



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 62 OF 1998**

**SARAH KANYUA MWITHIA &**

**HENRY MURITHI MWITHIA**

**(Suing as the legal representatives of**

**GERALD MWITHIA).....APPELLANT/APPLICANTS**

**VERSUS**

**STANLEY GITONGA.....RESPONDENT**

**RULING**

1. **SARAH KANYUA MWITHIA & HENRY MURITHI MWITHIA (Suing as the legal representatives of GERALD MWITHIA)** filed the application dated 26<sup>th</sup> May 2020 seeking orders of stay of execution of the Ruling delivered by this court on 30/4/2020, pending the hearing and determination of the intended appeal to the Court of appeal.

2. The application was supported by the grounds set out on the face of the application and in the two affidavits of **Henry Murithi Mwithia**. The applicants contend that they have since filed a notice of appeal within time and have requested for certified copies of proceedings and judgement. That the **Parcel No. 498 Kianjai Adjudication Section** (the suit premises herein) has been in the possession of the applicants and their family for all their life. They also contend that parcel 447 was never incorporated into parcel 498, that parcel 447 did not belong to the respondent as it belonged to one John Kabuuri and that the said parcel 447 does not measure 7 acres but 0.8 acres. The applicants therefore contend that they will be prejudiced if the Respondent implements the Ruling.

3. The respondent opposed the application through a Replying affidavit dated 30<sup>th</sup> July 2020. He averred that the applicants have not demonstrated that if the orders sought are granted, they will suffer substantial loss. That they have equally not demonstrated their willingness to deposit the security required by law, and that the application if allowed will restrain the respondent from realizing the fruits of his judgement.

4. Both parties have duly filed their respective submissions to the application. The applicants submitted that they have filed the application within reasonable time. That they shall be rendered homeless hence they shall suffer substantial loss. That this being a land matter they propose that an order of inhibition be placed on the suit premises. They are equally ready to offer any security.

5. The respondent submitted that the question as to who owns the suit premises was determined in **Nyeri Court of Appeal Civil Case No. 297 of 2010**. That the applicants intend to deny the respondent the fruits of his judgement. That the applicants have not shown that they shall suffer substantial loss and equally they have not demonstrated their willingness to abide by the courts directions.

**Analysis and Determination**

6. It is only proper to point out and briefly illustrate the history of the dispute herein and the genesis of the application. **Gerald Mwithia** had instituted the suit against the respondent in the magistrate's court i.e. **Meru Cmcc No. 120 of 1993** seeking to evict the respondent from land parcel 498. His case was dismissed on a technicality. He moved to the **High Court in Meru High Court Civil Appeal No. 62 of 1998** where he won. Stanley Gitonga then moved to the **Court of Appeal in Nyeri COA Civil Case No 297 of 2010** where he challenged the High Court decision. He won.

7. In the application dated 14/10/2013, the respondent desired to have the Court of appeal's decision implemented by seeking the following Orders;

***a) That this Honourable Court do Order the District Land Adjudication Officer and the demarcation officer Kianjai Adjudication***

section to rectify their records and reinstate the land Parcel No. 447 KIANJAI Adjudication Section measuring 7 acres to the name of the Respondent/ Applicant herein Stanley Gitonga M' Itimitu as per judgement of the Court of Appeal at Nyeri in Stanley Gitonga Versus Gerald Mwithia.

b) That the Respondent herein Gerald Mwithia be ordered to vacate Parcel No. 447 Kianjai Adjudication Section and in default to be forcibly evicted.

c) That the O.C.S Ngundune Police station be directed to provide security to the land Adjudication officers in order to implement the judgement of the Court of Appeal and to show the parties their respective boundaries.

8. This court vide its Ruling dated 30/4/2020 agreed with the Respondent and issued him the prayers sought. The court held as follows;

*“This judgement of the High Court is the one which was set aside vide the Court of Appeal judgment of 18/7/2013 in Court of Appeal Nyeri 297 of 2010. It follows that the execution of the court of appeal judgement entails undoing what had been done by the High Court. The application by Stanley the applicant herein is in line with the process of undoing the High Court judgement. In essence, the incorporation of Land Parcel No. 447 into parcels No. 498 and the eviction of the current applicant from what was parcel No. 447 is what was set aside by the court of appeal. In the circumstances I find that the application dated 14/10/2013 is merited...”*

9. The only issue before me is whether or not, in the circumstances, I ought to grant stay of execution of this court's Ruling pending the hearing of the appeal. The applicable provision of law is **Order 42 rule 6 of the Civil Procedure Rules 2010**, which stipulates as follows:

*(1) “No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order..... (2) No order for stay of execution shall be made under sub-rule (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.”*

10. In **Catherine Njeri Maranga v Serah Chege & another [2017] eKLR**, the Court held as follows on the principles to be adhered to in a prayer for stay of execution;

*“From the above provision, it is clear that the court must be satisfied that there is “sufficient cause” to grant a stay. Further, the filing of an appeal does not, ipso facto, guarantee stay of execution of the court's orders”.*

11. In **Raymond M Omboga vs. Austine Pyan Maranga Kisii HCCA No. 15 of 2010**, it was held that:

*“The court cannot see how it can order stay of the decree that is not the subject of an appeal. Had the aforesaid order been the subject of this appeal then different considerations would have applied. The court would have looked at it alongside the settled principles aforesaid for granting stay of decree. The order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can be no stay of execution of such an order...The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory do not arise... It is trite law that stay of execution pending appeal can only be granted against the order being appealed against. Put differently, an order for stay of execution pending appeal cannot be granted if the intended appeal is not against the order sought to be stayed; yet this is what obtains in this application where the applicant's appeal is against the order of dismissal of his application, yet the stay sought is against the subordinate court's judgement or decree.”*

12. In **Western College of Arts and Applied Sciences v Oranga & Others (1976-80) 1 KLR, the Court of Appeal for East Africa** stated as follows in respect of stay of execution:

*“But what is there to be executed under the judgment, the subject of the intended appeal? The High Court has merely dismissed the suit with costs. Any execution can only be in respect of costs..... In the instant case the High Court has not ordered any parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court Judgment for this Court, and in application for stay, it is so ordered”.*

13. In **Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya) [2015] eKLR** the Court of Appeal (Kantai J.A ) held as follows:

*“An order for stay of execution [pending appeal] is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a Judgment. The delay of performance presupposes the existence of a situation to stay – called a “positive order” – either an order that has not been complied with or has partly been complied with....”*

14. The Order sought to be stayed herein emanated from the determination issued by the Court of Appeal. The aforesaid determination is yet to be stayed or appealed, yet the same was delivered more than 7 (seven) years ago on 18.7.2013. This court only sat to apply the determination of the Court of Appeal decision and nothing more. The merits and demerits of the aforesaid determination are not and cannot be the subjected to this court. Clearly the resultant decree and judgement which ought to be stayed is that of the Court of Appeal. The applicants are well aware that the Court of Appeal had set aside the Judgment of Hon. Judge Mary Kasango in H.C.A 629 of 1998 delivered on 6.11.2009 which in essence meant that the claim filed by Gerald Mwithia in the subordinate court was NO MORE.

15. In light of the foregoing analysis, I find that there is nothing to be stayed. I therefore find no merits in the Appellants' Notice of Motion dated 26<sup>th</sup> May 2020 which is hereby dismissed with costs to the respondent.

**DATED, SIGNED AND DELIVERED AT MERU THIS 30<sup>TH</sup> DAY OF SEPTEMBER, 2020**

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**

**ORDER**

The date of delivery of this Ruling was given to the advocates for the parties through a virtual session via Microsoft teams on 14.7.2020. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17<sup>th</sup> March, 2020 and published in the Kenya Gazette of 17<sup>th</sup> April 2020 as Gazette Notice no.3137, this Ruling has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the *Civil Procedure Rules* which requires that all judgments and rulings be pronounced in open court.

**HON. LUCY N. MBUGUA**

**ELC JUDGE**