



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC CASE NO. 90 OF 2008

WINFRED MAIGENE STEPHEN.....PLAINTIFF/APPLICANT

VERSUS

KINYUA M'MBIJIWE (being the legal representative of the estate of

GILBERT KABEERE M'MBIJIWE).....DEFENDANT/RESPONDENT

RULING

1. This court having already determined the main suit and delivered its judgment on 18th November 2020, is now called upon to determine an application by the plaintiff dated 24.11.2020 seeking an order of stay of execution of the judgment and decree in MERU ELC NO. 90 OF 2008 pending the hearing and determination of this application and the appeal as well as costs thereof.

2. The application is based on the grounds on its face of it and on the supporting and further affidavit of the applicant who avers that a notice of appeal has been filed in the high court and a letter has been written to the Deputy Registrar seeking typed copies of the proceedings and judgment. That this application has been brought without delay and she believes that she will suffer substantial and irrecoverable loss unless the orders of stay are granted as it will be impossible to retrieve the situation if the appeal succeeds. She has invested substantially towards the development of the suit property by constructing shops and other units leased to 3rd parties who stand to suffer great prejudice and loss if the court fails to grant orders sought. The appeal will also be rendered nugatory if the orders are not granted. She believes she will be evicted and the suit land will be sold. The respondent will not be prejudiced if the application is allowed.

3. The applicant filed her submissions reiterating the contents of her affidavits adding that her right to fair administrative action has been violated as the decree ordered that she vacates the suit property and she is yet to exercise her constitutional right of appeal. She urges the court to exercise its discretionary power of granting stay without the requirement of provision of security pending the outcome of the appeal. She relied on the cases of **Silvertein V Chesoni (2002)1 KLR 867, Northwood Service Ltd V Mac & More Solution Ltd [2015]eKLR, RWW V EKW [2019]eKLR.**

4. The application is opposed vide a replying affidavit dated 22nd January 2021, sworn by the respondent who avers that the applicant shall not suffer any substantial loss if he executes the decree as it has always been her position that he is entitled to the suit land to the extent of its measurement and not more. That the court did not give an order for costs and the applicant is taking advantage of the same to unnecessarily proceed with her endless litigation by continuing to drag this matter as she did with his father. His family has not been able to develop the property awaiting this case to be determined. Further she ought to deposit security for the due performance of the decree and he urges the court to order an amount of Kshs. 3 million as he is the one who is suffering. The application is without merit and will occasion him great prejudice.

5. The defendant vide submissions dated 16/4/21 averred that Order 42 Rule 6 gives the parameters that must be met in order to succeed in an application of this nature. That the applicant has avoided to ventilate the issue of substantial loss in compliance with the law and has not elaborated the aspect of substantial loss that she stands to suffer. She also does not offer security for the due performance of the decree and she must furnish the same. He relied on the cases of; **P.C.E.A Thro' The Registered Trustees V County Council Of Meru & 2 OTHERS [2021] eKLR, Mbogori Baichu V David Gitonga Mungania [2021]eKLR.**

Determination

6. Upon carefully considering the application, the Affidavits and the submissions, I find that the issue for determination is whether to grant or not to grant a stay of execution.

7. **Order 42 Rule 6 (1) of the Civil Procedure Rules, 2010**, provides thus: -

"No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside."

8. Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010, provides : -

“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”.

9. These rules are put in place to safe guard both the decree holder and the judgment debtor. That a successful litigant is entitled to enjoy the fruits of the judgment and the aggrieved party is also entitled to try his or her luck in the higher court and that is why there are hierarchy of courts. An aggrieved party should not be denied an opportunity to appeal but must follow and adhere to the rules and procedures.

10. I find that the application was filed without any delay.

11. On the issue of substantial loss, the applicant argued that she has developed the suit land and has shops on the ground which she has leased to 3rd parties who will suffer loss if stay is not granted. However from the pleadings and her own testimony she had averred that the defendant had demolished her structures on the suit land way back in year 2003. I do find that the applicant has not established what kind of substantial loss she will suffer if the stay order is not granted. The court should also not sanction continued trespass. The fact that a party is in occupation and such occupation has been found to be illegal does not mean that, that is a ground to claim that there will be substantial loss suffered. A party must go a step further and establish the loss that they will suffer, see **Samvir Trustee Limited vs. Guardian Bank Limited (2007) eKLR**.

12. All in all, I find that the application is not merited, the same is hereby dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED VIA EMAIL AT MERU THIS 22ND DAY OF SEPTEMBER, 2021

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this Ruling was given to the advocates for the parties through a notice issued on 3.9.2021. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this Ruling has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court.

HON. LUCY N. MBUGUA

ELC JUDGE