



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITUI**

**HIGH COURT CIVIL APPEAL NUMBER E38 OF 2021**

**ONESMUS KASAKI MBUTHI.....APPELLANT/APPLICANT**

**VERSUS**

**PAUL SAITI MUTHUI.....1<sup>ST</sup> RESPONDENT**

**FRANCIS MUSYOKA MUTHUI.....1<sup>ST</sup> RESPONDENT**

**RULING**

1. Before this court is a Notice of Motion dated 30<sup>th</sup> June 2021 brought under *Order 42 Rule 6 of Civil Procedure Rules* by ONESMUS KASAKI MBUTHI, the appellant/applicant herein, for the following order namely;

i. Spent

ii. Spent

iii. *That this Hon. Court be pleased to issue an order of stay of execution of the ruling delivered in Kitui Chief Magistrates Court Succession Cause No. 84 of 2016 by Hon. M. Kasera –Senior Principal Magistrate on 3<sup>rd</sup> June 2021 pending the hearing and determination of the appeal herein.*

2. The grounds are: -

*a) That the appellant/applicant was aggrieved by the ruling delivered on 3<sup>rd</sup> June 2021 by the said court vide Kitui Chief Magistrate’s Court Succession Cause No. 84 of 2016 and has filed the appeal herein.*

*b) That the respondents plan to demolish the appellant’s building.*

*c) That unless there is stay of execution of the judgement and ruling the success of the appellant in this appeal would be rendered nugatory besides the fact that the appellant may be rendered homeless.*

*d) That it is the best interest of justice to do grant a stay of execution.*

3. In his supporting affidavit sworn on 30<sup>th</sup> June 2021, the applicant has averred that he was granted 30 days stay by the trial court which has now lapsed. He has reiterated the grounds listed above adding that the respondents have been holding meetings planning how to carry out execution.

4. He avers that the respondents sought eviction orders against him which were granted.

5. He depones that he is ready and willing to abide by any conditions that maybe imposed for stay to be granted and that the respondent stands to suffer no prejudice.

6. In his written submissions dated 14<sup>th</sup> August, 2021 through his counsel M/s J.K. Mwalimu & Co. Advocates, the appellant contends that he has been in occupation of the parcel of land in dispute since he was born and that he has extensively developed it.

7. He contends that the dispute was resolved against him both in the lower court and vide an appeal in this court and that he was advised to

seek redress in the Environment and Land Court. He claims that he has not exhausted all avenues in seeking his rights and is asking for a chance to do so.

8. He argues that the respondents will not suffer any prejudice if stay is granted since they are cousins and have been living together for many years. He further contends that his appeal as well as the suit pending in the Environment and Land Court stands high chance of success.

9. The respondents have opposed this appeal through a replying of Francis Musyoka Muthui sworn on 6<sup>th</sup> July, 2021 and written submissions done through their learned counsel M/s D.M. Mutinda & Co. Advocate.

10. The respondents contend that the appeal filed herein is res judicata given that this court rendered itself vide **Kitui High Court Civil Appeal No. 36 of 2016**. They have exhibited the judgement of this court by Hon. Justice Mutende dated **15<sup>th</sup> February, 2018** as well as the lower court's decision by Hon. Kibiru dated **8<sup>th</sup> August 2016**.

11. According to the respondent, the case between the appellant and them has been determined and what remains is only execution.

12. They have expressed doubts about chances of success of the appeal herein pointing out that the matter was determined in 2018 and no appeal against the decision was filed.

13. They submit that under the provisions of **Order 42 Rule 6 of Civil Procedure Rules**, this court is required to look at the prospects of appeal in exercising its discretion. According to them the appeal herein stands no chance and that the same is frivolous only intended to buy time. They have relied on the decision of **RWW versus EKW [2019]eKLR** in urging this court to balance the interests of both the appellant and themselves arguing that they should not be deprived of fruits judgement.

14. They fault the applicant for abusing court process submitting that the execution is long overdue going by court's decision dated **30<sup>th</sup> June 2021, 15<sup>th</sup> February, 2018** and **3<sup>rd</sup> June, 2021**. According to them these orders have been not been challenged.

15. This court has considered this application and the response made. This is an application brought under the provisions of **Order 42 Rule 6 of the Civil Procedure Rules**. A stay of execution is a discretionary matter and is not automatic. **Order 42 Rule 6(1)** provides as follows: -

**“No appeal or 2<sup>nd</sup> appeal shall operate as a stay of execution or proceedings under a decree or Order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order a stay of execution of such decree or order and whether the application for such stay have been granted or refused by the court appealed from, the court to which the appeal is preferred shall be at liberty, on an application being made, to consider such application and to make such order thereon as may seem just to it.(emphasis added).”**

16. There is no doubt that the above provision that a court can only exercise its discretion and order stay of execution if “good cause” is shown. In my considered a good cause is shown if an applicant shows that he/she has an arguable appeal or show any other basis why the court should exercise its discretion and order a stay of execution.

The provision of **sub-rule (2) of Order 42 Rule 6** clearly states inter alia that no order of stay, shall be granted unless the court is satisfied that a substantial loss may result to the applicant and the application for stay has been made promptly.

17. This court is satisfied that this application was filed promptly as required by the cited rules above. However, there are issues raised by the respondents which in my considered view and without delving much on it at this stage for obvious reasons, have deflated the applicant's cause in this application. The reasons again without saying much are as follows: -

i. The court's decision made vide **Kitui Civil Appeal No. 36 of 2016** appears to have determined the issues raised by the appellant herein because he was a party in the said appeal. The appellant has a huge hurdle of Res judicata to surmount even before going into the merits of the appeal herein.

ii. Secondly, the appellant has pointed out that he has filed a suit in the **Environment and Land Court vide Machakos ELC Case No. 89 of 2019 (O.S)** and has cited the fact as one of the grounds why this should order a stay of execution. That fact in my view in itself ousts the jurisdiction of this court by dint of **Article 165(5) (b) of the Constitution** which provides as follows;

**“The High Court shall not have jurisdiction in respect of matters.....**

**(b) falling within the jurisdiction of the courts contemplated in Article 162 (2).”**

Environment and Land Court are contemplated under **Article 162 (2) of the Constitution** and this court must, as it should decline an invitation to consider issues pending in that court doing. That is an abuse of court process. If the applicant has sought injunctive reliefs in that court, then he should address his grievances there. He certainly cannot come to this court for stay citing that he has filed a suit in Environment and Land Court or that a suit is pending there. This court is seized with what is before it and as far as this court is concerned there is an appeal against orders of eviction issued on 13<sup>th</sup> January, 2021 by the lower court. That is what is pending and the same is within the armpit of the jurisdiction of this court.

From the foregoing, this court finds no merit in the application dated **30<sup>th</sup> June 2021**. The same is **dismissed with costs to the respondents**.

DATED, SIGNED AND DELIVERED AT KITUI THIS 17TH DAY OF FEBRUARY, 2022.

HON. JUSTICE R. K. LIMO

JUDGE