



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MERU

ELC APPEAL NO. 41 OF 2019

KITHELA LIRIA.....APPELLANT

VERSUS

JACOB NKUNJA KABILU.....RESPONDENT

RULING

1. The matter for determination is the appellant/applicants Notice of Motion dated 11th February 2019 which is brought under order 42 rule 6 (1) of the Civil Procedure Rules cap 21, Laws of Kenya. The applicant has sought orders for stay of execution of the judgement/decreed delivered on 28/12/2008 in Maua CMC ELC Case No. 287 of 2011 pending the inter-parties hearing and determination of this application and the appeal.

2. The application is premised on the grounds stated on the face of the application and in the supporting affidavit of Kithela Liria, the applicant. He avers that he has been in actual possession and user of the Suitland since 1993, that the lower court dismissed the respondent's suit and made a finding that the appellant was the prima facie owner of the suit land. However, the court issued an order of injunction suo moto against the appellant even after dismissing the respondents whole suit and therefore the said order amounts to an order of eviction of the applicant from the suit land

3. Applicant further avers that the appeal has very high chances of success and that he stands to suffer substantial loss and damages if he is evicted before this appeal is heard and determined. Applicant contends that he is ready to abide by such terms and conditions the court may set for stay of execution. He also states that the respondent in any way has never occupied the suit land.

4. In response the respondent asked the court to order the appellant not to interfere with the land since respondent has nowhere else to go.

5. Order **42 Rule 6 of the Civil Procedure Rules** states as follows;

“(2) No order for stay of execution shall be made under subrule (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.”

6. In the Maua court case, the present respondent was the plaintiff whose case was dismissed. In such instances, this court would ordinarily not issue a stay order since a dismissal is a negative order which does not elicit any execution save on costs – See **Meru ELC No. 6 of 2009 Kanampiu M'Rimberia vs. Julius Kathuanje & 2 Others since, Kenya Commercial Bank Limited v Tamarind Meadows Limited & 7 Ors [2016] eKLR, Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya) [2015] eKLR.**

7. In the instant case, though the suit was dismissed in the lower court, the same court gave injunctive orders restraining the current applicant from altering the current ownership, possession or user of the suit parcel until adjudication process is completed. According to the applicant, this order was made suo moto and it will amount to eviction of the applicant. I believe the order was made in good faith to maintain the status quo until the dispute is resolved through the laid down dispute resolution mechanism. The problem however arises as to the implementation of this order. How will compliance be adhered to? Who is currently in occupation of the suit land? These are questions that elicit long drawn arguments amounting to litigation all over again yet Judgment has been delivered.

8. I am therefore inclined to find that the circumstances of this case do warrant the granting of the orders sought for. I hereby grant a stay of the Judgment in Maua court case CM ELC NO. 287 OF 2011 but for a period of one year. 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

Respondent

Plaintiff

H.G Gitonga for applicant

HON. LUCY. N. MBUGUA

ELC JUDGE