



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC A NO. 64 OF 2021

DAVID KINYUA.....APPELLANT

VERSUS

MOSES MUTHURI MUKINDIA.....RESPONDENT

(Being an appeal from the Judgment of Hon. S. Ndegwa (S.P.M.)

delivered on 17th May, 2021, in Githongo SPM ELC No. 1 'B' of 2019)

RULING

1. The appellant through a motion dated **3rd June 2021** seeks for stay of execution of the judgment delivered on 17.5.2021 in **Githongo SPM ELC No. 1 B of 2019**. The application is supported by an affidavit sworn on **2nd June 2021**.
2. The grounds upon which the motion is made are that the lower court matter was heard and determined despite existence of **Meru ELC No. 20 of 2019 (O.S)** pending between the same parties and whose decree is inter alia for the eviction of the appellant from his land hence if effected this appeal and the O.S shall be rendered nugatory.
3. The application is opposed through a replying affidavit sworn on 15/7/2021 on five major grounds.
4. Firstly there was a similar an application for stay of the proceedings which was declined in the lower court and no appeal was ever lodged against it.
5. Secondly it is conceded there is a pending **ELC No. 20 of 2019 (O.S)** which is different in nature, from the lower court case.
6. Thirdly the respondent states a similar application as the instant one was made in the lower court and a 30 days stay granted at the time this application was made hence is an abuse of the court process.
7. Fourthly the respondent takes the view the **Meru ELC 234 of 2013** determined conclusively the issues hence the originating summons is resjudicata and to issue stay orders herein would be contra-statute and prejudicial him to yet he is entitled to enjoy fruits of his judgment in both the 2013 matter and the lower court decision.
8. Lastly the respondent maintains it is in the interest of justice that stay be denied otherwise he stands prejudiced unlike the applicant.
9. **Order 42 Rule 6 (1)** allows a court to grant a stay of execution pending appeal if satisfied that substantial loss may result to the applicant unless the order is made; there has been no inordinate delay in presenting the application; and that security has been offered for due performance of such decree.
10. In **James Wangalwa & Another –vs- Agness Naliaka Chesoto (2013) eKLR** the court held:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put on motion, by itself does not amount to substantial loss.

This is because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the

appeal the issue of substantial loss is the cornerstone of both jurisdiction. Substantial loss is which has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

11. Having looked at the pleadings, the rival submissions, several issues are not in dispute. Parties agree there is a decree issued by this court in **Meru H.C ELC No. 234 of 2013** over **Parcel No. Abothuguchi/Katheri/4046**, which was also the subject matter in the lower court case and in which the decree is sought to be stayed in this application.

12. Secondly, **Meru ELC No. 20/2019 (O.S)** was filed on **2nd May 2019** soon after the **ELC No. 234 of 2013** was heard and determined. The appellant raised existence of the said suit in his defence.

13. It is apparent therefore that upon the loss of a claim of customary trust, the appellant lodged another suit for adverse possession which is pending before this court and is yet to be determined.

14. In the originating summons, apart from Parcel No. 4046 the appellant is seeking for adverse possession for other 6 parcels of land.

15. The court has not been told an appeal has been filed against the decree issued on 28/9/2018.

16. Given the foregoing the appellant has not demonstrated any substantial loss more so when there has been a decree previously issued by this court and which he has not appealed against. It would therefore be illogical of this court to close its eyes and grant a stay and render such a lawful decree unenforceable.

17. Secondly and more importantly the overriding objective as set out in **Section 1A & 1B of the Civil Procedure Act** is to expeditiously dispose of matters and do substantive justice to the parties. To deny the respondent for the third time enjoyment of the fruits of his own judgment would be extremely prejudicial.

18. Lastly, the applicant has not offered any security for the due performance of the decrees already issued.

19. In the premises the application herein lacks merit. The same is dismissed with costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 3RD DAY OF NOVEMBER, 2021

In presence of:

Gichunge for the applicant

Nyaga for respondent

Court Clerk: Kananu

HON. C.K. NZILI

ELC JUDGE