



**REPUBLIC OF KENYA**

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

**ELC SUIT NO. 69 OF 2010 (O.S)**

**EDWARD MUTUA M' MWITHIGA.....PLAINTIFF**

**-V-**

**CHARLES KIMAITA M' MWITHIMBU.....1<sup>ST</sup> DEFENDANT**

**JANE GAUKU M' RITHARA.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The Notice of Motion dated 17.12.2018 is brought under Order 51 Rule 1, 42 Rule 6 of the Civil Procedure Rules Sections 1A, 1B, 3 & 3A of the Civil Procedure Act in which the applicant who is 1<sup>st</sup> defendant seeks an order of temporary stay execution of the judgment/decreed herein, pending the hearing of the intended appeal.
2. The gist of the application is that that Judgment herein was delivered on 8<sup>th</sup> November 2018 and that the applicant being dissatisfied with the said judgment had lodged an appeal to the Court of Appeal and that unless stay of execution of the judgment is given, the applicant would stand to suffer irreparable and substantial loss and the outcome of the appeal would be rendered nugatory.
3. The application was opposed by the plaintiff via his replying affidavit filed on 7.1.2019, where it is deponed inter alia that the transfer will not affect the status of the land since respondent was still living there and if the appeal succeeded the land would revert back to the applicants.
4. The respondent further contemporaneously filled a notice of preliminary objection contending inter alia that upon the issuance of the Notice of Appeal the matter was now in the province of the Court of Appeal and that as such, this court had no jurisdiction to hear and determine the application.
5. When the matter came up for hearing on 31<sup>st</sup> January 2019, the court directed that the application and the Notice of Preliminary Objection be heard together by way of written submissions.
6. It was submitted for the applicant that the subject land was family land, hence if a stay is not granted, applicants stand to suffer substantial loss. The applicants further submitted that the plaintiff would suffer no prejudice since he already had a judgment in his favour and that further they were ready to deposit security in court.
7. With regard to the preliminary objection, it was submitted that an aggrieved party had the option of seeking a stay in the High Court or the Court of Appeal.
8. On the other hand it was submitted for the respondent that no memorandum of appeal had been attached to show what grounds would be taken before the Court of Appeal, that the dispute was over land which the court had found had been occupied by the plaintiff over the years and that if the appeal succeeds the same would revert back to the applicants. With regard to the Notice of Preliminary objection and the issue of jurisdiction, it was submitted that once the Notice of Appeal had been filled in accordance with Rule 75 of the Court of Appeal Rules, the Superior Court or the High Court had no jurisdiction to order stay of execution, an injunction or stay of any further proceedings pending the hearing of the appeal by the Court of Appeal.
9. I have carefully considered the Notice of preliminary objection, the instant application, the rival submissions by the parties and the authorities relied upon.
10. On the notice of Preliminary Objection, it has been contended by the respondent that upon issuance of the notice of appeal, the matter is no longer in the jurisdiction of this court. I have considered this argument recently in the case of **Betha Ndumba M'Twaruchiu Meru ELC No. 63 of 2000** where I cited the case of **Magnate Ventures vs Simon Mutua Muatha & Another; Nairobi Civil Appeal no. 634 of 2017**, where the court stated that;

***“It is important to point out right at the outset that the conditions for a stay of execution pending appeal in the court of appeal and the high court are different.***

11. The conditions for stay of execution before the court of appeal are set out under **rule 5 (2) of the court of appeal rules** while such conditions before this court are anchored under order **42 rule 6 of the civil procedure rules**. Thus this court has jurisdiction to determine an application for stay pending appeal.

12. I therefore find that the authorities relied upon by the respondent are not applicable/relevant in the instant case since the same relate to the application of Rule 5 (2) (b) of the Court of Appeal Rules which rules have not been invoked in the present case. The upshot of the foregoing is that the Notice of Preliminary Objection dated 3<sup>rd</sup> January 2019 is without merit and the same is accordingly dismissed.

13. Turning to the application for stay, reference is hereby made to the provisions of order 42 rule 6 (2) of the Civil Procedure rules which provides that for applications of this nature to succeed, the court must be satisfied that sufficient cause has been shown, that substantial loss would occur unless the order is issued and that the said application has been brought without delay. The applicant is further enjoined to offer such security for the due performance of such decree as may ultimately be binding on him.

14. It is imperative to note that there is nothing which the Court has ordered to be done or to refrain from being done by the parties save for the excision of that one acre of land. That is the only issue which can be termed as sufficient cause and substantial loss. On the other hand, plaintiff also stands to suffer considering that applicants had lodged a counter claim seeking for the eviction of the plaintiff.

15. In the circumstances, I will allow the application with some conditions;

**1) A stay of execution is hereby given for a period of one year provided that the applicant shall deposit a sum of sh. 100 000 in court as security within a period of 30 days from the date of delivery of this ruling failure to which the stay order shall automatically lapse.**

**2) The plaintiff /respondent is to continue to occupy the one acre out of the suit land Ntima/Ntakira/1966.**

**3) The applicant is to pay costs of this application.**

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 15<sup>TH</sup> DAY OF MAY, 2019 IN THE PRESENCE OF:-**

C/A: Kananu

Munga for plaintiff

Mokua for defendant

Plaintiff

1<sup>st</sup> defendant

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**