



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC (O.S.) CASE NO. 23 OF 2013

LOISE NKATHA MUTHURIPLAINTIFF

VERSUS

SILAS KIOGORA MBURUGU1ST RESPONDENT

JOSEPH MUTHOMI NGARUTHI2ND RESPONDENT

RULING

1. Before the court is the application dated **22.9.2020** seeking for extension of the stay orders issued on **2.10.2010** until the Court of Appeal **No. 46 of 2020** is heard and determined. The application is supported by affidavits sworn on **22.9.2020** & **18.11.2020** by **Loise Nkatha Muthuri**.
2. The main grounds of the application are that out of Covid 19 restrictions and the slowdown of court operations, she has no control over the Court of Appeal diary in Nyeri so as to prosecute the appeal. Secondly the applicant is apprehensive that if the orders are not extended, she risks eviction from the suit land may take place.
3. The applicant submits she has come before expiry, all conditions granted initially over stay were complied with and there will be substantial loss if she were to be evicted from her land unlike the respondent who have no such developments.
4. The application is opposed through a replying affidavit sworn on 15.10.2020 jointly by the respondents. The respondents take the view the application is a waste of court's time; an abuse of the court process; lacks merit, time has already lapsed; it is an afterthought, there is no good and sufficient cause demonstrated why the appeal has not been prosecuted on time, is a delaying tactic; it amounts to frustrating the respondents from enjoying fruits of their judgment; it would be unjust to grant such orders and lastly it is in the interest of justice to deny extension of the orders.
5. The applicant relies on written submissions dated 18.11.2020 relying on **Order 42 rule 6 (1) Order 50 Rule 6** on discretion to extend time, **Section 1A and 1B** as to overriding objective; **Sections 13 (2) (e) and, 18 & 19** of the *Environment and Land Court Act*, ***RWW –vs- EKW [2019] eKLR*** provisions of security as per ***Gianfranco Manenthi & Another –vs- Africa Merchant Assurance Co. Ltd. [2019] eKLR, Focin Motorcycle Co. Ltd –vs- Ann Wambu Wangui & Another [2018] eKLR, Nicholas Kiptoo Arap Korir Salat –vs- Independent Electoral and Boundaries Commission and 7 Others [2014] eKLR.***
6. On the other hand the respondents by written submissions dated 18.11.2020 rely on ***Silverstein –vs- Chesoni [2002] eKLR 867*** on what substantial loss is and which the applicant has not demonstrated, further it is submitted there has been inordinate delay including filing the appeal late, justice delayed is justice denied. Reliance has also been placed on ***Congress Rental South Africa –vs- Kenyatta International Conference Centre, Cooperative Bank of Kenya Ltd & Another [2019] eKLR and Richard Kubondo –vs- Ndungu Waweru [2019] eKLR.***
7. The issue for determination is whether or not the court has jurisdiction to extend stay orders and if so on what principles of the law.
8. At the time the initial stay of execution was granted, the applicant had met the threshold for the grant of stay of execution pending an appeal. There were however conditions given; that the appeal be filed within 7 days, status quo be maintained which was obtained over Parcel No. Meru Municipality Block 1/244 as at 28.11.2018; there be deposit of security of Kshs. 200,000/= within 30 days and lastly orders to remain in force for a period of one year only. There was a rider that any non-compliance of the conditions shall mean the orders shall lapse.
9. It is not in dispute that the applicant's claim was based on adverse possession and there have been a plethora of cases including **Meru HCCC No. 86 of 2000, Meru HCCC No. 133 of 1996, Meru CMCC 361 of 2000** involving the subject matter.

10. The court ordered status quo to be maintained. In Republic –vs- National Environmental Tribunal exparte Palm Homes Ltd & Another [2013] eKLR; the court held an order for status quo was meant to preserve the existing state of affairs. It means and must be interpreted with respect to an existing factual scenario.

11. Similarly in T.S.S. Spinning & Wearing Co. Ltd –vs- NIC Bank Ltd & Another [2020] eKLR it was held as follows:-

“In essence therefore, a status quo order is meant to preserve the subject matter as it is existed as at the day of making the order. Status quo is about a court of law maintaining the situation or the subject matter of the dispute or the state of affairs as they existed before the mischief crept in, pending the determination of the issue in contention.”

12. In Kenya Airline Pilots Association (K.A.P.A.) –vs- Cooperative Bank of Kenya Ltd. & Another [2020] eKLR, the court held by maintaining the status quo, the court strives to safeguard the situation so that the substratum of the subject matter of the dispute before it, is not so eroded or radically changed or is not so negatively prejudiced that the status quo ante cannot be restored thereby rendering nugatory its proposed decision.

13. In Thugi River Estate Ltd & Another –vs- National Bank of Kenya Ltd & 3 Others [2015] eKLR the court took the view courts have to explicitly frame the state of affairs to be preserved.

14. In the instant case, the court gave orders of status quo and not stay of execution orders. Status quo orders as demonstrated above are different from injunctions and stay of execution orders.

15. Instead of seeking the extension of those orders, the applicant is now widening the gap. The applicant cannot in my view seek for review of the existing orders of status quo by seeking the court to convert the same to orders of stay of execution.

16. It is notable that at the time the orders were given there was no pending appeal in place. Therefore the court in my view became **functus officio** the moment it granted orders of status quo. This application therefore is resjudicata for the court cannot be asked to re-hear another application under **Order 42**. To do so the court would be sitting on appeal of its own ruling contrary to **Section 1A, 1B and Article 159 (2)** of the Constitution.

17. Thirdly the Court of Appeal is now seized of the matter and hence the applicant has rights to move to the Court of Appeal for appropriate reliefs.

18. Fourthly, the orders sought have already expired. The applicant did not move to court before the said orders expired. This court therefore cannot possibly revive that which has been spent. To do so without a formal prayer would be tantamount to prejudicing the respondents.

19. Lastly the applicant has said the loss they would suffer includes rental income and comfort she has been experiencing unlike the respondents who have no developments on the suit land. In my considered view the respondents are more prejudiced, by being denied that rental income, on top of denial of access and occupation of that which the court has already decreed to them.

20. Fifthly the applicant submits if the orders are not issued, there will be eviction. No extracted decree has been demonstrated and or warrants of eviction duly signed in furtherance of execution have been displayed. In the premises I find the application without merit. The same is dismissed with costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 17TH DAY OF NOVEMBER, 2021

In presence of:

Ashaba for appellant

Court Clerk: Kananu

HON. C.K. NZILI

ELC JUDGE