intended appeal.

5) That costs of this application be provided for.

2. The Application is supported by the undated affidavit of Tabitha Nyamuya Gathua.

3. The Deponent is the Advocate seized of this matter on behalf of the Plaintiff/Applicant. She depones that the Plaintiff was dissatisfied by the judgement of the court delivered at Thika on 27th July 2017 and therefore filed a notice of appeal dated 8th September 2017 on 12th September 2017. She exhibited the Notice of Appeal as 'GWN4' and the Court payment receipt as 'GWN5'. The Plaintiff who applied for court proceedings. Ms Tabitha further states that the Plaintiff had instructed her Advocates previously on record to file an application seeking to stay execution of the Judgement but they failed to do so. The Plaintiff had, as the deponent put it, been working on the motion that the application was made and an order of stay given in her favour . She (the Plaintiff) is not therefore to blame for any default or wrong committed by her Advocates.

4. The Plaintiff seeks a stay of execution of the resulting decree since as the deponent says; the Defendant /(decree-holder) has taken steps to evict the Plaintiff from the suit property.

5. Finally, the deponent states that the Plaintiff 's appeal has a reasonable chance of success. She beseeches the court to exercise its unfettered discretion in her favour.

6. The Defendant/Respondent opposed the application by the Plaintiff. In his replying affidavit sworn on the 28th September 2021, the Defendant avers that the Plaintiff is no longer on the suit land. She vacated the land in March 2021 after the Defendant served her with eviction order issued by the court. The Defendant further stated that the notice of intended appeal by the Plaintiff was filed out of time without leave of it therefore in the strict sense, there is no pending appeal.

7. The Defendant accuses the Plaintiff of inordinate delay and indulgence. In any event the Defendant states, there is nothing to stay the decree having already been executed and the Plaintiff evicted from the land. The Plaintiff's application is an afterthought that should not be entertained by the Court. It has been 4 years since the passage of the Judgement. The Application is overtaken by events and should not be allowed.

Directions by the Court.

8. When the matter came up for hearing of the Plaintiff's application on 12th October 2021 the Court directed that it be dispensed with by way of written submissions. The Plaintiff requested to file her written submissions within 7 days whereas the Defendant was granted 14 days within which to file her submissions upon being served with the Plaintiff's submissions. The Plaintiff did not comply with the directions on filing submissions. The Defendant however filed his submissions, dated 22nd October 2021.

Submissions by the Defendant/Respondent

9. In his submissions, the Defendant framed one major issue –whether the court should stay execution of the Judgement issued on 27th July 2017.

10. The Defendant cited various decided cases namely: -

i. Teresa Wairimu Vs Wanjiku Mwangi (2018) e KLR where the court in reference to order 42 of the Civil Procedure Rules 2020 held that though the court had the discretion to issue an order of stay of execution, ; it must exercise it judicially.

ii. Trust bank Ltd Vs Ajay Shah and 3 others (2012) e KLR (cited in Patrick J.Otieno Vs Lake Victoria South water Services Board (2020) e KLR.

The Court was of the view that all the conditions set out in Order 42 Rule 6(2) must be satisfied before a court grants an order of stay of execution pending appeal.

11. The Defendant submits that the Plaintiff has not demonstrated that they have an arguable appeal. The Defendant submission is that the notice of appeal was filed out of time and without leave of the Court. The Notice of appeal was filed on 8th September 2017 whereas the Judgement had been delivered on 27th July 2017. Further the Defendant argues that the Plaintiff has not attached a memorandum of appeal or a draft memorandum of appeal to show to the Court that she has an arguable appeal.

12. The Plaintiff, has also not demonstrated what substantial loss she is likely to suffer if the application is not allowed. The Defendant's argument is that the application is meaningless and overtaken by events as execution has already taken place.

13. The Defendant further submits that the Plaintiff is guilty of unreasonable delay, she has not given any reasonable explanations. The Plaintiff's attempt to blame her former Advocates holds no water. She too as a litigant had a responsibility to follow up her Advocates if she was interested in pursuing the orders for stay and the appeal. Equity does not aid the indolent.

14. The final submission by the Defendant was that the Plaintiff has not expressed willingness to deposit any security for costs. She has not made any offer as to the security for costs.

15. The Defendant prays for dismissal of the Plaintiff's application with costs.

Issues for Determination.

16. The only issue here is whether the Application for stay of execution pending appeal should be granted.

Analysis and Determination.

17. The law governing the grant of an order of stay of execution pending appeal is Order 42 Rule 6(2) of the Civil Procedure Rules. An Applicant seeking an order of stay pending appeal must satisfy the conditions set out in Rule 6(2) aforementioned, namely;

a) Demonstrate that substantial loss may result to the Applicant unless the order is made.

b) That the application has been made without undue delay .

c) That such security as the Court orders for the due performance of such decree or order as may ultimately be binding on the Applicant has been given.

18. In the instant case, the Defendant deposed in his replying affidavit that the execution which the Plaintiff seeks to stay by filing this application has already taken place. The Plaintiff has already vacated the land that was in dispute in the case.

19. The Plaintiff has not controverted the affidavit evidence of the Defendant. From the Court's record an eviction order was issued on 15th March 2021. The Defendant's evidence in his replying affidavit was that that the Plaintiff vacated the suit land once the eviction order was

issued.

20. I agree with the submissions of the Defendant that the Plaintiff's application is too little too late. It has been overtaken by events. This court refuses to exercise its discretion in vain. whatever the Plaintiff was attempting to prevent has already happened.

21. The conduct of the Plaintiff in this matter is not consistent with that of a diligent litigant keen on enforcing her rights under the law. Her notice of appeal was filed out of time without leave of the Court. The law provides that appeal must be filed within 30 days (not 14 days as the Defendant avers). The Judgement that she seeks to stay was delivered four (4) years ago. In her application she through an affidavit sworn by her advocates shifts the blame to her former advocates.

22. I cannot put it better that the learned Judge of Appeal did in **Bi-Mach Engineers Ltd Vs James Kahoro Mwangi (2011) e KLR**. In dismissing an application seeking extension of time to appeal, Judge Philip Waki JA

(as he then was) stated that;-

“The Applicant had a duty 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 to simply accuse the Advocate for failure to inform as if there is no duty on the client to pursue his matter”.

23. I cannot fail to comment on an averment made by the Plaintiff in the supporting affidavit to the effect that she has an appeal with a reasonable chance of success. The Plaintiff merely made that statement. she did not explain in her supporting affidavit her intended ground of appeal neither did she attach a draft memorandum of appeal. How is the Court to tell establish that her intended appeal has a reasonable chance of success? The Applicant had a responsibility to help the court reach such a conclusion otherwise her statement will be treated as a mere allegation.

24. The upshot is that this Court finds no merit in the Plaintiff's application dated 13th July 2021. The application is dismissed with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 4TH DAY OF NOVEMBER 2021.

M.D. MWANGI

JUDGE

In the Virtual Presence of :-

None attendance for the Plaintiff

Ms Rotich for the Defendant

Court Assistant: Hilda

M.D. MWANGI

JUDGE