



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. E0121 OF 2021

MATHEW GITUMA.....APPELLANT

VERSUS

COSMOS MURUNGI THAMBO.....RESPONDENT

RULING

1. By an application dated **22.11.2021** the appellant seeks stay of execution of the judgment read on **9.11.2021** in **Tigania ELC No. 9 of 2017** pending hearing and determination of the appeal. The application is supported by an affidavit sworn on the even date by **Mathew Gituma**.
2. For a party to be granted stay of execution three principles have to be met clearly demonstration of substantial loss if stay is not granted, the application be brought without unreasonable delay and lastly an offer of security for the due performance of the decree should the appeal be unsuccessful.
3. The respondent in the lower court by a plaint dated 19.6.2017 sought and was granted prayers declaring him the rightful owner of **Parcel No. 69B Mikinduri Market**, eviction and permanent injunctive orders plus costs and interests.
4. The basis of the claim was that the appellant fraudulently used a non-existent confirmation of grant allegedly issued in **Meru Succession Cause No. 288 of 2000** to have removed the name of the respondent removed and was registered as the owner of the aforesaid plot.
5. The trial court made a finding the alleged confirmation of grant had been revoked by Hon.Mr Justice William Ouko as he then was now Supreme Court Judge of Kenya, on 15.10.2009 and who had directed the appellant to be investigated by the D.C.I.
6. The respondent opposes the application through a replying affidavit sworn on 26.11.2021 on the grounds that there is no substantial loss and there is fear the property has changed hands so as to defeat the decree. Secondly the purported sale was not disclosed during the lower court trial and is yet another perpetuation of the fraudulent nature of the appellant. Third the appellant has not been paying any land rates at all. Forth there no officer, for security but nevertheless demands Kshs. 2,000,000/= be deposited in an interest earning account in their joint names and the rent payable be deposited to the said account.
7. Further, it is averred the appellant has not disclosed he has been generating income from the suit land and that he has not disclosed the same together with the number of tenants on the property.
8. Turning to the issue of substantial loss, the appellant states he sold the property to a third party who stays in the plot as his home and has developed the same for commercial purposes and has tenants who will be prejudiced in case of an eviction.
9. Additionally, the appellant avers the substratum of the appeal will be lost if eviction occurs.
10. In ***Vijay Morjaria –vs- Nansingh Madhusingh Darbar & Others [2000] eKLR***, the court held it is not enough for a party to say there will be substantial loss if execution occurs since execution is a legal process. A party must therefore demonstrate loss through empirical and other evidence.
11. In this case there is no evidence of substantial loss to occur to the appellant. He alleges he sold the subject land on 14.9.2007. It is not in dispute there was a finding by the High Court that the appellant used a fraudulent confirmation of grant to cause cancellation of the plot in favour of the respondent and which grant was revoked by the court on 15.10.2009. So in essence the appellant had no capacity to sell land which he did not possess in the first instance.

12. Similarly the alleged third party has no valid property which he can claim to own for the appellant had no clean title to land in the first instance.

13. Again the appellant's own mother testified that the appellant purported to include property which belonged to third parties as part of the estate of the deceased. So the appellant knew as early as 11.3.2002 the suit property belonged to the respondent. He could only have been purporting to dispose of the land so as to defeat the claim herein.

14. Moreover the appellant did not disclose that fact of disposal during his testimony in the lower court. Plot rent receipt dated 15.1.2008 showed he still the registered owner while paying rates of Kshs. 400/= in 2008.

15. Coming to the issue of security the appellant has offered no security for the due satisfaction of the decree. On the contrary he has alleged the property is no longer under his hand which raises the question as to his bonafides. He who come to equity must do equity and must come with clean hands.

16. Over and above **Order 42**, the court has to consider the overriding objectives under **Section 1A, 1B and Article 159** of the **Constitution** for the sake of substantive justice. The appellant has not been sincere to both the court and the alleged third party and the respondent. He cannot purport to claim prejudice or substantial loss for a party who is non-suited in this matter.

17. Consequently I find no merits in this application. The same is dismissed with costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 8TH DAY OF DECEMBER, 2021

In presence of:

No appearance for parties

Court Assistant - Kananu

HON. C.K. NZILI

ELC JUDGE