



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC MISC APPL NO. E010 OF 2020

M'MUTIA RUCHIATA.....APPLICANT

VERSUS

JOHN ELIAS KIRIMI.....RESPONDENT

JUDGMENT

1. This miscellaneous suit was filed vide a Notice of Motion dated 24/11/2020 brought pursuant to Order 50 Rule 6, Order 42 Rule 6(1) and (6), Order 51 Rule 1 of the Civil Procedure Rules and Section 3A, 63 and 95 of the Civil Procedure Act, where the applicant is seeking the following orders;

1. Spent.

2. That this Honorable Court be pleased to extend the time within which the *applicant may lodge his intended appeal against the ruling delivered on 28th October, 2020 in Meru Civil suit No. 19 of 2015.*

3. That this Honorable Court be pleased to order a stay of execution of the decree issued on 10th November 2015.

4. That this Honorable Court be pleased to issue an order staying further execution of the decree herein and specifically stop the respondent herein from any acts of hostility or malice towards the applicant.

5. That in the alternative to prayer no.3, the Honorable Court be pleased to grant a temporary injunction in such terms as it may deem fit restraining the respondent, his agents and/or representatives from further eviction, advertisement for sale, *selling and/or auctioning the applicant's property in execution of the decree issued in Meru Civil suit No. 19 of 2015 pending the hearing and determination of this application.*

6.. That the orders sought in prayer 3 and 4 above be confirmed upon hearing of the application till the hearing of the intended appeal.

7. That the costs of this Application be provided for.

2. The Application is based on the grounds on the face of it and on the Supporting Affidavit of the applicant dated 24/11/2019. The applicant states that he has been aggrieved by the ruling delivered on 28/10/2020 in Meru Civil suit No. 19 of 2015 and wishes to appeal the same, that the delay in filing an appeal was inadvertently occasioned by the reason that his then advocate left employment without informing him of the urgent need to file the requisite court documents in time.

3. He contends that he stands to suffer irreparable damage unless this application is heard on a priority basis and stay of execution orders are granted, and that in the interest of justice, he ought to be afforded an opportunity to file an appeal.

4. The respondent has opposed the application via his Replying Affidavit dated 5/2/2021, where he avers that the applicant has not offered any plausible explanation for the delay and if the application is allowed it will cause him untold prejudice. He prays that the application be dismissed.

5. I have carefully considered all the issues raised by the parties. The the issue for determination is **whether to allow the filing of an appeal out of time and whether to grant a stay of the ruling of 28.10.2020 in Meru CMCC no.19 of 2015 or in the alternative, whether the court can grant an injunction against the respondent.**

6. The applicant avers that he intends to appeal against a ruling dated 28/10/2020 and his reason for delay was that he was not informed by his counsel of the urgent need to file documents within the required timelines. I do note that his application is dated 24/11/2020 meaning that at the time the application was drawn, time had not yet lapsed and it leaves me to question why at that point, the appeal was not filed.

7. In *First American Bank of Kenya Ltd v Gulab P Shah & 2 Others Nairobi (Milimani) HCCC NO. 2255 of 2000 [2002] 1 EA 65* the Court set out the principles/factors to be considered in exercising its discretion when deciding whether or not to enlarge time.

(i). the explanation if any for the delay;

(ii). the merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice;

(iii). Whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant.

8. The contemplated action in the appeal is to overturn the ruling on injunction given by the trial court on 28.10.2020. The applicant is also seeking an injunction and/or a stay of execution against an order which I have not had the privilege of seeing and /or reading. The certificate of urgency also captures the averment that there is a pending suit between the same parties in Meru ELC 242 of 2018 which is awaiting hearing. What resonates from this analysis is that another suit in the form of the contemplated appeal would only convolute the dispute further and delay the course of justice.

9. I am therefore not satisfied that the application meets the threshold of good and sufficient cause to warrant the issuance of the orders sought -See *Dilpack Kenya Limited v William Muthama Kitonyi [2018] eKLR*. In the final analysis, I proceed to dismiss this miscellaneous suit with costs to the respondent.

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

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this Judgment was given to the advocates for the parties through a virtual session via Microsoft teams on 20.1.2021. 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 Judgment 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