

REPUBLIC OF KENYA

IN THE HIGH COURT

AT MERU

Civil Appeal 43 of 2009

MIRIGAMIERU FARMERS CO-OP. SOCIETY ... APPELLANT

VERSUS

JAMES MUTHURI MUNGANIA..... 2ND RESPONDENT

RULING

What is for consideration by this court in this ruling is the notice of motion dated 5th May 2009 brought under Order XLI Rule 4 (1), (2), (4), (5) and (6) of the Civil Procedure Rules. By that application, the appellant seeks stay of execution of the lower court judgment issued on 21st April 2009. For the purpose of the application, the court will only consider the appellant's affidavit annexed to the application and sworn on 3rd May 2009. I say this because the appellant without the leave of the court filed a further affidavit which is undated but was filed in court on 25th May 2009. During submissions before court counsel for the respondent requested the court to expunge that affidavit for having being filed without leave and when counsel for the appellant arose to respond to those submissions, he did not seek the leave of the court to admit that affidavit. For that reason, it shall not be considered in this ruling. The affidavit therefore which is properly before court dated 3rd May 2009 show that the appellant's application is premised on the basis that the judgment of the lower court being Meru CMCC No. 609 of 1997 was to the effect that the appellant was in occupation of land belonging to the respondent. The appellant chairman deponed that the land which was the subject of the lower court's adjudication is where the society has its offices and coffee drying sheds. The appellant's chairman deponed that the respondent was in the process of invading that land with a view to fence it to the detriment on the appellant. The appellant further stated that if the respondent was not stopped it would suffer irreparable damage. The respondent in the replying affidavit dated 11th May 2009 gave the background of the lower court case. He stated that his land had been illegally taken by the appellant. That the lower court found the land belonged to him. This was after 2 surveys were carried out and submitted before court. He annexed the survey that were exhibited before the lower court to his affidavit in reply. Further, the respondent deponed that the land which was found to belong to him had no building nor coffee drying shed as stated by the appellant. He stated that the appellant offices and their coffee drying sheds fell within land parcel Ntima/igoki/1783 which land was presently occupied by the appellant. He further stated that that land belonged to the County Council of Meru but reserved for Kiambogo factory. He in that regard annexed the green card to prove the same. He further stated that the appellant did not file a defence in the lower court. The appellant in order to succeed in its present application needed to satisfy 3 distinct grounds. The first ground that the appellant needed to satisfy was to show that if stay was not granted substantial loss may result. The 2nd is that the appellant needed to file the application without unreasonable delay. Lastly, the appellant needed to provide security for due performance of the decree of the lower court. The appellant filed their

application on 5th May 2009. The judgment of the lower court was on 21st April 2009. In my view, the application was filed without unreasonable delay. I however find that the appellant failed to show that it would suffer substantial loss if stay of execution was not granted. This is because the respondent replying affidavit remained unchallenged to the effect that the appellant did not have any structures on the particular portion of land which was found to belong to the respondent. Further, even the land upon which the appellants occupy it was shown by the respondent to be land belonging to the County Council of Meru. For that reason, they failed to show they would suffer substantial loss if stay was not granted. On likelihood of the success of the appeal on a *prima facie* basis, I find that the same does not have high chances of success because the respondent annexed two surveys one carried out by the District Surveyor Meru Central District and the other one by a private surveyor. That evidence appears to have not been contradicted by the appellant. On the issue of security, there was none offered by the appellant. On my part, I will not order security for I am satisfied that there is no likelihood of a loss being incurred by the appellant. The application dated 5th of May is not merited and the same is hereby dismissed with costs to the appellant.

Dated and delivered at Meru this 26th day of November 2009.

MARY KASANGO

JUDGE