



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**Civil Case No. 110 Of 2011**

**MUSYOKA MUTIE MAKAU.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**PETER MUTIE MAKAU .....2<sup>ND</sup> DEFENDANT/APPLICANT**

**VERSUS**

**MUSYOKA MUTIE MAKAU .....PLAINITFF/RESPONDENT**

**RULING**

1. The application dated 14<sup>th</sup> November, 2012 is brought pursuant to provisions of Order 42 rule 6, Order 51 rule 1 of the Civil Procedure Rules. Section 1A, 1B & 3A of the Civil Procedure Act and any other enabling provisions of the law
2. It seeks an order of stay of execution of the ruling dated 29<sup>th</sup> May, 2012, any decree and/or subsequent orders thereto pending hearing and determination of the intended appeal.
3. The application is premised on grounds that;-
  - i. The applicants were pursuing an appeal against the ruling of Hon Justice Dulu delivered on the 29<sup>th</sup> May 2012.
  - ii. It is in the interest of justice that orders sought be granted.
  - iii. The applicants will suffer substantial loss/damage if evicted from the suit land and the intended appeal shall be rendered nugatory.
  - iv. The appeal is arguable and has a high chance of success; the application has been brought without undue delay and the applicants are willing to deposit security.
4. The application is supported by an affidavit deposed by **Munyao Mutie** the 1<sup>st</sup> Applicant who also had authority from the 2<sup>nd</sup> Applicant. He reiterated what was stated in the grounds in the body of the application.
5. In response the Respondent, **Musyoka Mutie Makau** swore an affidavit dated 29<sup>th</sup> January, 2013 opposing the application, he stated that the applicants did not appeal against the decree/judgment of the court, therefore the application is misguided and ought to be dismissed in limine. The applicant's application having been premised on a Notice of Appeal filed on 4<sup>th</sup> June, 2012 in respect of a ruling by the court against the defendants (applicants) through the application dated 8<sup>th</sup> August, 2011 which was intended to set aside an *ex parte* court order had been overtaken by events in view of the court's judgment of 7<sup>th</sup> November, 2012.
6. In the absence of a Notice of Appeal against the court's judgment of 7<sup>th</sup> November, 2012 the application could not be sustained.
7. Further, he stated that the applicants are guilty of laches. They have occupied the land in issue for over eleven (11) years, should the court consider granting the orders sought they should deposit

- security.
8. At the hearing learned counsel for the applicant **Mr. Kituku** submitted that the applicants were pursuing an appeal against the ruling of the Hon Justice Dulu dated 29<sup>th</sup> May, 2012, implementation of the order of the court would make the defendant suffer substantial loss as they will be evicted from the suit land where their permanent homes are situated. He argued further, that the defendants were denied a chance to defend the suit/file a defence hence their pursuit for appeal to ensure the matter is disposed of on merit.
  9. In a reply thereto learned counsel for the Respondents **Mr. Ngwele**, opposing the application submitted that the ruling was delivered on the 29<sup>th</sup> May, 2011. The application was filed on the 15<sup>th</sup> November, 2012. In the meantime the case was formally proved on 4<sup>th</sup> July, 2012. The applicant did not participate in the case. After the judgment was delivered; on being served with a notice of judgment and decree dated 8<sup>th</sup> November 2012 the applicants filed the application for stay but did not appeal against the judgment. He called upon the court to find that the application was being used as a delaying tactic.
  10. In this case the applicants are to be evicted from a parcel of land they have been in occupation following a decree of this court. In a plaint dated 10<sup>th</sup> May, 2011 the Plaintiff/Respondent sought a mandatory injunction to be issued against the applicant to vacate the suit land or be evicted therefrom. The applicant entered appearance in the matter but failed to file a defence within the stipulated time. Consequently an interlocutory judgment was entered on the 6/7/2011. On the 1/8/2011 a date was fixed for formal proof. An application was filed by the applicants to set aside the interlocutory judgment on the 8<sup>th</sup> August, 2011. The main ground relied on was that the file could not be traced at the registry to enable the applicants file a defence.
  11. The Honourable Justice Dulu heard the application and dismissed it on 29<sup>th</sup> May, 2012. At the time of delivering of the ruling the applicants were not represented. A date for formal proof was fixed.
  12. Six (6) days thereafter on the 4<sup>th</sup> June, 2012 a Notice of Appeal was lodged by the applicants at the High Court Registry to the effect that they were appealing against the ruling of Hon. Justice Dulu. There is a letter attached to the application requesting for proceedings but it has no stamp impression to show if at all it was received at the registry.
  13. In the meantime, the matter proceeded to formal proof. A judgment thereof was delivered on the 7<sup>th</sup> November, 2012. A decree to that effect was consequently issued.
  14. This is what prompted the applicants to file the current application seeking stay of execution of the ruling pending determination of the application and intended appeal.
  15. At the 1<sup>st</sup> instance counsel for the respondent instead of responding to the application, he filed an application dated 18<sup>th</sup> December, 2012 seeking for orders that the officer commanding Machakos Police Station be ordered to assist him in enforcing the decree of the court dated 9<sup>th</sup> November, 2012.
  16. This court has the power to order stay of execution sought if there is sufficient cause (*see Order 42 rule 6(1) of the Civil Procedures Rules*). Such an order can only be granted if ;-
    - a. The court is satisfied that substantial loss may result and if the application is made without undue delay- (see Order 42 (6) (2) (a) of the Civil Procedures Rules )
  17. Issues to be considered therefore are:-
    - a. Was there unreasonable delay in bringing the applications.
    - b. Will substantial loss be incurred by the applicants?
  18. The Ruling dismissing the application to set aside the interlocutory judgment was delivered on 29<sup>th</sup> May, 2012. Six (6) days later, on the 4<sup>th</sup> June, 2012 the applicants filed a Notice of Appeal.
  19. It is clear per the record that the applicants were desirous to appeal against the ruling after they were dissatisfied with the order that denied them the opportunity to be heard. There was no unreasonable delay on the part of the applicant in making the application. The question of delay for a period of 12 days was addressed in the case of Joseph **Simiyu Mukenya versus Agnes**

*Naliaka Cheseto [2012] eKLR* where the court found that a period of 12 days could not be deemed to be undue delay. In the case of *Standard Chartered Bank Ltd versus Florence Mueni Kyalo [2000] eKLR* the Court of Appeal stated that the delay of 32 days in taking out a motion is long but not inordinate.

20. In the instant case duration of six (6) days taken is evidence of the appellant having been keen to appeal against the ruling. The case of *Rhoda Mukima versus John Abuoga [1987] KLR, 39* addressed the issue of substantial loss. The court of Appeal stated that it was laid down in *MM Butt versus the Rent Restriction Tribunal, Civil Application No. Nai 6 of 1979, (following Wilson V Church (No.2) [1879] 12 Ch. 454 at P. 448)* that in the case of a party appealing, exercising his undoubted right of appeal, the court ought to see that the appeal is not rendered nugatory. It should preserve the *status quo* until the appeal is heard.

21. The court went on to state thus:-

***“...Substantial loss is the cornerstone of both jurisdictions that is what has to be prevented because such loss would render the appeal nugatory. Therefore it is necessary to preserve the status quo.”***

22. The matter in dispute herein is land which is currently in occupation of the applicants and allegedly belongs to the respondents. Loss of the said land will definitely be substantial. If the decree is executed it will mean the applicant will be evicted from the land. The intended appeal will therefore be rendered nugatory. If the court of appeal will grant orders favourable to the applicants, the respondents may not be able to fully and satisfactorily compensate the applicant.

23. In the case of *Ngotho Commercial Agencies Ltd vs George Wanjuki Gethi [2006] eKLR the Hon Justice Waki at Pg 5* stated thus:

***“The subject matter in issue is immovable property... on the facts the applicant occupies the property with his family. After the court’s earlier ruling there is nothing to prevent the respondent from evicting the applicants from the property if indeed the appeal succeeds on the main prayer, the property may well have disappeared irretrievably although monetary compensation may be available. The respondent may not be capable of restitution of the same property. In the circumstances, substantial loss would ensue.”***

24. The Applicants herein lodged a Notice of Appeal with the court which was an intimation of their desire to appeal against the ruling. In the circumstances, I do exercise my discretion by granting orders sought in the application, namely stay of the ruling and subsequent orders obtained pending hearing and determination of the intended appeal.

25. The costs of the application shall be in the appeal.

**DATED, SIGNED and DELIVERED at MACHAKOS this 14<sup>th</sup> day of JUNE 2013.**

**L.N. MUTENDE**

**JUDGE**