



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU**

Civil Case 55 of 1995

BETWEEN

JOSEPH KABURU PLAINTIFF/APPLICANT

VERSUS

M'ITHINJI M'MBURUGU DEFENDANT/RESPONDENT

RULING OF THE COURT

The application before me is a Notice of Motion dated 4.2.2005 brought under Order 41 Rule 4 of the Civil procedure Rules (CPR). The application seeks the following orders:-

1. That the Honourable Court be pleased to make an order for stay of all proceedings and execution of orders of the counter-claim in this suit until the plaintiff/applicant's intended appeal to the Court of Appeal is heard and finally determined.
2. That in particular this court do stay its orders granted to the defendant on counterclaim until the appeal is filed and determined.
3. That the costs of this application do abide the intended appeal.

The application is premised on three grounds on the face thereof namely:-

- (a) That the plaintiff/applicant has already filed a "Notice of Appeal" with an intention of filing an appeal to the Court of Appeal;
- (b) That if at all the defendant/respondent is allowed to execute his counterclaim, the plaintiff/applicant's appeal will be rendered worthless and nugatory and ;
- (c) That the plaintiff/applicant will suffer immensely if at all the defendant/respondent will be allowed to execute his counter-claim orders by way of evicting the plaintiff.

The application is also supported by an affidavit made and sworn by the plaintiff/applicant on 4.2.2005 in which he has deponed that the defendant/respondent who is his father, has threatened to execute the counter-claim orders by evicting him from land title No. Nkuene/Ukuu/445 out of which he (applicant) had occupied two acres and extensively developed for the last 30 years. He has deponed further that he believes his intended appeal has chances of success. Further that if the orders sought are not granted, the applicant will suffer immense and irreparable damage.

The application is opposed. The defendant/respondent filed his Relying Affidavit in which he has

deponed that the plaintiff/applicant is not entitled to the orders sought because any alleged developments put up by the plaintiff/applicant on land reference Nkuene/Ukuu/445 were so put up in total disregard of existing injunction orders restraining him from effecting such developments. The respondent attached to his affidavit an annexure "MMI" being a copy of the ruling in Meru CMCC No. 214 of 1990 in which the plaintiff/applicant was committed to civil jail for six months for contempt of the court's injunctive orders barring him from building on parcel Nkuene/Ukuu/445.

This application arises out of the judgment of this honourable court given by myself on 19.1.2005, dismissing the plaintiff's/applicant's suit against the defendant/respondent and allowing the defendant's/respondent's counter-claim to evict the plaintiff/applicant from parcel Nkuene/Ukuu/445. The plaintiff/applicant was also given the opportunity to peaceably move out of parcel No. Nkuene/Ukuu/445 and to settle in Nkuene/Ukuu/53, a parcel that the defendant/respondent has set apart and allocated to the plaintiff/applicant.

The only issue for determination is whether the plaintiff/applicant has satisfied the conditions of Order 41 Rule 4 for the granting of stay. Order 41 Rule 4(2) of the CPR provides as follows:-

"2. 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 such decree or order as may ultimately be binding on him has been given by the appellant.

I have carefully considered the submissions by counsel for both applicant and respondent. I have also carefully considered the pleadings before me. I am not persuaded that the applicant is entitled to the orders sought. In his submissions to the court Mr. Kioga for the applicant submitted that there is already a threat to dispose of the subject matter and that if the orders sought are not granted, the applicant stands to suffer. He also submitted that the Notice of Appeal (a copy of which was not annexed to the affidavit by the applicant) should be treated as a filing of an appeal. Be that as it may, the court finds that the applicant has parcel Number Nkuene/Ukuu/53 on which he can settle if he is evicted from parcel No. Nkuene/Ukuu/445. The defendant/respondent gave evidence on oath that Nkuene/Ukuu/53 is for the applicant and the applicant only. In effect therefore I do not find that the applicant has proved to this court what loss he is likely to suffer if the he seeks order is not granted. See the case of **Shaban V Nairobi City Council (1982 – 88) IKAR 681.**

In any event, the plaintiff/applicant has not annexed to the application a copy of the memorandum of appeal from which this court could say whether or not the said intended appeal has any chances of success. I have full confidence in judgment I delivered on 19.1.2005 although the plaintiff/applicant is entitled to appeal against it. It is also clear from the pleadings on record, and particularly from annexure "MMI" to the defendant's/respondent's affidavit that if any loss should occur when the applicant is Joseph Kaburu v M'Ithinji M'Mburugu [2005] eKLR evicted from Nkuene/Ukuu/445, such loss would fall squarely at the applicant's own feet as being the author of his own misfortune. The applicant has not come to court with clean hands. He does not therefore deserve the exercise of this court's discretion in his favour.

In the result, I find no merit in the applicant's application dated 4.2.2005. The same is accordingly dismissed with costs to the defendant/respondent.

It is so ordered.

Dated and delivered at Meru this 10th day of May 2005.

RUTH N. SITATI

JUDGE

10.5.2005