



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL NO. 7 OF 2019

HADIJA HAJI GALMA..... APPELLANT

VERSUS

ABDI AHMED KAWIR RESPONDENT

RULING

1. The application before me is dated 15.2.2019 and is brought under section 1A and 3A of the civil procedure act order 42 rule 6 and order 51 rule 1 of the civil procedure rules.

2. The applicant is seeking a stay of execution of the judgment delivered on 13.12.2018 in Isiolo CM ELC No. 30 of 2011.

3. Applicant avers that she has been in occupation of the suit property since 1993. She faces imminent eviction and she will therefore suffer substantial and irreparable loss as the suit land is her home where she stays with her children and grandchildren.

4. Applicant further avers that she is ready to deposit security of Kshs.70,000.

5. In support of her case, applicant has proffered the following authorities:

- *Bonface Kariuki Wahome vs Peter Nziki Nyamai & another (2019) eKLR.*
- *Antoine Ndiaye vs African virtual university (2015) eKLR*
- *Anne Njeri Mwangi vs Muzaffer Musafee Essajee & another (2014) eKLR, H.C at Nairobi (Milimani), civil case no. 49 of 2011.*
- *Daniel Chebutul Rotich & 2 others vs emirates airlines civil case no. 368 of 2001.*

6. The respondent has opposed the application averring that he is the registered and the beneficial owner of the suit land known as plot K or Isiolo Municipality Block 3/267. Respondent avers that applicant is a trespasser and she has not met the criteria set out in order 42 of the civil procedure rules.

7. I have considered all the arguments raised herein as well as the submissions of the rival parties.

8. Order 42 rule 6 (2) of the civil procedure rules provide that:

“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”.

9. To grant or to refuse an application for stay of execution pending appeal is discretionary in that the court when granting a stay, it has to balance the interests of the applicant with those of the respondent. In determining this balance, the court gives due consideration to the three criteria set under order 42 rule 6 (2) of the Civil Procedure Rules, that is to say:

(1) Whether appellant stands to suffer substantial loss,

(2) Whether the application has been brought without delay and

(3) Whether there is security.

10. On the issue of substantial loss, **Gikonyo J in Wangalwa & another vs Agnes Naliaka Cheseto Misc. application no. 42 of 2011 (2012) eKLR** stated that; “*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 instance case, there appears to be no dispute that the applicant is the one in occupation of the suit land. She avers that she is elderly and she is staying with children and grandchildren on the suit land, an averment which has not been rebutted by the respondent. To this end, I do find that the authorities cited by the respondent in support of the criteria of substantial loss (*Antoine & Ndiaye vs African Virtual University, Ann Njeri Mwangi vs Muzaffer & another, Daniel Chebutul Rotich & 2 others vs Emirates Airlines supra*) are relevant on this point.

12. On the issue of delay, I find that the judgment of the lower court was delivered on 13.12.2018 and this application was filed on 20.2.2019 hence a lapse of two months 7 days. This is quite a delay but I would not term the same as unreasonable.

13. I have also taken into account that the memorandum of appeal has already been filed as well as the record of appeal. The lower court file too is available. This means that the appeal is ready for admission and hearing.

14. On the issue of security, I find that applicant has already offered to deposit a sum of Shs.70,000 as security.

15. In conclusion, I find that applicant has met the criteria set out in order 42 rule 6 (2) of the civil procedure rules.

16. I allow the application dated 15.2.2019 on the following terms:

- (1) I hereby grant a stay of execution of the judgment and decree in Isiolo CM ELC No. 30 of 2011 for a period of one year.**
- (2) The applicant is to deposit a sum of Shs.70,000 as security in court within a period of 30 days failure to which the order of stay given in (1) above shall lapse.**
- (3) The costs of this application shall abide the outcome of the appeal.**

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 10TH DAY OF JULY, 2019 IN THE PRESENCE OF:-

C/A: Kananu

Mutuma for respondent

Ouma holding brief for Mwiti for appellant

HON. LUCY. N. MBUGUA

ELC JUDGE