



CIVIL PRACTICE AND PROCEDURE

- *Stay pending appeal.*
- *A party to be affected by an appeal should be made a party in such an appeal.*

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HIGH COURT CIVIL APPEAL CASE NO. 21 OF 2011

**MARIA NDURU M'TURUCHIU (Sued as the legal representative
of the estate of)**

STANLEY M'TURUCHIU M'MWENDA.....APPELLANT

VERSUS

JOHN KIRIMI M'MWENDA.....DEFENDANT

RULING

The appellant has filed a Memorandum of Appeal against the judgment and decree of CMCC Court Meru of 18th January 2011. Pending that appeal, the appellant has filed a Notice of Motion dated 16th February 2011. By that application, the appellant seeks stay of execution of the decree in Meru CMCC No. 466 of 1994 pending the hearing and determination of this appeal. By her supporting affidavit, the appellant stated that Stanley M'Turuchiu M'Mwenda deceased was her husband and was the registered owner of LR No. *Abothuguchi/Gaitu/133*. She is the personal representative of his estate. That the lower court by its judgment of 18th January 2011 awarded the respondent half share of the suit property and another person who was not a party in that case, that is, Agnes Kanyamu 2.05 acres. The appellant stated that she, together with her extended family are in possession of the suit property. She was aggrieved by the judgment of the lower court and hence filed this present appeal. She stated that if stay is not granted, she would suffer prejudice. The application was opposed by the respondent. The respondent in his replying affidavit stated that he was in occupation of half of the suit property before he was violently chased away by the appellant. As a result of that eviction, he was reduced to a pauper because the appellant had denied him his right to earn a living. He denied that the appellant and her family were in occupation of the suit property and stated that after she chased him away, she rented part of the land to some people and had sold two acres to a person he named as William. The respondent stated that the appellant by her present application was merely intending to prolong his suffering. He therefore prayed that he be allowed to begin

to use the land as per the judgment of the lower court. The appellant swore a further affidavit. She stated that she is in occupation of the suit property with her family members and stated that William Mutuiri was also her family member. The family members whom she named were fully utilizing the suit property. Order 42 rule 6 (2) of the Civil Procedure Rules 2010 provides as follows:-

Order 46 rule 6 (2)

(2) No order for stay of execution shall be made under subrule (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; 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.”

Those are the conditions that the appellant should fulfill in order to succeed in her application for stay pending appeal. It is not denied by the respondent that the appellant and her family members are in occupation of the suit property to his exclusion. With that in mind, and balancing the interests of the appellant as against those of the respondent I find that the appellant will indeed suffer substantial loss if stay of execution is not granted. Not only will the appellant suffer but her family members who are utilizing the land will also suffer. I have also considered the appeal and I find that it is not without merit because the lower court gave land to one Agnes Kanyamu yet the said Agnes from the documents before me was not a party in that action. I will order the said Agnes Kanyamu to be made a party in this action since the appeal which may be considered will affect the orders made in her favour by the lower court. I therefore make the following orders:-

- 1. An order is hereby issued staying the execution of the decree and the subsequent orders in CMCC Meru No. 466 of 1994 pending the hearing and the determination of this appeal.***
- 2. The appellant is ordered to join as a 2nd respondent Agnes Kanyamu within 21 days from the date hereof and to do so the appellant shall file an amended memorandum of appeal reflecting the said proposed 2nd respondent.***
- 3. On filing the amended memorandum of appeal, the appellant shall serve the amended memorandum of appeal on both the respondents within 15 days of such amendment.***
- 4. The costs of the Notice of Motion dated 16th February 2011 shall abide with the outcome of this appeal.***

Judgment by:-

**MARY KASANGO
JUDGE**

Dated, signed and delivered at Meru this 21st day of July 2011.

J. LESIIT
JUDGE