



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 72 OF 2008

ALEX KYALO MUTISO.....1ST PLAINTIFF

FREDRICK MUTUA MUTISO (Suing as the Legal Representative of the
Estate of MUTISO MUMO KALA.....2ND PLAINTIFF

VERSUS

NDONYE MUSUU.....1ST DEFENDANT

SAMMY NDUNDA.....2ND DEFENDANT

MUMBUA MWILU.....3RD DEFENDANT

MUSUU MUASYA.....4TH DEFENDANT

KIMUYU MUASYA.....5TH DEFENDANT

RULING

1. In the Notice of Motion dated 15th August, 2019, the Defendants have sought for the following orders:

a. That the court do make an order for stay of execution of the Decree/Judgment made on 23rd November, 2018 and the Ruling of the Taxing Master delivered on 17th July, 2019 until Appeal No. 249 of 2019 in the Court of Appeal is heard and determined.

b. The costs of the Application do abide the results of the Appeal.

2. The Application is supported by the Affidavit of the 4th Defendant who has deponed that the Judgment in this matter was delivered on 23rd November, 2018; that the Defendants filed an Appeal challenging the decision of this court on 16th December, 2018 and that a stay of execution of the Judgment should be granted until the Appeal is heard and determined.

3. In response to the Application, the 2nd Plaintiff deponed that the Judgment in this case was delivered on 23rd November, 2018; that the counsel for the Applicant did not apply for certified copies of proceedings and Judgment until 5th February, 2019, which is outside the 30 days allowed by law and that the Defendants are trespassers on the Plaintiffs' land.

4. The 2nd Plaintiff deponed that the Defendants will not suffer any loss if they vacate the suit property and that the Defendants can be compensated in monetary terms in the event they succeed in their Appeal.

5. In his submissions, the Defendants' advocate submitted that having filed an Appeal, the Defendants should be allowed to exercise their statutory right of Appeal; that the issue of when proceedings were applied for are more technicalities and that the Application was filed without undue delay.

6. The Plaintiffs' advocate submitted that the present Application was prompted by the eminent execution of the Decree against the Defendants; that no evidence has been availed to show the existing structures on the land and that the Defendants will not suffer any loss if

they are ordered out of the land.

7. This court delivered its Judgment in this matter on 23rd November, 2018. In the said Judgment, the court allowed the Plaintiffs' claim as follows:

- a. That a declaration be and is hereby issued that the land L.R. No. Muvuti/Kaani/1678 is registered in the name of the Plaintiffs' deceased father Mutiso Mumo Kalai;
- b. That an order be and is hereby issued that the illegal structures built by each of the Defendants be demolished at the cost of each of them;
- c. That General damages for trespass be provided for.
- d. The costs of this suit.

8. The Defendants lodged a Memorandum of Appeal in the Court of Appeal on 10th June, 2019. However, it is not clear to this court if the Defendants lodged in the Court of Appeal a Notice of Appeal within fourteen (14) days after the delivery of the Judgment.

9. Although the Notice of Appeal has not been attached on the 4th Defendant's Affidavit, the 4th Defendant has deponed that he filed the said Notice on 6th December, 2019, an assertion that the Plaintiffs have not denied.

10. The law providing the circumstances under which the court can stay its Judgment is Order 42 Rule 6(2) of the Civil Procedure Rules which stipulates as follows:

“(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.”

11. The Plaintiffs have not denied that the Defendants have structures on the suit property. Indeed, the effect of the Judgment of this court is to have the Defendants evicted from the suit property.

12. The destruction of the Defendants' structures and their eviction will cause the Defendants to suffer substantial loss, and render them homeless. That being the case, its only just that the Defendants are allowed to continue occupying the structures standing on the suit property pending the hearing of the Appeal.

13. For those reasons, I allow the Notice of Motion dated 15th August, 2019 as follows:

a. That the court do make an order for stay of execution of the Decree/Judgment made on 23rd November,2018 and the Ruling of the Taxing Master delivered on 17th July,2019 until the Appeal No. 249 of 2019 in the Court of Appeal is heard and determined.

b. The costs of the Application do abide the results of the Appeal.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 19TH DAY OF FEBRUARY, 2021.

O.A. ANGOTE

JUDGE