



NO. 8 /2014

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

ELC APPEAL NO. 81 OF 2014

DANIEL MAGONDU MUTEGIAPPELLANT/APPLICANT

VERSUS

JOSEPH MUGAO MAKUNYIRESPONDENT

(Being an appeal from the original Judgment in Kyuso Principal Magistrate's Court Civil Case No. 1 of 2010 by

Hon. E. M. Mutunga R.M. on 07/08/2014)

RULING

1. The Appellant is the Applicant in a Motion dated 8th September 2014, in which he seeks orders for stay of execution of the Kyuso PMCC NO. 1/2010 judgment delivered on 7th August 2014.
2. The application is based on the grounds on the face of the Motion and the Supporting Affidavit sworn on the 4th September 2014 by **Daniel Magondu Mutegi**.
3. The application is opposed by the Respondent vide his Replying Affidavit sworn on the 25th September 2014 and the 2 annexures.
4. The Applicant's case is that he was sued over trespass inter alia over unsurveyed land subject herein.
5. The matter was heard and the court at Kyuso found for the Plaintiff/Respondent herein and allowed Plaintiff to have quiet possession of the suit land plus cost and interest.
6. Being aggrieved by the aforesaid decision, the Appellant/ Applicant appealed herein in a Memorandum of Appeal dated 18th August 2014.
7. He subsequently filed the Motion dated 8th July 2014 subject of the ruling. The Applicant contends that unless the stay sought herein is granted, he will be evicted and execution be levied for the costs awarded in the trial court.

He believes the appeal has good chances of success.

8. The respondent on his part has opposed the application and contends that the Applicant is not honest as he is not in occupation in the disputed land as he lives far away at around 15km. He avers that it is him who is in occupation of the land subject herein since his birth in 1959, he cultivates and has permanent home and grazes therein.
9. He annexes a bill of cost pending in the lower court which is yet to be taxed, a Motion dated 20th

August 2014 for stay pending in the lower court and his reply to the said Motion. He contends that the Applicant is abusing court process and seeks the Applicant to be ordered to deposit decretal amount (presumably the amount in costs to be assessed) in court.

10. The issues arising hereof are;

- i. Whether the material before the court discloses a case for stay of the execution?
- ii. Should security be deposited as a condition for stay pending appeal?

11. **Order 42 Rule 6(2) Civil Procedure Rules** sets out the conditions for stay pending appeal and what is to be demonstrated, namely:-

1. Substantial loss may result unless the order is granted.
2. Security to be furnished.

12. This is a land matter where it emerges from the rivaling averment that the Applicant is in one way or another in possession of the subject matter. The Respondent avers that the Applicant is not in occupation yet in his claim and judgment he sought and got orders for him to take possession.

13. I hold that if execution is levied in giving the possession to the Respondent on the part occupied by the Applicant, he will suffer substantial loss. The Respondent told court during the hearing that the Applicant is occupying about 4 acres of the suit property.

14. The court will therefore, allow the Applicant to continue being in possession on the subject portion of land he is holding.

15. On security, I find that the bill of costs is yet to be assessed. I direct that the same be assessed by the trial court and then the Applicant can seek to pay the same as the trial court may direct. If a dispute on costs arises as to assessment and payment, the Applicant can always apply to this court.

DATED, SIGNED and DELIVERED at MACHAKOS this 31ST day of OCTOBER, 2014.

CHARLES KARIUKI

JUDGE