



**REPUBLIC OF KENYA**

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

**CHUKA ELC CIVIL APPEAL CASE NO. 107 OF 2017**

**FORMERLY MERU ELC. CIVIL APPEAL CASE NO. 01 OF 2017**

**MICHENI KENYATTA.....1<sup>ST</sup> APPELLANT**

**MUSYOKA B. KITHINJI.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**M'KEA M'MURITHI.....RESPONDENT**

**RULING**

1. This application is dated 27<sup>th</sup> August, 2019. It is stated on the face of the Notice of Motion that this application has been brought to court Under Articles 50 and 159 (1) (d) of the Constitution of Kenya, Section 1A, 1B & 3a of the Civil Procedure Act, Chapter 21 Laws of Kenya, Order 42, Rule 6 & Order 51 of the Civil Procedure Rules, 2010 and any other enabling provisions of the law.

2. The application seeks orders that:

1. The application be certified as urgent and heard ex-parte in the first instance.
2. This honourable court be pleased to grant an order for stay of execution of the judgment and decree in Meru CMCC No. 183 of 1999; M'Kea Muriithi vs Micheni Kenyatta delivered on 27<sup>th</sup> August, 1999 and any subsequent proceedings in the suit pending the hearing and determination of this application inter parties.
3. This honourable court be pleased to grant an order for stay of execution of the judgment and decree in Meru CMCC No. 183 of 1999; M'Kea Muriithi vs Micheni Kenyatta delivered on 27<sup>th</sup> August, 1999 and any subsequent proceedings in the suit pending the hearing and determination of the impending appeal.
4. In the alternative, this honourable court be pleased to grant an order of status quo maintaining the current position with regard to the ownership of L.R. No. Karingani/Ndagani/4696 pending the determination of this application inter parties and the impending appeal.
5. The costs of this application do abide the outcome of this application.

3. The application is supported by the affidavit of Musyoka B. Kithinji the 2<sup>nd</sup> Appellant/Applicant which more or less regurgitates the grounds set out on the face of the application. These grounds are:-

- a) The Respondent herein had instituted a suit against the 1<sup>st</sup> Appellant in Meru CMCC No. 183 of 1999: M'Kea Muriithi vs Micheni Kenyatta regarding a dispute involving L.R. No. Karingani/Ndagani/4695.
- b) The 2<sup>nd</sup> Respondent, Musyoka B. Kithinji, was not a party to the suit at the Chief Magistrate's Court and as such was not aware of the suit.
- c) On 27<sup>th</sup> August, 1999, the honourable Ithiga (Senior Principal Magistrate) delivered his judgment in Meru CMCC No. 183 of 1999: M'Kea Muriithi vs Micheni Kenyatta in favour of the Respondent The judgment and resultant decree required the 1<sup>st</sup> Applicants/ Appellants to transfer parcel L.R.No. Karingani/Ndagani/4695 and 4696 to the Respondent.
- d) Unfortunately, there was a grave error apparent on the face of the record of the decree dated 27<sup>th</sup> August, 1999 of the Senior

Principal Magistrate requiring the transfer to the Respondent of L.R. No. Karingani/Ndagani/4696 registered in the name of the 2<sup>nd</sup> Applicants/Appellants and this adversely affecting the rights of the 2<sup>nd</sup> Appellant who was neither a party in the said suit at the time of filing the suit or at the time of the judgment.

e) The Applicants/Appellants herein being aggrieved by the judgment of the honourable court entered on 27th August, 1999 instituted an Appeal in the High Court at Chuka in Civil Appeal Case No. 107 of 2017: Micheni B. Kenyatta & Musyoka B. Kithinji vs. M'Kea Muriithi.

f) The 2<sup>nd</sup> Appellant was particularly aggrieved by the fact that the judgment affected his ownership of L.R. No. Karingani/Ndagani/4696 which is registered in his name despite the fact that he was not a party to the suit nor was the said property the subject of the said suit.

g) The 2<sup>nd</sup> Appellant was also aggrieved that it (sic) was not notified of the suit against him and thus denied an opportunity to be heard even though his ownership of the property, L.R. No. Karingani/Ndagani/4696, was a topic of contention in the suit.

h) On 20<sup>th</sup> June, 2018, the honourable P. M. Njoroge delivered his judgment dismissing the Applicants/Appellants appeal against the decision of Senior Principal Magistrate Njeru Ithiga in Meru CMCC, No. 183 of 1999; M'Kea Muriithi VS. Micheni Kenyatta.

i) The Applicants/Appellants being aggrieved with the said judgment, communicated their intention to lodge an appeal at the Court of Appeal and filed a Notice of Appeal on 28<sup>th</sup> June, 2018 and served the same to all parties.

j) Despite having knowledge of the pending appeal, the Respondent has proceeded to execute the decree of the magistrate's court against the Appellants.

k) The pending appeal will be rendered nugatory if the Respondent is allowed to execute the judgment and decree in Meru CMCC. No. 183 of 1999: M'Kea Muriithi vs. Micheni Kenyatta.

l) The Applicants have a meritorious appeal, which raises weighty and substantive issues of law and it will serve the ends of justice, if this honourable court stayed the execution of its judgment and decree pending the hearing of the appeal.

m) The applicant has and will suffer substantial loss and irreparable damage if the execution of the judgment and decree is not stayed pending the hearing of this application inter parties.

n) It is in the interest of justice that the reliefs sought herein are granted.

4. The respondent's advocate filed grounds of opposition dated **3<sup>rd</sup> September, 2019** and filed on the same date which grounds are in the following terms:

#### **GROUND OF OPPOSITION**

**TAKE NOTICE** that during the hearing of the application dated 27/08/2019 the Respondent shall raise the following grounds in opposition to the said application:-

1. That the application dated 27.8.2019 is defective, legally incompetent and in violation of the provisions of Order 42 Rule 6(1) & (2) of the Civil Procedure Rules, 2010 for the reason that:-

a) The intended appeal to the Court of Appeal by the Applicants is against the decision made in this appeal and not against the judgment and decree of the Lower Court in Meru CMCC No. 183 of 1999.

b) This honorable court lacks jurisdiction to entertain the instant application as it is functus officio in relation to the decree and judgment of the Lower Court.

c) The instant application has been instituted after an unreasonable and inordinate delay.

d) The applicants have not offered any security for the due performance of the decree or order that may ultimately be binding on them.

**REASONS WHEREFORE** the Respondent prays that the application dated 27/08/2019 be dismissed with costs.

DATED AT CHUKA THIS 3<sup>RD</sup> DAY OF SEPTEMBER, 2019

.....

**FOR: M/S BASILIO GITONGA, MURIITHI & ASSOCIATES**

## ADVOCATES FOR THE RESPONDENT

5. The application was heard interpartes on **4<sup>th</sup> September, 2019**.
6. Mr. Bachi, for the applicants, asked the court to grant the applicants an order of stay of execution of the judgment and decree in Meru CMCC No. 183 of 1999 or in the alternative to grant an order of status quo to maintain the current position with regard to ownership of L.R. No. Karingani/Ndagani/4696 pending determination of the impending appeal. Mr. Bachi posited that if the orders sought in this application are not granted, the intended appeal would be rendered nugatory and occasion the applicants substantial loss. Mr. Bachi further told the court that the delay in filing of this application was occasioned by the indolence of the previous advocates who were representing the applicants. He laconically averred that the mistakes of the litigants' previous advocates should not be visited upon them.
7. Mr. Mark Muriithi for the respondents told the court that he had raised four grounds of opposition. He said that he would take grounds a and b together. He laconically stated that this court was *functus officio* in as far as the judgment and decree of the lower court was concerned. He argued that order 42 Rule 6 envisages the grant of orders of execution by only 2 courts. Firstly, the court from which the appeal emanated AND/OR the court to which the appeal has been preferred. In the instant case, he proffered, the applicants had preferred an appeal against the decision of this court. However, they are not seeking the stay of the decision of this court but the stay of the magistrates' courts orders and decree. Mr. Muriithi submitted that stay as crafted in this application could only be raised in the Court of Appeal or in the magistrate's court. He submitted that this court is not the correct forum to entertain this application.
8. Mr. Muriithi further told the court that this application had been brought to court after an inordinate delay and reminded the court that the judgment in Meru CMCC No. 183 of 1999 had been delivered on **27<sup>th</sup> August, 1999, 20 years ago**. He also pointed out that the judgment by this court in this matter was delivered on **20<sup>th</sup> June, 2018, one year and three months** before this application was filed. He termed this delay as inordinate.
9. Mr. Muriithi told the court that at paragraph 13 of the affidavit supporting this application the applicants had deponed that the respondent had executed the judgment and decree of the lower court. According to him, this reality rendered this exercise *pyrrhic* and, *ipso facto*, a mere academic exercise.
10. Mr. Muriithi further submitted that contrary to the provisions of Order 42 Rule 6 of the Civil Procedure Rules, the applicants had not offered any security for the due performance of such decree or order as may ultimately be binding on them should the order of stay be granted.
11. The advocate representing the applicants has submitted that the delay of one year and 3 months in filing this application after this court delivered its judgment on **20<sup>th</sup> June, 2018** can only be blamed on the advocates who previously represented the applicants. I do not agree with this veritably hackneyed excuse. The period of one year and 3 months before this application was filed is inordinate. Indeed, in all circumstances, a suit belongs to the litigant. It is his responsibility to ensure that his suit is diligently and timeously prosecuted. The applicants have not explained to the satisfaction of this court why they delayed for one year and three months before they filed this application. I do note that when this court delivered its judgment on **20<sup>th</sup> June, 2018**, all the litigants were represented in court by advocates who had been sent to court by their lawyers.
12. Having considered the pleadings and the submissions proffered by the parties in this application, I uphold all the grounds of opposition proffered by the respondent's advocates. I have also taken into account that the applicants at paragraphs 13 of the 2<sup>nd</sup> Applicant's supporting affidavit have averred that the apposite decree had been executed.
13. In the circumstances, I issue the following orders:
  - a) This application is hereby dismissed.
  - b) Costs, against the Applicants, are awarded to the Respondent.

**Delivered in open court at Chuka this 2<sup>nd</sup> day of October, 2019 in the presence of:**

CA: Ndegwa

Kirimi Muturi h/b Bachi for the Appellants

M'Kea M'Murithi – Respondent - present

**P. M. NJOROGE**

**JUDGE**