



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MAKUENI**

**ELC CASE NO. 84 OF 2018**

**JULIUS MUTHUNGU MUKANDA..... PLAINTIFF/APPLICANT**

**VERSUS**

**MBULUNG'A KITUMA .....DEFENDANT/RESPONDENT**

**RULING**

1. The application for determination is dated 26<sup>th</sup> February, 2020 filed by the Plaintiff/Applicant under certificate of urgency on 27<sup>th</sup> February, 2020. It is brought under Order 42 Rule 6 of the Civil Procedure Rules, 2010 Sections 1A, 1B, 3 and 3A of the Civil Procedure Act and all other enabling provisions of the Law.

2. The Applicant seeks the following Orders: -

**i) Spent.**

**ii) That pending the hearing and determination of this application, this Honourable Court do order a stay of execution of the Ruling and Orders of the Honourable Justice Mbogo, given at Makueni on the 28<sup>th</sup> day of January, 2020 and the Defendant his agents, family members, servants and/or employees in any manner howsoever be restrained from claiming interests, rights or in any way farming, grazing, residing in dealing with or trespassing onto or continuing further trespass onto Land Title No. Ukia/Utaati/449 and/or interfering with the Plaintiff's rights of quiet possession, occupation and enjoyment thereof. [SPENT]**

**iii) That pending the hearing and determination of the intended Appeal, this Honourable Court do order a stay of execution of the Ruling and Orders of the Honorable Justice Mbogo, given at Makueni on the 28<sup>th</sup> day of January, 2020 and the Defendant his agents, family members, servants and/or employees in any manner howsoever be restrained from claiming interests, rights or in any way farming, grazing, residing in dealing with or trespassing onto or continuing further trespass onto Land Title No. Ukia/Utaati/449 and/or interfering with the Plaintiff's rights of quiet possession, occupation and enjoyment thereof.**

**iv) That the costs of this application be provided for.**

3. The application is supported by the affidavit of Julius Muthungu Mukanda, the Plaintiff/Applicant herein, sworn on the same day. The basis of the application is that the Applicant is dissatisfied with the Ruling of this Court delivered on 28<sup>th</sup> January, 2020. He deposes that the net effect of the Ruling is that the Applicant's interests in the suit property as affirmed by the Ruling of Hon. C. Kariuki J. dated 21<sup>st</sup> June, 2018 in Makueni HCSC No. 197 of 2017 will have been wrongfully varied. That for the said reason he will suffer substantial loss. That he has already filed a Notice of Appeal against the impugned Ruling and requested for typed proceedings. That he is able and willing to provide such security as the court may order and that the application has been made without unreasonable delay.

4. The application is opposed by Mbulung'a Kituma vide the Replying affidavit sworn on 12<sup>th</sup> November, 2020. He has deposed that the application has been made following an unreasonable delay which has not been explained by the Applicant. The Respondent also contends that the Applicant has not demonstrated that he will suffer substantial loss should the stay of execution of the Ruling herein not be granted. The Respondent further urges that the application is frivolous and an abuse of the court process and prays that the same be dismissed with costs for want of merit.

5. The parties duly filed their respective submissions as per the directions issued on 24<sup>th</sup> September, 2020. It is common ground from the parties' submissions that the prerequisite conditions for a grant of the orders sought herein are well spelt out under Order 42 Rule 6 (2) of the Civil Procedure Rules (2010). These are: -

***i) That substantial loss may result to the Applicant unless the order is made;***

***ii) That the application has been made without unreasonable delay;***

*iii) That security has been given by the Applicant for the due performance of the decree as may ultimately be binding on him.*

6. On substantial loss, the Applicant's contention is that the impugned Ruling will override another Ruling by the High Court at Makueni which has concurrent jurisdiction to this court. It is further submitted that the High Court ruled with finality that the occupation and possession of the suit property by the Defendant was unlawful and contrary to the Plaintiff's interests. The Applicant relies on one authority in support of his application: -

**James Wangalwa & Another -Vs- Agnes Naliaka Cheseto [2012] eKLR.**

7. In his submissions, the Respondent asserts that the Applicant have not demonstrated any substantial loss that they stand to suffer. No factual particulars or evidence has been annexed to the Applicants' supporting affidavit to show threatened execution of the Ruling and as such there is no basis to find any substantial loss.

8. On the aspect of delay, it is noted that Ruling herein was delivered on 28<sup>th</sup> January, 2020. The Applicant then filed a Notice of Appeal on 4<sup>th</sup> February, 2020 and the application herein was filed on 27<sup>th</sup> February, 2020. That is a span of about one month.

9. On security, the Respondent has noted no evidence by the Applicant of his ability to provide the same for the due performance of the Ruling. As such, it is submitted that the Applicant has failed to meet the conditions outlined under Order 42 Rule 6 of the Civil Procedure Rules, 2010 so as to invite this Court to exercise its discretion in the Applicant's favour. The Respondent relies on the following authorities: -

**Jaber Mohsen Ali & another -Vs- Priscillah Boit & Another [2014] eKLR; and Kiplagat Kotut -Vs- Rose Jebor Kipngok & Another [2016] eKLR.**

10. In determining whether the Applicant has satisfied the requirements of Order 42 Rule 6 (2) of the Civil Procedure Rules 2010, this Court's discretion is guided by the Court of Appeal decision in **Butt -Vs- Rent Restriction Tribunal [1982] KLR 417** where it was held as follows:

*"1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.*

*2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.*

*3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.*

*4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.*

*5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse."*

11. In my view, the length of time from the date of delivery of the Ruling to filing of the formal application herein was one month. It is my view that the application was made in sufficient time.

12. On substantial loss, I find that the Applicant has not demonstrated in clear terms the nature of substantial loss he is likely to suffer should stay not be granted. I have not seen evidence of threatened execution of the Ruling. By merely repeating that he stands to suffer substantial loss without discharging the evidentiary burden attached thereto, the Applicant has fallen short of the mark required to prove substantial loss. In fact, from a keen reading of Exhibit JMM1 in the supporting affidavit, it is noted at paragraph 8 thereof that not even the Respondent has liberty to deal with the suit property until the question of ownership is determined by this Court.

13. I am therefore minded to agree with Platt Ag. J.A. (as he was then) when he held as follows in **Kenya Shell Ltd -Vs- Kibiru [1986] KLR 416:**

*"It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented."*

14. Lastly, the Applicant has not convinced this Court of his ability to abide by such order for security as this Court may order in his application. I can only agree with the Respondent's submission that the Applicant offers nothing but a bald statement of his willingness to provide security.

15. Given the above findings, it is my view that there is no sufficient cause to stay execution of the Ruling delivered on 28<sup>th</sup> January, 2020. The application is hereby dismissed with costs to the Respondent.

Signed, dated and delivered at Makueni via email this 19<sup>th</sup> day of April, 2021.

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**HON. MBOGO C.G.**

**JUDGE**

**Court Assistant:** Mr. Kwemboi