



**REPUBLIC OF KENYA**

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

**ELC. APPEAL NO. 17 OF 2019**

**KIVUVA MAUNDU MUINDE.....APPELLANT**

**VERSUS**

**MUSAU M. MUINDE.....RESPONDENT**

***(Being an Appeal from the Judgment of Chief Magistrate's Court***

***at Machakos in Civil Case No. 490 of 2011 delivered on 10<sup>th</sup> April, 2019 by***

***Hon. A.G. Kibiru, Chief Magistrate)***

**RULING**

1. In the Notice of Motion dated 14<sup>th</sup> August, 2019, the Appellant has prayed for the following orders:

***a. That this Honourable Court be pleased to grant a stay of execution of the orders of the Honourable A.G. Kibiru (CM) in Machakos Chief Magistrate Civil Case No. 490 of 2011 delivered on 10<sup>th</sup> April, 2019, pending the hearing and determination of this Application and thereafter pending the hearing and determination of this Appeal.***

***b. That a temporary injunction pending Appeal be issued restraining the Respondent herein, by his agents, servants and/or employees or otherwise from sub-dividing, selling or disposing, alienating and/or dealing adversely with land parcel Machakos/Kiandani/1963 pending the hearing and determination of this Application and Appeal herein.***

2. The Application is supported by the Affidavit of the Applicant who has deponed that he commenced Machakos CMCC No. 490 of 2011 in which he sought for a declaration that the Respondent is a trespasser on land known as Machakos/Kiandani/1963 (*the suit property*); that the Respondent filed a Defence and Counter-claim and that the learned Magistrate decreed that the two of them are the joint owners of the suit property.

3. The Appellant has further averred that the learned Magistrate also directed the Land Registrar to sub-divide the land into two equal parts and the said sub-divisions to be registered in his favour and in favour of the Respondent; that he has filed an Appeal against the said decision and that unless a stay of execution is granted, then the suit land will be sub-divided into two.

4. In reply, the Respondent deponed that the Appeal filed by the Appellant does not raise arguable issues of law and fact; that he is in occupation of a portion of the suit land measuring 25 feet x 100 feet and that he has no intention of selling his portion of land. Both the Appellant's and the Respondent's advocates filed submissions which I have considered.

5. The law governing Applications for stay of execution is Order 42 Rule 6(2) of the Civil Procedure Rules which provides as follows:

***“(2) 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.”***

6. In considering if the Appellant will suffer substantial loss unless an order of stay of execution is granted, I am guided by the decision of the Court of Appeal in *Kenya Shell Limited vs. Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988) 1 KAR 1018* in which the

court stated as follows:

***“It is usually a good rule to see if Order 41 Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be a rare case when an Appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay.”***

7. I have perused the Judgment of the lower court. In its Judgment, the court made a declaration that the Appellant is holding half of the suit property in trust for the Defendant. The learned Magistrate further directed the Land Registrar, Machakos, to sub-divide into two equal parts the suit property and give consideration to the respective development by the parties.

8. The lower court has decreed that the Title Deed to parcel of land known as Machakos/Kiandani/1683 (*the suit property*) should be cancelled and be sub-divided. It follows that the portion of land that is to be registered in the name of the Respondent is likely to be out of reach of the Appellant, and this court, because the Respondent may sell it.

9. Indeed, the sub-division of the suit property will change the character of the land, thus occasioning the Appellant substantial loss in the event the said portion of the land is sold or charged.

10. Having shown that he shall suffer substantial loss unless the order of the lower court is stayed, and the Application having been filed within a reasonable time, I find that an order for stay of execution should issue. That being so, and in view of the fact that it is the Appellant who is in possession of the Title Deed in respect of the suit land, I will not consider the prayer for injunction.

11. For the reasons I have given above, I allow the Application dated 14<sup>th</sup> August, 2019 as follows:

***a. An order for stay of execution of the orders of the court in Machakos Chief Magistrate Civil Case No. 490 of 2011 delivered on 10<sup>th</sup> April, 2019, pending the hearing and determination of the Appeal be and is hereby granted.***

***b. Each party to bear his own costs.***

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 15<sup>TH</sup> DAY OF MAY, 2020.**

**O.A. ANGOTE**

**JUDGE**