



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**ELCC NO. 26 OF 2016**

**SAMMY INGUUVU ISIGI.....PLAINTIFF**

**VERSUS**

**ALPHONIS SAMUEL MAKOMERE.....DEFENDANT**

**RULING**

1. Judgment was delivered herein on 26<sup>th</sup> June 2018 in favour of the plaintiff. The court made the following orders:

- 1. A declaration that the Defendant is in breach of the contract entered into on 16/1/2001 thus not enforceable.**
- 2. Termination of tenancy relationship between the Plaintiff and Defendant.**
- 3. Costs of this suit to the plaintiff.**

2. Subsequently, the plaintiff filed Notice of Motion dated 24<sup>th</sup> June 2021 while the defendant filed Notice of Motion dated 30<sup>th</sup> July 2021. This ruling is in respect of both applications.

3. The following orders are sought in Notice of Motion dated 24<sup>th</sup> June 2021:

1. THAT an eviction order be and is hereby issued against the Defendant/Respondent from the suit premises erected on Land Registration NO. KAKAMEGA/LUSENGEL1/803.

2. THAT the Officer Commanding Station (OCS) Mudete Police Station do ensure compliance of the eviction order.

3. THAT costs of this application be borne by the Defendant/Respondent.

4. The application is supported by an affidavit sworn by the plaintiff. He deposed that judgment was delivered in his favour and that despite termination of the tenancy agreement, the defendant has disobeyed the judgment by refusing to vacate the suit property.

5. The defendant opposed Notice of Motion dated 24<sup>th</sup> June 2021 through a replying affidavit in which he deposed that he appealed against a ruling dated 20<sup>th</sup> November 2018 through which the court had declined to set aside the judgment and that the appeal has high chances of success. That execution will render his appeal nugatory and that he had filed an application for stay pending appeal. He added that the plaintiff had intimated to his advocate on record that they were not going to execute until the appeal is finalized.

6. Notice of Motion dated 30<sup>th</sup> July 2021 on its part seeks the following orders:

1. The Honorable court be pleased to grant stay of execution of the judgment and decree of this honourable court that was issued on the 26<sup>th</sup> June 2018 and ruling delivered on the 20<sup>th</sup> November 2018 respectively pending the determination of COURT OF APPEAL CIVIL APPEAL NUMBER 13 OF 2019.

2. Costs of this application be provided for.

7. The application is supported by an affidavit sworn by the defendant. He generally reiterated what he deposed in the aforesaid replying affidavit and urged the court to grant him the orders.

8. The plaintiff opposed Notice of Motion dated 30<sup>th</sup> July 2021 through grounds of opposition in which he took the position that the application is frivolous, vexatious, full of malice and does not meet the principles applicable to stay of execution pending appeal.

9. An order was made that the applications be canvassed through written submissions. The plaintiff relied on **Order 22 Rule 6** of the **Civil Procedure Rules** as well as the case of **Samuel M. N. Mweru & Others v National Land Commission & 2 others [2020] eKLR** and argued that the decree ought to be enforced. In regard to Notice of Motion dated 30<sup>th</sup> July 2021, he argued that the defendant has not demonstrated substantial loss and that the application was filed after an inordinate and unexplained delay of over three years. Finally, he argued that the defendant has not furnished any security. Relying on **JOSEPH GACHIE T/A JOSKA METAL WORKS V SIMON NDETI MUEMA [2012] eKLR**, he urged the court to dismiss Notice of Motion dated 30<sup>th</sup> July 2021.

10. The defendant did not file any submissions.

11. I have considered the applications, the affidavits, grounds of opposition and the submissions. The plaintiff seeks eviction of the defendant from the suit premises. He claims that the eviction is to be in execution of the decree herein. Whereas it is correct that judgment was delivered herein on 26<sup>th</sup> June 2018 in favour of the plaintiff, I have not seen an order of eviction among the reliefs that the plaintiff was granted. The only reliefs that the plaintiff obtained was a declaration that the defendant is in breach of a contract entered into on 16<sup>th</sup> January 2001, an order of termination of tenancy relationship between the plaintiff and defendant and an award of costs of the suit. I have also perused the plaint that was filed herein by the plaintiff and I note that eviction was not sought. I am surprised that the plaintiff now imagines that he was awarded that which he did not even claim.

12. Judgment having been delivered herein, the substantive dispute between the parties was brought to a conclusion. The became *functus officio* in so far as its power to determine the parties' respective claims in the matter goes. Once such a decision has been made, it is final and conclusive, subject to any right of appeal. The court does not have jurisdiction to revoke or vary its decision, save in cases of applications for setting aside or review. See **Raila Odinga & Others vs. IEBC & Others [2013] eKLR**.

13. The court's jurisdiction flows from either the Constitution or legislation or both and it can only exercise jurisdiction as conferred on it by law. See **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR**. Any order or step taken by a court in the absence of jurisdiction is a nullity. See **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR**. If I were to accede to the plaintiff's request to order an eviction, I would be in essence modifying the decree herein without any jurisdiction.

14. Any proceedings filed in a court without jurisdiction are dead on arrival and cannot be remedied. See **Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service [2019] eKLR**. That exactly is the fate that must befall Notice of Motion dated 24<sup>th</sup> June 2021. The application must be struck out.

15. Regarding, Notice of Motion dated 30<sup>th</sup> July 2021, I note that the defendant did not advance any arguments in respect of the application.

16. The court's jurisdiction to grant stay of execution pending appeal is guided by **Order 42 rule 6 (1) and (2)** of the **Civil Procedure Rules, 2010**. An applicant seeking stay of execution pending appeal must demonstrate that substantial loss will result to

him if stay is not granted and that the application has been made without unreasonable delay. The applicant is further required to give such security as the court may order for the due performance of the decree. See **Kenya Power & Lighting Co. Ltd v Kigaita Ngare Unduthu & 36 others** [2020] eKLR and **Kenya Shell Limited v Benjamin Karuga Kibiru & another** [1986] eKLR.

17. The defendant's main fear is that the plaintiff may evict him in execution of the decree. As already noted, no order of eviction was granted in the decree. If there is any risk of eviction, it certainly does not arise from the decree in this matter. Thus, I am not persuaded that the defendant has demonstrated any substantial loss.

18. An applicant seeking stay of execution pending appeal is also required to bring the application without unreasonable delay. Judgment was delivered in this matter on 26<sup>th</sup> June 2018 while the ruling in respect of which the appeal has been preferred was delivered on 20<sup>th</sup> November 2018. Notice of Motion dated 30<sup>th</sup> July 2021 through which stay is sought was filed on 10<sup>th</sup> August 2021, after a delay of over two and a half years after the ruling dated 20<sup>th</sup> November 2018. I find the delay to be unreasonable. In the circumstances, Notice of Motion dated 30<sup>th</sup> July 2021 is without merit.

19. In view of the foregoing discourse, I make the following orders:

- a. **Notice of Motion dated 24<sup>th</sup> June 2021 is struck out.**
- b. **Notice of Motion dated 30<sup>th</sup> July 2021 is dismissed.**
- c. **No order as to costs of both applications.**

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 15<sup>TH</sup> DAY OF MARCH, 2022**

**D. O. OHUNGO**

**JUDGE**

Delivered in open court in the presence of:

Mr Manyoni holding brief for Ms Rauto for the plaintiff

No appearance for the defendant

Court Assistant: E. Juma



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