



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMRU

ELC APPEAL NO. 24 OF 2020

NICHOLAS MWITI MUTUARUCHIU.....APPELLANT/APPLICANT

VERSUS

JOSEPH KABURU MBUI.....1ST RESPONDENT

SUSAN KAGWIRIA (Sued as the legal representative of

GEOFFREY MUTUMA MUTUARUCHIU.....2ND RESPONDENT

RULING

1. The applicant/appellant has filed the application dated 17.3.2020 seeking orders of stay of execution of the judgment in Meru CMCC No. 9 of 2015 and that the respondent be restrained from interfering with applicant's occupation of parcel Abothuguchi/Githongo/1184, selling, leasing or charging the said land.
2. The prayer for stay of execution was granted ex parte on 27.4.2020 pending the determination of this application. The applicant contends that he and his family live on the suit land where he has built 4 semi-permanent houses, he has installed piped water and he has planted over 20 mature eucalyptus trees. He contends that the respondents have never resided on the suit land.
3. The applicant further contends that the judgment of the trial court had ordered that he vacates the suit land and he is now on the verge of being evicted.
4. In his submissions the applicant has reiterated the averments set forth in his affidavits. He relies on the cases of **Bashir Godana Vs Fatuma Godana Tupi (2018) eKLR**, **Florence Makungu Harun & another vs Stanley Mafoli Musindi & another (2018) eKLR** and **Naftali Ruthi Kinyua vs Patrick Thuita Gachure & another (2015) eKLR**.
5. The respondents contend that he filed his replying affidavit on 3.6.2020 but on 2.7.2020, the court directed the respondent to file their response as none was in the court file. They were given 7 days to do so. On 5.10.2020, again the court alerted the respondent that the only document they sent to the court was a receipt and not a replying affidavit. They were granted further 7 days to avail their response. By the time I set out to write this ruling, no replying affidavit could be traced in the court file.
6. The respondents however have filed submissions where he contends that the applicant has been in unlawful occupation of the suit land and he ought to vacate the same as he has another parcel of land.
7. The respondents further state that the application was filed to frustrate them from enjoying the fruits of their judgment, and that the applicant is not specific and precise about the security he intends to offer.
8. In support of their case, the respondents have relied on the case of **Jospeh Murage Meru vs Lucy Wangui Chege & another (2013) eKLR**.
9. I have considered all the issues raised herein including the submissions of the parties. I find that the application is basically anchored on the provisions of order 42 rule 6 (1) (2) and (6) of the Civil Procedure Rules. In the case of **Feisal Amin Jan Mohammed T/A Dunyia Forwarders vs Shami Trading Co. Ltd (2014) eKLR**, the court stated that;

“It is trite law therefore that a stay of execution order is generally granted if the applicant has successfully demonstrated that substantial loss may result to him unless the order is made, that the application was made without unreasonable delay and that

the applicant has offered proper security”.

10. On the issue of substantial loss, it is not disputed that applicant is the one in occupation of the suit land. The trial court termed such occupation as unlawful and so does the respondent. The defendant’s counter claim before the trial court was allowed to the effect that applicant was ordered to vacate the suit land. It is therefore apparent that applicant has established the element of substantial loss as he faces imminent eviction from the suit land. .

11. On the issue of delay, I find that judgment of the trial court was delivered on 26.2.2020 and the current application was filed 20 or so days later on 17.3.2020. Thus the application was timely filed.

12. On the issue of security I find that applicant is ready to abide by any conditions set out by the court.

13. In the final analysis, I do allow the application dated 17.3.2020 on condition that the applicant shall deposit a sum of Kshs.70,000 in court within 30 days from date of delivery of this ruling failure to which the orders granted herein shall lapse. The orders of stay of execution shall remain in force for a period of **ONE YEAR**. The costs herein shall abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED AT MERU THIS 4TH DAY OF NOVEMBER, 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 5.10.2020. 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