



**REPUBLIC OF KENYA**

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

**ELC. CASE NO. 60 OF 2010**

**MBWELE MUOKI .....1<sup>ST</sup> PLAINTIFF**

**DENNIS MUOKI .....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**JUSTUS MUTIE KIOKO.....DEFENDANT**

**RULING**

1. In the Notice of Motion dated 31<sup>st</sup> May, 2018, the Defendant/Applicant is seeking for the following orders:

***a. That the Honourable Court be pleased to issue an order of stay of execution of the Judgment delivered by the Honourable Justice Angote on 4<sup>th</sup> May, 2018 pending the hearing and determination of the intended Appeal.***

***b. That the costs of this Application do abide the outcome of the intended Appeal.***

2. The Application is premised on the grounds that the Defendant/Applicant is aggrieved by the Judgment of the court of 4<sup>th</sup> May, 2018; that the Defendant/Applicant has already filed a Notice of Appeal dated 16<sup>th</sup> May, 2018 and that the intended Appeal raises serious issues of fact and law.

3. According to the Defendant/Applicant, if the orders sought are not granted, the Appeal will be rendered nugatory; that the orders of the court are for eviction of the Defendant/Applicant from the suit land; that if evicted, then there will be nothing for determination and that there is sufficient cause for an order of stay of execution to issue. The Plaintiffs filed Grounds of Opposition in which they averred that the Application is misconceived, without merit and an abuse of the court process. Although the Plaintiffs/Respondents purported to file a Replying Affidavit on 11<sup>th</sup> December, 2018, the court disallowed the said reply, the same having been filed out of time and without the leave of the court.

4. The Defendant's/Applicant's advocate submitted that while incorporating Order 42 Rule 6(1) and (2) of the Civil Procedure Rules, the court ought to facilitate determination of Appeals; that the Defendant/Applicant has sufficient cause and that he will suffer substantial loss if the Application for stay of execution is not allowed.

5. This court delivered its Judgment in this matter on 4<sup>th</sup> May, 2018. In the said Judgment, the court allowed the Plaintiffs' Plea and dismissed the Defendant's Counter-claim. The order that was allowed by the court was the eviction of the Defendant from the whole of the land parcel number Makueni/Unoa/58.

6. After the delivery of the Judgment, the Defendant filed a Notice of Appeal challenging the said Judgment. In the meantime, the Plaintiffs filed an Application dated 30<sup>th</sup> July, 2018 seeking for an order of forceful eviction of the Defendant from the suit land. The said eviction, according to the Plaintiffs, should be undertaken by M/S Eastern Kenya Auctioneers, under the supervision of the OCS, Makueni Police station.

7. Order 42 Rule 6(2) of the Civil Procedure Rules 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 power to grant or refuse an Application for a stay of execution is a discretionary power. As was held in the case of ***Butt vs. Rent Restriction Tribunal (1979) eKLR***, the court, as a general rule, ought to exercise its best discretion in away so as not to prevent the Appeal, if successful from being rendered nugatory.

9. The effect of the Judgment of this court is to have the Defendant evicted from the entire suit land. Indeed, such an eviction entails demolishing the Defendant’s place of abode and rendering him a destitute. The Defendant is therefore likely to suffer substantial loss if he is evicted from the suit land before his Appeal is heard by the Court of Appeal. The Defendant in this matter filed the current Application within a few days of the date of the Judgment. I therefore find and hold that the same was filed without unreasonable delay.

10. The Decree of this court is in respect to a piece of land, which is an immovable asset. The suit land will be available to any of the party who will succeed on Appeal. Consequently, an order for security for the due performance of the Decree is not necessary.

11. For the reasons I have given above, I find that the Defendant/Applicant has established the requisite grounds for a stay of execution of the Judgment of this court pending the hearing and determination of the pending Appeal. The Application dated 31<sup>st</sup> May, 2018 is therefore allowed as follows:

***a. An order of stay of execution of the Judgment delivered on 4<sup>th</sup> May, 2018 is hereby issued pending the hearing and determination of the intended Appeal.***

***b. Each party to bear his own costs.***

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 29<sup>TH</sup> DAY OF MARCH, 2019.**

**O.A. ANGOTE**

**JUDGE**