



**REPUBLIC OF KENYA**

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

**ELC APPEAL NO.E079 OF 2021**

**SAMUEL KIMATHI M'MUGWIKA.....APPELLANT**

**VERSUS**

**NJAGI NG'ENTU.....1<sup>ST</sup> RESPONDENT**

**ESTHER KATHUKU MBOROKI.....2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Judgment of Hon. L.N. JUMA (S.R.M.) delivered on 22<sup>nd</sup> June, 2021, in Meru C.M. ELC No. 135 OF 2019)*

**RULING**

1. Before this court is an application dated **2.7.2021** seeking for stay of execution of the judgment delivered on **22.6.2021** in which the plaintiff's suit was disallowed and the counterclaim allowed.
2. The grounds upon which the application is made are that there is a pending appeal with overwhelming chances of success; there is an impeding execution; the applicant is likely to suffer grave hardship which may not be compensated by way of damages and that the application has been made without undue delay as well as in good faith.
3. The application is supported by affidavits sworn by **Samuel M'Mugwika** on **2.7.2021** and **4.11.2021** respectively.
4. The respondents oppose the application through a replying affidavit sworn on **24.9.2021** on the basis that no execution process has started; the applicant has never been in occupation of the suit land **Meru/Municipality/Bock/11/733** which has now been declared illegally obtained and due for cancellation; further the respondents submit they are entitled to enjoy fruits of their judgment; no substantial loss has been demonstrated and lastly no security has been offered at all.
5. As regards the issues raised in the replying affidavit, with leave of court, the applicant filed supplementary affidavit sworn on 4.10.2021 and insists to be in occupation and has offered to deposit the original certificate of lease in court as security pending hearing and determination of the appeal.
6. Parties herein consented to canvass the application by way of written submissions which were to be filed by 10.11.2021. The applicant filed on time while the respondent filed on 13.10.2021.
7. The application is premised on **Order 22 rule 22 (1)** and **Order 10 rule 11 of the Civil Procedure Rules**. The former applies to the court where a decree has been sent for execution while the latter applies to setting aside an ex parte judgment. Both scenarios do not exist in this application. The applicant ought to have come under **Order 42 rule 6**. For a party to succeed under **Order 42 rule 6**, there must be demonstration of substantial loss; the application must be made without undue delay and lastly, security must be offered for due performances of the decree.
8. The judgment was delivered on 22.6.2021. No decree has been attached to show the respondents have taken a step towards execution. There is no indication the applicant has been served with orders to vacate the suit land. The appeal was lodged in 2.7.2021 together with the instant application. I find the applicant moved with speed to seek for the orders of stay.
9. In ***Victory Construction –vs- BM a minor suing through next friend one PMM [2019] eKLR*** the court held:

***“... The stay may only be granted for sufficient cause and that the court in deciding whether or not to grant the stay and in the light of the overriding objective stipulated in Section 1A & 1B of the Civil Procedure Act, the court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objectives in the exercise of its powers under the Civil Procedure Act or in the interpretation of any of its provisions.”***

10. Further in Century Oil Trading Co. Ltd. –vs- Kenya Shell Ltd NRB [2018] eKLR the court held substantial loss is more than ordinary loss which any losing party is bound to suffer and must be sufficiently demonstrated. In the instant case the applicant has not brought any empirical or documentary evidence to support his contention that he will experience grave loss and damage should the application be disallowed.

11. Given that I have found the application was filed immediately after the appeal was lodged, and considering the applicant has also offered security in line with conditions set for granting stay of execution, I am inclined to find the application satisfies the overriding objective under **Section 1A 1B of Civil Procedure Act**. In order to meet the threshold of **Section 1B of the Civil Procedure Act**, I allow the application on the following conditions:-

- a. Stay be and is hereby granted for six months from the date hereof.**
- b. The applicant shall deposit with the Deputy Registrar the original certificate of lease for Parcel Meru/Municipality Block/11/733 together with all original documents regarding its acquisition within 3 days of this order.**
- c. The record of appeal be filed and served within 2 weeks from the date hereof failure of which the orders stand vacated.**
- d. The appeal be prosecuted within 6 months from the date hereof.**
- e. Status quo be maintained as ordered by the court with no new developments regarding Parcel No. Meru/Municipality/Block/11/733.**

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 10<sup>TH</sup> DAY OF NOVEMBER, 2021**

**In presence of:**

Mr. Karatu for respondent

Court Clerk: Kananu

**HON. C.K. NZILI**

**ELC JUDGE**