



IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO 4 OF 2014

PRISCA MUKETHE MUIU.....APPELLANT/APPLICANT

VERSUS

CHARLES MUIU

SAMMY MUIU

RAPHAEL MUIU

PRISCA YULA MUIU..... RESPONDENTS

RULING

The application for consideration is the Notice of Motion dated 11th February 2014 brought under Order 42 Rule 6(1) and (2) Order 51 Rule 1 of the Civil Procedure Rules and section 3A of the Civil Procedure Act seeking for orders that there be a stay of execution of the ruling delivered on 16th January 2014 in SRMCC No 79 of 2013 Yatta pending the hearing and determination of High Court Appeal No.5 of 2014 at Machakos.

This application is premised on the grounds stated on the face of the application and the supporting affidavit of **Prisca Mukethe Muiu** who stated that she brought a claim for land against the Respondents who had secretly registered themselves as the owners of the family land at Yatta-SRMCC No 79 of 2014 and she made an application seeking to injunct the respondents ,their servants and/or agents from evicting or interfering with the suit property and at the same time the Respondents filed an application seeking to evict her and a ruling was delivered on 16th January 2014. That the ruling on injunction dismissed and the Respondents application was dated 21st August 2013 for eviction was allowed and orders that she be evicted from the suit property granted without the suit being heard and determined.

Being dissatisfied with the ruling she instructed her advocates to lodge an appeal and she was also granted 30 days stay of execution which days have already expired. She now makes this application seeking to stay the execution pending the hearing and determination of the appeal. She avers that the appeal has high chances of success and the same will be rendered nugatory if the orders sought are not granted since the effect of the ruling was to determine the entire case without the court hearing the merits and demerits of the suit. She also stated that the application has been brought without any delay and to ensure that status quo is maintained before the determination of the appeal and that in the interest of justice the orders sought be granted and the status quo should be preserved until this application is heard and determined.

This application is opposed. The 4th Respondent **Priscilla Yula Muiu** swore her replying affidavit on 5th March 2014 stating that the applicant was her daughter who had been married in 1974 but later divorced then moved to Dubai and later Brazil where she lived and worked till 2004 when she came back to Kenya where she established her home in Mavoloni and in South C, Miller Estate Nairobi. She added that in December 2002 the applicant visited the Respondent in Yatta where the subject matter is situated and she was welcomed and later the applicant brought her children to the suit property. The applicant and her children later became unbearable in their character and attitude which prompted the deponent to call the 2nd and 3rd Respondents to talk to the applicant but even so the applicant could not hear their counsel so the 2nd and 3rd Respondent relocated the deponent to Nairobi. That the applicant later obtained a court order barring anybody from dealing with land parcels Kithimani A plots No.173,174 and 175. That the effect of the court order was that the Respondents were barred from cultivating the aforesaid land thus condemning them to destitution as they had relied on the said land for cultivation for 60 years. The court order has also barred the family from making any repairs on a leaking roof of the house they lived in. She added that the suit property was subdivided in accordance with Kamba custom in 1974 and since then each of the sons have taken care of their parcels including planting trees and conserving the soil and that none of them has attempted to dispose, lease or deal with the land so as to remove it from the family for the last 65 years. She believes that the applicant has not satisfied the threshold for granting of orders of stay as no substantial loss will be suffered by her for the reasons that she had never been in the suit land for the last 40 years which the Respondents have zealously taken care of and that no piece of land had ever been sold or alienated to date.

Parties filed their respective written submissions in advancing their cases. The applicant filed her submissions on 4th April 2014 stating that she has high chances of success therefore the prayer for stay of execution should be allowed. She also added that the law does not allow a party to be condemned unheard and that the orders that were made at the interlocutory stage should not have the effects of determining the entire suit as was in this case. To advance her case she relied on the case of **Hamadi Bakari Kalamu-vs- Joseph Mutua Makau HCC No 515 of 2011** where the court held that the effect of allowing a prohibitory order that had been pleaded in a plaint would summarily dispose or evict the defendant. The applicant also submitted that outcome of the order by the lower court amounted to evicting her before the suit was heard and determined. She submitted that she filed her application without delay and that she would suffer irreparable harm if no stay is granted since she lives on the land which was not shared to her when the adjudication began in the area.

The Respondent filed her submissions on 8th April 2014 where she submitted that the applicant had not demonstrated that she would suffer substantial loss as no property has been wasted, that she has not been on the land for the last 40 years. The respondent also submitted that the applicant had not offered any security for costs to demonstrate that she is willing to abide by the law therefore the application should be dismissed.

I have duly considered counsels' submissions and the authorities relied upon. The grant of stay under Order 42 Rule 6(1) of the Civil Procedure Rules is a discretionary remedy. Order 42 Rule 6(2) of the same Rules sets out the circumstances when the grant of stay of execution will be declined notwithstanding the latitude given to court to exercise its discretion under Rule 6(1). In other words the exercise of discretion under Rule (1) is subject to Rule 6(2) which provides as follows:

"No order for stay of execution shall be made under sub rule (1) unless-

- a. the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay;***
- b. such security as the court orders for the due performance of the decree or order as may ultimately be binding on him has been given by the applicant".***

This Rule is to the effect that, over and above the discretion which the court enjoys to grant or refuse stay, it must be certain before it grants any stay that firstly, the applicant/appellant has satisfied the court that

she will suffer substantial loss if the order for stay is not made, secondly, she has demonstrated that her application has been made without unreasonable delay and thirdly, she has given security for satisfaction or performance of the decree in the event her appeal fails.

The Court has power in its discretion to grant stay of execution where it appears to be equitable so to do with a view to temporarily preserving the status quo. It would be unwise in some circumstances to defeat a statutory right of appeal by for example evicting the appellant from the suit property so that the appeal is rendered nugatory.

Looking at this case the applicant has demonstrated that she has an arguable appeal. The applicant faces a threat of eviction from her parents' home. Even though the Respondents claim that she had been married elsewhere and that she had been divorced, the fact is that the applicant felt discriminated upon in the sharing out of her father's estate which the trial court should have given her a chance to be heard on merit. The Learned Magistrate found that the applicant should be evicted from the suit property without giving her a fair hearing by not getting onto the merits of the case and that the subsequent decision to kick her out of her parents' home was unreasonable and unjustifiable. The magistrate in his ruling held that:-

“The defendant need not have a counter claimed or filed a separate suit to be entitled to the orders sought given that the suit is the same and involves the same parties”.

The practice in filing suits and defending them is that parties are required by law to file the required pleadings. It was wrong for the learned Magistrate to have allowed the Respondents application for eviction when there was no substantive suit filed against the appellant .That alone is a miscarriage of justice.

The appellant has shown that she would suffer irreparable loss since she resides in the suit property. She will be rendered destitute if driven out of her parent's property.

The circumstances of this case are that the parties herein are a family. Asking the applicant to furnish security of costs would negate the applicant's right to justice as the suit property cannot be liquidated. Further the Respondents have not stated any prejudice they would suffer if security of costs is not provided by the applicant. It is therefore my considered opinion that as long as the applicant has brought her suit timeously and has shown this court that she would suffer substantial loss by being rendered destitute the court will not hesitate to grant the application for stay.

I will allow the applicant application dated 11th February 2014 in terms of prayer No 3. Costs shall be in the cause.

Dated, signed and delivered this **22nd** day of **October, 2014**

L.GACHERU

JUDGE

In the Presence of:-

Mr Masika for the Applicant/Appellant

None attendance for the Respondent

Kamau “ Court Clerk

L. GACHERU

JUDGE

