



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. APPEAL NO. 10 OF 2018

JUSTUS MUTAVI KIKO.....APPELLANT

VERSUS

BONIFACE MAKAU NZOKA.....1ST RESPONDENT

KITHUKA IKINYA2ND RESPONDENT

(Being an Appeal from the Judgment of Chief Magistrate's Court at Machakos in Civil Case No. 1026 of 2009 delivered on 20th March, 2018 by Hon. A.G. Kibiru– CM)

RULING

1. In his Application dated 20th April, 2018, the Appellant/Applicant is seeking for the following orders:

- a. That the execution of Judgment dated 20th March, 2018 in Civil Suit No. 1026 of 2009 at Machakos be stayed pending the hearing and determination of this Application.***
- b. That the execution of Judgment dated 20th March, 2018 in Civil Suit No. 1026 of 2009 at Machakos be stayed pending the hearing and determination of the Appeal herein.***
- c. That the costs of this Application be provided for.***

2. The Application is premised on the grounds that the Applicant has lodged an Appeal against the Judgment of the Magistrate in Civil Suit No. 1026 of 2009, Machakos; that the Applicant will suffer substantial loss if the Judgment is executed and that unless an order of stay of the Judgment is granted, the Appeal will be rendered nugatory.

3. The Appellant/Applicant has deponed that he faces the risk of being evicted from the suit land where he has established his home unless an order staying eviction is issued and that he will suffer substantial loss.

4. The Respondents did not file a reply to the Application dated 20th April, 2018. However, both parties filed written submissions. Having not filed a Replying Affidavit or Grounds of Opposition pursuant to the provisions of Order 51 Rule 14 of the Civil Procedure Rules, the filing of submissions by the Respondents' advocate was unprocedural. The submissions filed on 8th October, 2018 by the Respondents' advocate are therefore expunged from the record.

5. The Applicant's advocate submitted that if the orders of the lower court are executed, his client will be expected to vacate the suit land; that the Appellant's family has settled on the suit land and that an order of stay should be granted.

6. In the Judgment of the court in Machakos CMCC No. 1026 of 2009 dated 20th March, 2018, the court ordered the Appellant to vacate parcels of land known as Muthetheni/Kyethivo 1/700 and 697 within ninety (90) days.

7. The law relating to stay of execution of an order or decree is found under Order 42 Rule 6(2) (a) and (b) of the Civil Procedure Rules which provides as follows:

“6(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.”

8. The Appellant has annexed on his Affidavit photographs showing the permanent structures that he has put on the suit land, which is the land that he claims the Respondents are holding in trust.

9. Having exhibited photographs showing the permanent structures that are standing on the suit premises, it follows that the eviction of the Appellant from the suit land will render him and his family homeless, thus occasioning him substantial loss. The Application by the Appellant was filed within one month of the date of the Judgment. Therefore, the said Application was filed without undue delay.

10. Having held that the eviction of the Appellant from the suit land will occasion him substantial loss, and the Application for stay of execution having been filed within a reasonable time, I find that the provision of security for the due performance of the decree, in the event the Appellant loses the Appeal, is not necessary because the suit land will still be available.

11. For those reasons, I allow the Notice of Motion dated 20th April, 2018 as prayed.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 22ND DAY OF FEBRUARY, 2019.

O.A. ANGOTE

JUDGE