



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
ELC APPEAL NO. 15 OF 2015

FREDRICK NTONGAI M'ERIMBA.....APPELLANT

VERSUS

GICHUNGE M'KAUNGANYI AITHURA.....RESPONDENT

R U L I N G

This application is dated 5th May, 2015 and seeks orders:

1. ***THAT this application be certified urgent and the same be heard expeditiously and ex parte in the first instance.***
2. ***THAT pending the hearing of the application interpartes, the Honourable Court be pleased to stay the orders issued on 17.4.2015 in Meru CMCC NO.255 of 2013.***
3. ***THAT pending the hearing and determination of the Appeal, the Honourable court be pleased to stay the orders issued on 17.4.2015, in CMCC NO 255 of 2013.***
4. ***THAT the cost of the application be provided for.***

It is supported by the affidavit of **FREDRICK NTONGAI** and has the following grounds:

- a) ***THAT the appellant purchased L. R. NO NJIA/BURIERURI/5119 for Kshs.4,515,000/= and has been in occupation of the suit land for more than 5 years now.***
- b) ***THAT on 1.3.2015, the trial court in MERU CMCC 255 of 2013, visited the scene and found that the Appellant was in occupation of the suit and had in fact built a house therein.***
- c) ***THAT the orders issued on 17.4.2015, by the trial magistrate preventing the Appellant from accessing the suit land amounted to an eviction through the back door.***
- d) ***THAT for the interest of justice, the said orders of 17.4.2015, need to be stayed on that the Appellant does not lose his investment.***
- e) ***THAT the appellant has a final judgment against the Respondent for the transfer of the suit land to the Appellant, which judgment was given on 28.1.2014.***

The application was heard interpartes on 14.5.2015. Mr. Mwirigi, advocate, for the applicant submitted that he had filed this application for stay of execution of a lower court's judgment timeously and that if stay of execution was not granted the appellant would suffer irreparable loss. He told the court

that the appellant had invested Kshs.4.5 Million in buying and developing the suit land and had been in occupation for over 5 years. He also told the court that the appellant was willing to deposit security as directed by the court.

Mr. Mwirigi told the court that the trial court had indeed visited the suit land and ascertained the status on the grounds. He, however, lamented that the suit in the lower court had been dismissed on a technicality.

Mr. Kaimenyi, advocate for the respondent, opposed the application. He decried the fact that the application was brought under order 42 instead of order 43 CPR. He prayed for the dismissal of the application as the appellant had invoked the wrong provision of the law.

He submitted that the respondent was in actual possession and was the registered owner of the suit land. He prayed for the dismissal of the application.

I have considered the pleadings of the respective parties. Regarding possession of the suit land, the parties have proffered diametrically opposed positions. I, however, find that the application has been made without unreasonable delay. I am satisfied that substantial loss may result to the applicant unless an order of stay is granted. I also find that the application is properly in court and that the correct provisions of the law have been invoked.

In the circumstances, I allow the application in terms of prayer 3 and grant the following orders:

- 1. Subject to a deposit as security of the sum of Kshs.400,000/= in court, to be paid within 30 days after delivery of this ruling, a stay of the orders issued on 17.4.2015 in Meru CMCC No. 255 of 2013 is granted.***
- 2. Failure to pay the sum of Kshs.400,000/= within 30 days as stipulated will automatically lead to the lapse of the stay granted herein.***
- 3. Directions on 14.7.2015.***

Delivered and signed in Open Court at Meru this 11th day of June 2015 in the presence of:

Cc. Lilian

Kaimenyi for Respondent

Nyamu Nyaga h/b Mwirigi for Applicant/Appellant

P. M. NJOROGE

JUDGE