



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. APPEAL NO. 19 OF 2018

CHRISTOPHER MUTEMI MUTIO.....APPELLANT/APPLICANT

VERSUS

ESTHER MASAA KAESA (on behalf of the Estate of KAESA KIITI)1ST RESPONDENT

PETER KIITA NGUI.....2ND RESPONDENT

SIMEON MUNYASYA3RD RESPONDENT

SAMUEL M. MWINZI4TH RESPONDENT

KITUI COUNTY COUNCIL.....5TH RESPONDENT

RULING

1. In the Notice of Motion dated 29th May, 2018, the Appellant is seeking for the following orders:

a. That a stay of execution be granted pending hearing and determination of the Appeal.

b. Costs be provided for.

2. The Application is premised on the grounds that the Applicant risks being evicted from the suit land; that the 1st Respondent is in the process of construction; that the Applicant has an arguable Appeal and that the Appeal will be rendered nugatory if a stay of execution is not granted.

3. In his Affidavit, the Appellant deponed that Judgment was entered against him on 18th October, 2010; that the effect of the said Judgment was that he was barred from occupying the suit land and that he has been in occupation of the suit land since 1980.

4. Due to the reorganization of the courts in the country, the Appellant deponed that he has been unable to list the Appeal for hearing; that no developments have been made by either party on the suit land and that he is ready and willing to abide by such terms as the court may impose to preserve the land.

5. In reply, the 1st Respondent deponed that the Judgment of the lower court was delivered on 18th May, 2011; that the suit land has always been vacant land until May, 2018 when he started constructing thereon and that the Appellant has never served on him the Memorandum of Appeal and the Record of Appeal. The 1st Respondent finally deponed that the Application has been overtaken by events because the lower court's Judgment has been executed; and that the Application should be dismissed.

6. The Appellant's advocate submitted that the Appeal raises substantial issues of law which ought to be ventilated at the hearing; that if the Appellant is evicted, the Appeal shall be rendered nugatory and that the delay in filing the Application has been explained by the Appellant.

7. The 1st Respondent's counsel submitted that under Order 42 Rule 6(1) (a) of the Civil Procedure Rules, a stay of execution shall not be granted unless the court satisfies itself that substantial loss may result to the Applicant unless the order is made and that the Application has not been made without unreasonable delay.

8. The Respondents' counsel submitted that the delay of seven (7) years in filing the Application has not been explained by the Appellant; that the Application has been overtaken by events because the Judgment of the lower court has already been executed and that in any event, the Applicant has not demonstrated that he will suffer substantial loss if an order of stay is not granted. Counsel relied on several authorities which I have considered.

9. The record shows that on 15th June, 2011, the Appellant filed a Memorandum of Appeal challenging the decision of Hon. Nyaberi which was delivered on 18th May, 2011.

10. Other than the said copy of Memorandum of Appeal, there is no evidence on record to show that the Appellant has ever applied for the proceedings for the purpose of filing the Record of Appeal. Indeed, the Appellant has never filed the Record of Appeal since he filed his Memorandum of Appeal on 15th June, 2011.

11. Order 42 Rule 6(2) of the Civil Procedure Rules provides that no order of stay of execution shall be made unless the court satisfies itself that substantial loss may result to the Applicant unless an order of stay of proceedings or execution is made and that the Application has been made without unreasonable delay.

12. The 1st Respondent has annexed on his Affidavit the photographs showing the developments that he has made on the suit land. Indeed, the 1st Respondent has now been recognized as the owner of the suit land by the County Government of Kitui. According to the evidence before the court, it is the 1st Respondent who has been paying the requisite land rates.

13. Considering that it is the 1st Respondent who is in possession of the suit land pursuant to the Decree of the lower court, no substantial loss shall be suffered by the Applicant if the order of stay of execution is not granted.

14. In any event, the current Application was filed seven (7) years after the delivery of the Judgment, which, in my view, is an unreasonable delay.

15. The Application dated 29th May, 2018 is therefore dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 5TH DAY OF JULY, 2019.

O.A. ANGOTE

JUDGE