



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CIVIL APPEAL NO.169 OF 2014**

**ONESMUS MULI MUTUA.....APPELLANT/APPLICANT**

**VERSUS**

**COSMAS WAMBUA MWANGANGI.....RESPONDENT**

**RULING OF THE COURT**

1. The Application before court is a Notice of Motion dated 5<sup>th</sup> February 2015. It has been brought under the Provisions of Order 42 Rules 6, Order 51 rules 1, 2, 3, 4 and 10(2) of the Civil Procedure Rules and Section 3A, 1A and 1B of the Civil Procedure Act. It seeks for the following orders namely:-

***(1) This Honourable Court be pleased to issue an order of stay of execution of the decree and other consequential orders in Suit No. CMCC. 55 of 2013 pending the hearing and determination of this Appeal.***

***(2) Costs be provided for.***

The Application is supported by an annexed affidavit of the Appellant/Applicant sworn on even date and further on the following grounds:-

***(a) THAT the Applicant is at danger of being evicted from his lawful property known as PLOT NO. 3010 at Katelembo Athiani Muputi Farming and Ranching Co-operative Society following decree issued in the suit CMCC No. 55 of 2013.***

***(b) THAT the Applicant has lodged an appeal against the said decree order and if the orders sought herein are not granted, then the appeal shall be rendered nugatory.***

***(c) THAT the Appeal has high chances of success against the said judgment.***

***(d) THAT the Respondent will not suffer any prejudice if the orders sought are granted in the interest of justice.***

2. The Appellant/Applicant's case is that a lower court delivered judgment in which he was ordered to be evicted from the suit property. The Applicant contends that he has been unlawfully evicted from the land where he and his family resides and that he has already filed an appeal which has high chances of success and now contends that if stay of execution is not granted he stands to suffer great prejudice and loss and further that the appeal shall be rendered nugatory.

3. The Application is opposed. The Respondent filed one ground of opposition to the effect that the judgment of the lower Court has been fully executed. The Respondent further filed a Replying sworn on

18/02/2015 in which he vehemently opposed the Applicant's averments as follows:-

***(i) That the orders sought are a nullity in law since what is sought to be stayed has already taken place.***

***(ii) That the Applicant was duly evicted from the suit premises and his attempts at a comeback are unlawful and should not be legitimized.***

***(iii) That the Applicant has not met the conditions for grant of stay pending appeal.***

4. Parties filed written submissions which I have carefully considered. The only issue for determination is whether this court should grant stay of execution of decree in **Machakos CMCC. No. 55 of 2013.** Order 42 Rule 6 of the Civil Procedure Rules grants order of stay of execution if sufficient cause is shown. The said rule lays down the conditions to be fulfilled for the stay orders to be given. These conditions were outlined in the case of **AGGREY MAULA MALUNGU –VS- JOSEPH SANYA MWAKARI [2015] eKLR** where the court noted as follows:-

“For a stay of execution to be granted, an Applicant must satisfy three (3) conditions stated in rule 6 (2) to the effect that:-

***(a) The Application for stay must be made without unreasonable delay from the date of the decree or order to be stayed;***

***(b) The Applicant must show that he will suffer substantial loss if the orders of stay are not granted.***

***(c) The Applicant offers such security as the court may order to bind him to satisfy any ultimate orders the court may make binding upon him.***

The record of the lower court shows that judgment was delivered on the 30<sup>th</sup> July, 2014 in which the Appellant/Applicant was given 14 days within which to vacate the suit land failing which the Respondent would proceed to evict him. The Respondent subsequently obtained orders of eviction which were carried out on the 11<sup>th</sup> September, 2014. The Appellant/Applicant appears to have filed an Application dated 5<sup>th</sup> August, 2014 seeking for stay of execution but which was later withdrawn by his learned counsel as it was indicated to court that it had been overtaken by events as execution had already been carried out. The order of withdrawal was made on 16/09/2014. The Applicant waited another five (5) or so months and filed the present application for stay pending appeal. As regards the first condition for grant of stay namely whether substantial loss will be suffered, I note from the record that an earlier Application for stay was withdrawn by the Applicant on the ground that the same had been overtaken by events which events were that the Applicant had been evicted from the suit premises. It seems the Applicant attempted to re-enter the premises unlawfully which forced the Respondent to file an Application for contempt which is still pending for determination. The Applicant has not disclosed in his Application that he had already been evicted from the premises and this therefore militates against his claim that he stands to suffer substantial loss if stay is not granted. He has already been evicted from the premises and has not sought to be restored back into the premises so as to benefit from a stay. In any event the Applicant has not explained how he is likely to suffer substantial loss when already evicted. Had he been in occupation of the premises, then he could explain any loss likely to be suffered if eviction is to be undertaken. If the Applicant unlawfully re-entered the premises, then he cannot seek to stay the initial decree that had been legitimately obtained by the Respondent. It is clear that the Applicant has not revealed to this court of his unlawful re-entry into the premises and as such he cannot be heard to claim that he is in danger of being evicted when in actual fact he had already been evicted. He had not sought to set aside the order of eviction so as to entitle him to re-enter the premises. He has therefore come to court with unclean hands and he is not deserving of the court's exercise of discretion. I find the Applicant has not met the first condition for grant of stay.

As regards the second condition, the Applicant filed an Application dated 5/8/2014 for stay and which

was rescheduled to 16/09/2014. However the Applicant withdrew the same on the ground that it had been overtaken by events in that eviction had already been carried out. The Applicant did not make any other Application until five (5) months later when he filed the present application. The Applicant has not explained the reasons for the delay in filing the Application. It seems the Applicant made the present Application after attempting to unlawfully re-enter the premises yet he had full knowledge that the order of eviction had been carried out and had not been set aside or stayed. Hence it is clear that the Application herein had been made with unreasonable delay.

As regards the third condition for grant of stay namely, whether the Applicant is ready to furnish security, it is noted that the issue of furnishing security is neither stated by the Applicant nor in his Affidavit in support. He has not averred that he is ready and willing to furnish security for the due performance of the decree in the event the court calls upon him to do so. The Applicant was under a duty to state clearly that he is ready and willing to offer security for the due performance of the decree in the event he is called upon to do so. He did not do so and therefore there is nothing to demonstrate his seriousness and commitment to warrant him to be granted an order of stay of execution of decree.

The Appellant is seeking equitable relief. He who comes to equity must come with clean hands. The Appellant has come to court with unclean hands. He first filed an application for stay dated 05/08/2014 and later withdraw upon execution being carried out and indicated to the court that indeed he had been evicted. He purports to re-enter unlawfully onto the premises and five (5) months thereafter applies for stay of execution of a decree that had already been executed. That is an abuse of the due process of the court which this court cannot countenance.

In the result, it is the finding of this court that the Applicant's Application dated 05/02/2015 has no merit. The same is ordered dismissed with costs to the Respondent.

It is so ordered.

Dated, signed and delivered at Machakos this 4<sup>TH</sup> day of **APRIL** 2017.

**D. K. KEMEI**

**JUDGE**

**In the presence of:**

Mulei for Respondent.....

C/A- Munyao .....