



**REPUBLIC OF KENYA**

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

**ELC. CASE NO.175 OF 2014**

**KANINI KITILI MWENGI** (*Suing as the Legal Administrator*

*of the Estate of KITILI MWENGI MWAI (deceased).....***PLAINTIFF**

**VERSUS**

**PAUL MULWA LUNGUI.....**DEFENDANT

**RULING**

1. In the Application dated 11<sup>th</sup> October, 2018, the Defendant is seeking for the following orders:

***a. That there be a stay of execution of this Honourable Court's Decree and/or Judgment dated 2<sup>nd</sup> March, 2018 pending hearing and determination of the intended Appeal.***

***b. That costs of this Application be provided for.***

2. In support of his Application, the Defendant has deponed that this court dismissed his Counter-claim; that he has since filed an Appeal against the said Judgment; that there is an eviction order directing the Kitui OCS to forcefully evict him from the suit land and that his offices are on the suit premises.

3. The Defendant finally deponed that the Appeal has overwhelming chances of success and that the Appeal will be rendered nugatory if the orders sought are not granted.

4. In response, the Plaintiff deponed that in an effort to frustrate him from executing the Judgment, the Defendant filed a report at Kitui Police Station to the effect that he had received money by false pretences from him; that on 11<sup>th</sup> October, 2018, him, together with his son were charged with the offence of conspiracy to defraud and of obtaining money by false pretences; that this Application has been filed seven (7) months since the Judgment was delivered and that the Appeal has no chances of success.

5. The Defendant's/Applicant's advocate submitted that the Defendant has his offices on the suit property; that if he is evicted, the same will result in untold destruction of his client's property and that the eviction will result in the Defendant suffering substantial loss.

6. The Defendant's counsel submitted that he applied for typed proceedings in good time; that before being served with a notice of eviction, there was no threat of eviction and that the Defendant is willing to abide by any condition on security for the due performance of the Decree. Counsel relied on several authorities which I have considered.

7. The Plaintiff's/Respondent's advocate submitted that the Defendant was aware of the Judgment of the court; that The defendant has acted in bad faith by causing the Plaintiff and her son charged in respect to matters that have already been determined by this court and that the law is clear on the manner of dealing with the Estate of a deceased person.

8. Counsel submitted that the Applicant has not satisfied the conditions precedent for the grant of a stay of execution pending Appeal; that there has been inordinate delay in filing the Application and that it has not been demonstrated in what manner the Applicant is likely to suffer substantial loss if the order of stay is not issued. Counsel relied on many authorities which I have considered.

9. This court delivered its Judgment in this matter on 2<sup>nd</sup> March, 2018. In the said Judgment, the court allowed the Plaintiff's Plaint and dismissed the Defendant's Counter-claim. In the Judgment, the court directed that the Defendant removes at his own costs structures and development standing on a parcel of land known as Kyangwithya/Tungutu/1124 within ninety (90) days.

10. The Defendant filed his Notice of Appeal challenging the decision of the court on 6<sup>th</sup> March, 2018.

11. Although the court delivered its Judgment on 2<sup>nd</sup> March, 2018, and the Plaintiff filed his Notice of Appeal on 6<sup>th</sup> March, 2018, it was not until 11<sup>th</sup> October, 2018 that the Defendant filed the current Application seeking for a stay of execution pending Appeal.

12. The law relating to a stay of execution of a Decree or Order is now settled. For the Applicant to succeed, he has to satisfy the grounds stipulated under Order 42 Rule 6(2) of the Civil Procedure Rules which provides as follows:

***“(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.”***

13. It is true, as submitted by the Defendant/Applicant, that the purpose of the Application for stay of execution pending Appeal is to preserve the subject matter in dispute. This is meant to afford the Appellant to exercise his undoubted right of Appeal and not to render the Appeal nugatory. However, such an Application must be brought without unreasonable delay.

14. The Defendant/Applicant has deponed that when his advocate visited the registry to confirm the position of the typed proceedings, he was informed that there was a pending eviction order that had been issued by the court directing the Kitui OCS to forcefully evict him from the suit premises; that he never sought for an order for stay of execution immediately because there was no threat of execution and that he will suffer substantial loss if he is evicted.

15. Although the Defendant/Applicant is likely to suffer substantial loss if evicted, there was unreasonable delay in filing the current Application. Indeed, having been aware that the court had directed that he should vacate the suit property within ninety (90) days, the Applicant should have sought for an order of stay of execution within the ninety (90) days. Instead, he waited for more than seven (7) months until when the Plaintiff obtained an order directing the OCS to evict him, to file the current Application.

16. In fact, considering that the court directed the Defendant/Applicant to vacate the suit land within ninety (90) days, the Defendant was in contempt of the court order after the ninety (90) days lapsed. He cannot therefore call upon the court to exercise its discretion in his favour when he has actually disobeyed the orders of the court.

17. To the extent that the Defendant was aware of the orders of the court that he should vacate the suit land by 2<sup>nd</sup> June, 2018, and having not given any plausible reason why he did not file an Application for stay of execution within the ninety (90) days that he was supposed to vacate the suit land, I find that the Defendant is not only in contempt of the order of the court, but also that the Application was not filed within reasonable time.

18. For those reasons, I dismiss the Defendant’s Application dated 11<sup>th</sup> October, 2018 with costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 22<sup>ND</sup> DAY OF MARCH, 2019.**

**O.A. ANGOTE**

**JUDGE**