



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. APPEAL NO. 56 OF 2018

MONICAH MWELU GIDEON.....APPELLANT

VERSUS

JAMES KIVUVA NDETEI (*legal representative of the Estate of*

KANUU NDETEI (*deceased*).....**RESPONDENT**

RULING

1. In the Application dated 10th August, 2018, the Appellant is seeking for the following orders:

- a. That there be a stay of execution of the Ruling delivered on 7th August, 2018 by Hon. A. G. Kibiru dismissing the Application dated 25th November, 2015 pending the hearing and determination of the instant Application and the Appeal.***
- b. That the court be pleased to stay the eviction of the Appellant/Applicant from land parcel No. Konza South Block 2/171 pending hearing and determination of the instant application and the Appeal.***
- c. That the costs of this Application be provided for.***

2. The Application is supported by the Affidavit of the Appellant who has deponed that on 25th November, 2015, he sought to set aside the Judgment in Civil Suit No. 349 of 2013; that his Application was dismissed by the court on 7th August, 2018 and that he is likely to be evicted from parcel of land known as Konza South Block 2/171 which he has occupied since 1970.

3. According to the Appellant, her late husband, Gideon Katuu Male and his late brother, Ndeti Kyalo, held a joint share in Konza Farming and Ranching Company Limited from which the suit land arose and that she is claiming half share of the suit land. It is the Appellant's case that she was condemned unheard and that the impugned Ruling should be stayed.

4. In his Replying Affidavit, the Respondent deponed that the lower court Judgment and Decree was long executed and that there is nothing to be stayed; that the Grant of the suit property was confirmed vide Makeni High Court Succession Cause No. 513 of 2015; that the Applicant will not suffer any loss since the Decree was executed and that the Applicant is seeking for an opportunity to go back to the suit land.

5. Both the Appellant and the Respondent filed written submissions which I have considered. I have also considered the filed authorities.

6. The Appellant is seeking for a stay of execution of the Ruling delivered on 7th August, 2018 by the lower court in Machakos CMCC No. 349 of 2013. In addition, the Appellant is seeking for a stay of his eviction from a parcel of land known as Konza South Block 2/171 pending the hearing and determination of the Appeal.

7. The Appellant has annexed on her Affidavit the Application dated 25th November, 2015 that she filed in the lower court. In the said Application, the Appellant sought for an order to set aside the interlocutory Judgment entered on 7th June, 2014 and the final Judgment of 2nd October, 2014.

8. The Application dated 25th November, 2015 that was filed in the lower court was premised on the grounds that when the Appellant was served with Summons to Enter Appearance and Plaint, she left her documents with Kituo Cha Sheria; that the Appellant came to learn later that no action was taken by Kituo Cha Sheria to defend the suit and that she is keen to defend the suit.

9. The court, while dismissing the Appellant's Application, held that the Judgment that was entered into was a regular Judgment and that in any event, he could not set aside a Judgment that had been entered into by a court of equal status. The Appellant has filed a Memorandum of

Appeal challenging the Ruling of the lower court.

10. The law relating to a stay of execution of an order or decree is governed by Order 42 Rule 6(1) of the Civil Procedure Rules. Under the said Order, the Applicant has to show that she will suffer substantial loss if the order of stay is not granted, and the Application must have been filed without unreasonable delay. The Applicant is also required to provide security for the due performance of the Decree.

11. Although the Appellant has annexed on her Affidavit the Ruling she is appealing against, she did not annex a copy of the Judgment that she had sought the lower court to set aside. Indeed, it is not clear when the Judgment in Machakos CMCC No. 349 of 2013 was delivered and the terms of the said Judgment.

12. Notwithstanding the absence of a copy of the Judgment of the lower court, the Respondent has informed the court that it executed the Judgment of the court and that the Appellant is no longer on the suit land.

13. To show that the Appellant was evicted from the suit land, the Respondent annexed on his Affidavit a letter from Eastern Kenya Auctioneers and addressed to the Chief Magistrate. In the said letter, which was received on 30th January, 2015, the Auctioneer informed the Chief Magistrate that they had evicted the Appellant from the suit land vide an eviction order of 15th November, 2014.

14. According to the letter by the auctioneer, after evicting the Appellant, they put the Respondent's wife in possession of the land. It would therefore appear that by the time the Appellant filed the Application dated 25th November, 2015 in the lower court, she had already been evicted from the suit land.

15. Indeed, the Appellant did not file an Affidavit to deny that she was evicted from the suit land in the year 2014. The Appellant did not adduce any evidence by way of photographs or otherwise to convince this court that she is still in occupation of the suit.

16. Having not shown that she is on the suit land, I find that the Appellant has not proved to the required standards that she will suffer substantial loss unless the order of stay of execution of the Judgment of the lower court is stayed. In any event, the Judgment that authorized the eviction of the Appellant from the suit land has not been exhibited. The Ruling of the lower court of 7th August, 2018 cannot be stayed in exclusion of the said Judgment.

17. For those reasons, I dismiss the Application dated 10th August, 2018 with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 29TH DAY OF MARCH, 2019.

O.A. ANGOTE

JUDGE