



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO. 14 OF 2018

(Formerly Meru HCCC no. 71 of 1995 and Nyeri HCCC no. 60 of 1987)

MBOGORI BAICHUPLAINTIFF/RESPONDENT

VERSUS

DAVID GITONGA MUNGANIA

(sued as the legal representative of the estate of

LIVINGSTONE M'MUNGANIA – deceased).....DEFENDANT/APPLICANT

RULING

1. Vide the application dated 6.10.2020, the applicant/defendant is seeking an order of stay of execution of the judgment delivered on 30.9.2020 pending the hearing and determination of the application and the intended appeal. It is averred that the plaintiff/respondent is in the process of actively executing the judgment which actions will render the substratum of the appeal process nugatory. It is also averred that the mesne profits are astronomical and that plaintiff/respondent has no known sources of income or property. The applicant is ready to offer any reasonable security.

2. The application is opposed by the plaintiff vide his replying affidavit filed on 22.10.2020, where he states that no notice of appeal has been filed, that the suit land has remained inhibited through the trial and that the respondent will be denied the fruits of his judgment. It is further averred that the applicant has not demonstrated that he stands to suffer substantial loss.

3. In his submissions, defendant, applicant avers that he relies on the suit land for his subsistence and that respondent has not been in occupation of the suit land. He further states that he is a peasant farmer and cannot afford the amount being claimed to the tune of Shs.6,120,000.

4. In support of his case, the applicant has relied on the cases of **Charles Ngatia Nguyo vs Ekira Gathani Kariithi (2014) eKLR**, **Mary Cheptoo Soke vs Samson Cheruiyot & another (2015) eKLR**, and **Kalonde Mbusya vs Martin Kimwele Kikoi & 10 others (2005) eKLR**.

5. It was submitted for the respondent that the award of Shs.6,120,000 continue to attract a sum of Kshs.180,000 yearly until payment is made in full. The court has also been urged to find that the dispute has been in courts for a period of over 35 years at the behest of the applicant. Thus, the respondent prays that the amount be deposited in an interest earning account and that the yearly deposit accruing to the tune of Shs.180,000 should be ordered.

6. This court has carefully considered the issues raised by the parties. The principles for granting an order for stay of execution are provided for under Order 42 rule 6 (2) of the Civil Procedure Rules, where it is stipulated as follows:

“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; 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.”

7. The power of the court to grant or refuse an application for a stay of execution is a discretionary power, - See **Amal Hauliers Limited v Abdunlasir Abukar Hassan [2017] eKLR**.

8. I have no doubts that the application has been filed without undue delay. I have also seen a notice of appeal filed in court on 8.10.2020.

9. On substantial loss, the applicant avers that he relies on the suit land for his subsistence. In the case of **Samvir Trustee Limited V Guardian Bank Limited [2007] eKLR**, it was held as follows on the issue of substantial loss;

“It is not enough to merely put forward allegations or assertion of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider mere assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and appropriate evidence of substantial loss....”

10. In **Wangalwa & another vs Agnes Naliaka Cheseto Misc. application no. 42 of 2011 (2012) eKLR**, the court stated as follows:

“The appellant must establish other state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal”.

11. In the case of **Wellington Lusweti Baraza & 43 others vs Lands Limited & another (2015) eKLR**, the court cited the case of **Charles Wahome Sethi vs Angela Wairimu Gethi, Court of Appeal No. 302 of 2007** where the court of appeal held that:

“It is not enough for the appellants to say that they reside or live on the suit land and that they will suffer substantial loss. The applicants must go further and show the substantial loss that the applicants shall suffer if the respondent executes the decree”.

12. In paragraph 30 of the Judgment, the court noted that the applicant does not live on the suit parcel no. 192. He has settled on parcel 195 and 196. He uses the suit parcel for farming.

13. I find that the applicant has not established the element of substantial loss in so far as the use and title to the land is concerned.

14. The applicant contends that the amount awarded is astronomical and that the plaintiff has no known source of income and may not be able to refund the same if paid and the appeal succeeds. The respondent in response to this issue has averred that in that case the applicant can deposit the money in an interest earning account instead.

15. I find that the applicant may suffer substantial loss if he pays the award of Shs.6,480,000 to the respondent then thereafter, the appeal succeeds, and he (applicant) is unable to recover this amount.

16. This court in giving final directions on the matter has taken into consideration that the matter has been in court for a period of 33 years or so at the behest of the applicant. The court has also taken into account that the award of mesne profits continues to accrue to the tune of Shs.180,000 every year.

17. In the circumstances, I give a conditional stay of the judgment delivered on 30.9.2020 in the following terms:

(1) There shall be a stay of execution of the judgment delivered on 30.9.2020 for a period of one year from the date of delivery of this ruling.

(2) The applicant/defendant shall deposit the sum of Kshs.3,120,000 in an interest earning account within a period of 30 days from the date of delivery of this ruling, failure to which the stay orders shall lapse.

(3) The applicant is condemned to pay costs of this application.

DATED, SIGNED AND DELIVERED AT MERU THIS 3RD DAY OF FEBRUARY, 2021

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this Ruling was given to the advocates for the parties through a virtual session via Microsoft teams on 18.11.2020. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this Ruling has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the ***Civil Procedure Rules*** which requires that all judgments and rulings be pronounced in open court.

HON. LUCY N. MBUGUA

ELC JUDGE