



**REPUBLIC OF KENYA**

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

**CHUKA ELC CASE NO 03 OF 2019 (OS)**

**SUSAN NYAMBURA MWATHI .....PLAINTIFF**

**VERSUS**

**DUNCAN KIRIA KABETE.....DEFENDANT**

**RULING**

1. On the face of the Notice of Motion, the applicant states that this application which is dated **24<sup>th</sup> August, 2020** has been brought to court pursuant to sections 1A, 1B, 3A and 63(c) and (e) of the Civil Procedure Act and Order 42 Rule 6(1) and (2) of the Civil Procedure Rules.

2. The application seeks the following orders:-

1. That this application be certified as urgent, service be dispensed with and it be heard ex-parte in the first instance.
2. That this honourable court be pleased to issue an order of stay of execution of the judgment delivered on 11<sup>th</sup> March, 2020 pending the hearing and determination of this application.
3. That this honourable court be pleased to issue an order of stay of execution of the judgment delivered on 11<sup>th</sup> March, 2020 pending the hearing and determination of Civil Appeal No. 117 of 2020 in the court of appeal at Nyeri.
4. That there be such other or further orders as may be necessary and appropriate to meet the ends of justice.
5. That the costs of this application be provided for.

3. The application is supported by the **affidavit of Susan Nyambura Mwathi**, the applicant, sworn on **25<sup>th</sup> August, 2020** and has the following grounds:

1. That on 11<sup>th</sup> March, 2020 the court delivered the judgment herein and inter alia declared the plaintiff the proprietor of 3 acres out of Land Parcel No. Tharaka/Chiakariga "A"/586 through the doctrine of adverse possession and ordered that the plaintiff should be evicted from the land declared herein to belong to the defendant if she continued to occupy the said land after ninety days of the delivery of the said judgment.
2. That the defendant has intimated and made it clear to the plaintiff/applicant that he is in the process of taking a land surveyor to commence the subdivision of the suit land at any time and evict the plaintiff in implementation or to give effect to the judgment herein.
3. That the plaintiff/applicant was aggrieved by the judgment herein and has filed an appeal at the Court of Appeal at Nyeri.
4. That if the orders sought herein are not granted the plaintiff/applicant will be evicted from the suit land by the defendant/respondent and/or the defendant/respondent shall execute the impugned judgment before the aforesaid appeal is heard and determined and thereby render the same nugatory.
5. That it is in the best interests of justice for this honourable court to grant the orders sought.

4. The application was heard inter partes on **19<sup>th</sup> October, 2020**. The applicant's advocate, Mr. John Muthomi, told the court that the applicant was ready to abide by such conditions as the court may impose and was ready to give deposit for security for the stay of execution to accrue. He pointed out that the only complaint the respondent seemed to raise was that the application was filed following an inordinate

delay. He pointed out that the apposite judgment was delivered on **11<sup>th</sup> March, 2019** and soon thereafter a national lock down was instituted due to the Coronavirus pandemic. He asked the court to take Judicial notice of this situation.

5. Advocate Ouma, for the defendant told the court that the defendant wholly and solely relied upon the replying affidavit sworn by the respondent on

**12<sup>th</sup> October, 2020.** The said affidavit reads as follows:-

I, DUNCAN KIRIA KABETE of P. O. Box 194 Meru do make oath and state as follows:-

1. That I am the Defendant in this matter and hence competent to swear this Affidavit.
2. That the contents of the Application dated **25<sup>th</sup> August 2020** have been read and explained to me by my advocate on record and I wish to respond as follows.
3. That the Application is a non-starter and vexatious and it is a ploy to delay me from enjoying the fruits of the judgment.
4. That the Plaintiff's Appeal has no chance of success as her evidence and that of her witnesses pointed out that she only occupies a portion of the suit land and the rest is occupied by me and my tenants.
5. That the Plaintiff is still in occupation of the portion she was awarded by this Honourable Court and I have never evicted her from the portion she is occupying.
6. That this Honourable Court delivered the Judgment on **11<sup>th</sup> March, 2020** and the Plaintiff has never sought for stay of execution until now and she has not offered an explanation about the delay in seeking the stay orders.
7. That the application has been filed **four months** after judgment thus making the delay inordinate.
8. That I have been advised by my advocate which advice I verily believe to be true that the Plaintiff's Appeal was filed out of time and hence it has no chance of succeeding.
9. That the Applicant has not demonstrated evidence of the substantial loss she would suffer if any and her aim is to continue frustrating me from utilizing my land.
10. That the Plaintiff should not be granted stay simply because she can furnish security as there is no security capable of compensating me from the many years that I will lose prosecuting the Appeal.
11. That the Application herein has no grounds capable to warrant the orders sought since I am in occupation of a substantial portion of the suit land and the Plaintiff occupies approximately 2 acres.
12. That the Appeal has no chance of success and the balance of convenience tilts in favor of the Defendant.
13. That the right of Stay of execution ought to be balanced with the right of the Defendant to enjoy the fruits of his judgment and not to (sic).
14. That I pray that the application by the Applicant be dismissed with costs since it has no merit.
15. That what is deponed to herein is true to my knowledge, understanding and belief.

6. I have carefully considered the pleadings filed by the parties to buttress their diametrically incongruent assertions. I opine that the respondent has offered a strong case in his opposition to the application. Most poignantly, the respondent is unequivocal that he does not intend to evict the applicant from the 3 acres given to her through a court order. However, it is not disputed that the applicant has already filed an appeal. The applicant is willing to deposit security as required by order 42 Rule 6(2) of the Civil Procedure Rules. In the greater interest of justice, I will allow the application conditionally in the following terms:

- a) Prayer 3 in the application is granted for an order of stay of execution of this court's judgment delivered on **11<sup>th</sup> March, 2020** pending the hearing and determination of **CIVIL APPEAL NO. 117 of 2020** in the Court of Appeal at Nyeri **PROVIDED** that the applicant, **SUSAN NYAMBURA MWATHI**, deposits in court a **sum of Kshs.900,000/=** as deposit for security within the next 21 days **AND** should this condition not be satisfied within the stipulated time, this order will automatically lapse.
- b) Costs shall be in the cause.

Delivered in open Court at Chuka this **26<sup>th</sup> day of October, 2020** in the presence of:

CA: Ndegwa

Saluny h/b M/s Kithaka for the defendant

Applicant and her lawyer - absent

**P. M. NJORGE,**

**JUDGE.**