



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
(MILIMANI LAW COURTS)
ENVIRONMENT AND LAND COURT
ELC. APPEAL NO.87 OF 2015

SYENGO MBANGULA.....APPELLANT/APPLICANT

-VERSUS-

MUTUA SUNDI.....RESPONDENT

R U L I N G

Coming up for determination is the *Notice of Motion* application dated **10th November 2015**, brought by the **Appellant** herein **Syengo Mbangula**, seeking for various orders. The orders sought are:-

- 1) That stay of execution of the judgement/decree passed on 27th October 2015 be granted pending the hearing and disposal of the Appellant's appeal lodged at the High Court at Nairobi being ELC Appeal No.87 of 2015 (Syengo Mbangula..Vs..Mutua Sundi).**
- 2) That pending the hearing and determination of this application inter-parties this Honourable Court be pleased to issue an order of temporary injunction restraining the Respondent by himself, his agents, sons and daughters and his servants from entering and fencing, cutting trees, grazing or cultivating the property in disputed land and status quo be maintained until this Appeal is heard and finalized.**
- 3) That this Honourable Court be pleased to order the Principal Magistrate Kyuso Court in his PMCC No.12 of 2012, Mutua Sundi..Vs..Syengo Mbangula, to stop assessing/taxing the bill of costs or signing the decree before him until the application before this Honourable Court is heard and determined.**
- 4) The costs of this application are provided for.**

The application is premised on the grounds stated on the face of the application and on the **Supporting Affidavit** of **Syengo Mbangula**, the Appellant herein. The grounds in support of the application are:-

- i. The appellant/Applicant has filed the appeal mentioned in prayer 2 above and the same, now pending before the High Court, has overwhelming chances of success.**
- ii. If the orders of stay are not granted, the appeal will be rendered nugatory and/or irreparable loss and damage will be occasioned to the Appellant.**

iii. The Court has the powers to make orders sought, which are discretionary, in the interests of justice.

In his **Supporting Affidavit**, **Syengo Mbangula** averred that he was dissatisfied with the **Judgement** dated **27th October 2015**, issued by the **Principal Magistrate Court** at **Kyuso** in **PMCC No.12 of 2012** and has lodged an appeal before this Court. He further averred that the Respondent has commenced execution of the said Decree of the Court against the Applicant though the Appellant/Applicant filed the appeal expeditiously. He also averred that the Court should order Stay of Execution of the said Judgement until the appeal is heard and determined. It was his contention that unless the Respondent and his sons are restrained by an order of this Court, they will continue to trespass into the Appellant's/Applicant's disputed land and consequently, the Applicant will suffer irreparable loss. Further that the appeal will be rendered nugatory.

The application is opposed and the Respondent **Mutua Sundi**, swore his **Replying Affidavit** on **4th December 2015**, and averred that the Applicant has not satisfied the conditions necessary for grant of Order of Stay of Execution pending Appeal. He averred that the Applicant has not demonstrated irreparable loss which will be occasioned to him if the Orders sought are not granted. It was his contention that the Applicant is not in actual possession of the suit land and therefore there is no threat of eviction from the said land. It was his further contention that the Plaintiff has not demonstrated that he has an arguable appeal which will be rendered nugatory unless the Orders sought are granted. The Respondent also alleged that the application herein is frivolous, vexatious and an abuse of the process of this Court. He urged the Court to dismiss the instant application entirely with costs.

The application was canvassed by way of **Written Submissions**. The Appellant/Applicant filed his submissions on **16th March 2016**, and urged the Court to allow the instant application so that his Appeal may not be rendered nugatory. He further submitted that the Appeal has overwhelming chances of success and any slight form of execution would defeat it and deny the Appellant justice.

Further, the **Law Firm of Mathuva Mwalimu & Co. Advocates** for the Respondent filed their **Written Submissions** on **10th May 2016**, and urged the Court to dismiss the instant application with costs to the Respondent. Respondent submitted that the Appellant has failed to satisfy the Court that he has met the conditions stipulated in Order 42 Rule 6(2) of the Civil Procedure Rules on Stay of Execution.

This Court has now considered the instant **Notice of Motion** and the provisions of Order 42 Rule 6(2) which deals with the issue of Stay of Execution. The said order provides that:-

“No order of Stay of Execution shall be made unless,

- a) The Court is satisfied that substantial loss may result to the Applicant unless the Order is made and the application has been made without unreasonable delay and;**
- b) Such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him, has been given by the Applicant”**

The Court has considered the Court records and there is no doubt that the **Principal Magistrate's Court, Kyuso** entered Judgement in favour of the Respondent herein on **12th October 2015**. In the said Judgement, the Court granted a permanent injunction restraining the Defendant (the Appellant herein) from entering or in any manner remaining on the suit land. It is also evident that the Appellant was dissatisfied with the said Judgement and he consequently lodged an Appeal as is evident from the **Memorandum of Appeal** filed in Court on **10th November 2015**. The Appellant/Applicant has alleged that the Respondent herein has attempted to execute the Judgement of the lower court even though the Appellant has filed an Appeal. It was his contention that if the stay of execution is not granted as prayed, the Appeal lodged by himself might be rendered nugatory.

As I consider whether to grant the orders sought or not, this Court will have to establish whether the

grounds for grant of stay of execution have been satisfied. The Court will be persuaded by the findings in case of **Kenya Commercial Bank Ltd..Vs..Sun City Properties Ltd & 50 Others (2012) eKLR**, where the Court held that:-

“In an application for stay, there are always two competing interests that must be considered. These are that a successful litigant should not be denied the fruits of his Judgement and that an unsuccessful litigant exercising his undoubtful right of appeal should be safeguarded from his appeal being rendered nugatory. These two competing interests should be balanced.”

The Court herein will be guided by the above findings as it strive to balance the competing interests herein.

First, the Applicant must satisfy the Court that if the order sought herein is not granted, substantial loss may result. The Appellant/Applicant has alleged that he has lived on the suit land all his life as he inherited the same from his father who had in turn inherited the same from his father(Appellant’s grandfather). Now with the findings of the Court ***in PMCC No.12 of 2015***, the Appellant is supposed to move out of the suit land. Further that if Respondent is allowed to execute the decree of the Court, that would mean evicting the Appellant and his family. The said eviction would amount to substantial loss on the part of the Appellant/Applicant.

The Respondent has alleged that the Appellant was never in possession and he would therefore not suffer any harm. However, it is evident that the Lower Court did direct the Appellant not to remain on the suit land in any manner whatsoever. Indeed if the decree issued in ***PMCC No.12 of 2015*** is executed, the Appellant will have to move out of the suit land if he is in occupation of the same. The fact that the Appellant will move out of the suit land before the Appeal is heard and determined means that he will suffer substantial loss unless a Stay of Execution is granted. The Court in the case of **George Kihara Mbiyu..Vs..Sifa International Ltd & Others, Nairobi Civil Application No.41 of 2002**, held that:-

“For an applicant to succeed in an application for stay of execution pending appeal, he must show first that he has an arguable appeal and secondly that unless he is granted a stay, the intended appeal will be rendered nugatory.”

Further in the case of **Delphis Bank Ltd..Vs..Caneland Ltd & Others, Kisumu HCCC No.2000 of 1998**, the court also held that:-

“The only criteria which apply to an application for stay are whether substantial loss may result to the Applicant unless the order is made and whether the application has been made without unreasonable delay and security.”

Considering the nature of the Orders issued by the ***Principal Magistrate Court Kyuso***, on ***12th October 2015***, the Court finds that if the Orders sought are not granted, the Appellant/Applicant stands to suffer substantial loss in case he is evicted from the suit land and his house demolished in execution of the Decree of the Lower Court.

The ***second condition*** to consider is whether the application was made without reasonable delay. The Court has seen the Judgement that was issued at the Lower Court and has noted that the same was issued on ***12th October 2015***. This instant application was filed on ***11th November 2015***. This application was filed within duration of ***30days*** and thus the Court finds that there was no reasonable delay. The instant application was filed within reasonable time and therefore the Applicant/Appellant has fulfilled that second condition.

The ***3rd condition*** is on the order of security as the Court may deem fit. The Decree issued herein is not a monetary decree but a decree in rem. The Appellant/Applicant alleges that he has been living on the suit land since childhood. It is evident that grant of stay of execution is an exercise of judicial discretion which has to be exercised judiciously. The Court has also to consider the circumstances of each case. This Court finds that considering the circumstances of this case, it would not be just and proper to order

the Appellant/Applicant herein to deposit any security as a condition for grant of stay of execution. This Court is guided by the findings in the case of Cotecna Inspection SA..Vs..Herns Group Trading Co. Ltd, Civil appeal No.303 of 2000, where the Court of Appeal held that:-

“It is the discretion of the court to grant or refuse stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its discretion in a way so as not to prevent the appeal if successful, from being nugatory”.

Being guided by the above findings, the Court finds and holds that in the circumstances of this case, there is no need of ordering for furnishing of any security by the Appellant/Applicant herein.

Having now carefully considered the instant **Notice of Motion** dated **10th November 2015**, the Written Submissions and the relevant provisions of law, the Court finds it merited and the same is allowed entirely in terms of **prayers no.2 and 5**.

Further the court directs that *status quo* be maintained pending the hearing and determination of the appeal herein. The Court has noted that the suit land falls within the jurisdiction of Machakos ELC, Consequently this matter is transferred to Machakos ELC forthwith for hearing and determination of the Appeal herein.

Costs of the application shall be in the cause.

It is so ordered.

Dated, signed and delivered at NAIROBI this 4th day of August 2017.

L. GACHERU

JUDGE

4/8/2017

In the presence of

No appearance for Appellant/Applicant

No appearance for Respondent

Court clerk - Phillis

L. GACHERU

JUDGE

4/8/2017