



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. 111 OF 2019

TIMOTHY MARETE NCHEBERE & ANOTHER...APPELLANTS

VERSUS

JAPHET BUNDI.....RESPONDENT

RULING

1. Vide the notice of motion dated 25.9.2019, the applicants/ appellants are seeking orders of stay of execution of the judgment delivered on 22.8.2019 in Meru CM ELC No. 144 of 2018 pending the hearing of the appeal. The application is premised on the grounds on the face of it and the affidavit of the 1st applicant (Timothy Marete). It is averred that the applicants will suffer irreparable loss and damage if the orders are not granted.

2. The respondent has opposed the application through his replying affidavit filed in court on 25.10.2019 where he avers that he is an octogenarian aged over 80 years and he needs to enjoy the fruits of his judgment. He contends that the appellants are land grabbers and trespassers who occupied his land by force.

3. I have considered all the arguments raised herein as well as the submissions of the rival parties.

4. Order 42 rule 6 (2) of the civil procedure rules provide that:

“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”.

5. To grant or to refuse an application for stay of execution pending appeal is discretionary in that the court when granting a stay, it has to balance the interests of the applicant with those of the respondent. In determining this balance, the court gives due consideration to the three criteria set under order 42 rule 6 (2) of the Civil Procedure Rules, that is to say:

1. Whether appellant stands to suffer substantial loss,
2. Whether the application has been brought without delay and
3. Whether there is security.

6. On the issue of substantial loss, **Gikonyo J in Wangalwa & another vs Agnes Naliaka Cheseto Misc. application no. 42 of 2011 (2012) eKLR** stated that;

“The appellant must establish other state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal”.

7. It is not enough for the applicants to say that they will suffer irreparable damage. The Applicants must go further and show the substantial loss that they stand to suffer if the respondent executes the decree in the lower court; See **Kiplagat Kotut v Rose Jebor Kipngok [2015] eKLR**.

8. I find that the applicants have not demonstrated the irreparable loss that they stand to suffer if the order of stay is not granted. The court has also taken into consideration that the respondent appears to be a very elderly person in his 80s. Thus even though the application was filed without any delay, and even though the applicants are ready to deposit security, I find no sufficient cause to warrant the exercise of this courts discretion in favour of the applicants.

9. The application dated 25.9.2019 is hereby dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT MERU THIS 16TH 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 23.6.2020. 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 17th March, 2020 and published in the Kenya Gazette of 17th 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