



**REPUBLIC OF KENYA**

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

**ELC SUIT NO. 6 OF 2009**

**KANAMPIU M'RIMBERIA.....PLAINTIFF**

**-V-**

**JULIUS KATHUANJE & 2 OTHERS.....DEFENDANTS**

**RULING**

1. Before me is a Notice of Motion Application brought pursuant to provisions of Sections 1A, 1B, & 3 of the Civil Procedure Act, Order 22 Rule 25 of the Civil Procedure Rules, Section 28 of the Civil Procedure Act in which the plaintiff seeks stay of execution of the decree and judgment delivered on 13<sup>th</sup> February 2019, pending the hearing and determination of the intended appeal.

2. The gist of the application is that this court delivered judgment on 13<sup>th</sup> February 2019, dismissing the suit for want of jurisdiction and that there is a pending ministers appeal in respect of land parcel number 6220 and 1711 vide 53/2008. That, the 1<sup>st</sup> and 2<sup>nd</sup> defendants are threatening and harassing the plaintiff with eviction and criminal charges of forcible detainer. Consequently, the plaintiff prayed for stay of execution pending the hearing and determination of appeal 53/2008 before the minister.

3. The application was opposed via a replying affidavit filed in court on 5<sup>th</sup> March 2019, by the 1<sup>st</sup> defendant who contended inter alia that the orders sought were completely unmerited as the applicant had opted to come to court instead of appealing to the minister and that the court having heard and fully determined the suit, the Minister's jurisdiction had been overtaken. Further, it is contended that plaintiff's suit was dismissed and a dismissal order cannot be stayed.

4. When the application came up for hearing on 18<sup>th</sup> March 2019, the court directed that the same be canvassed orally. Counsel for the plaintiff sought to rely on the grounds on the application and affidavit of the applicant and contended inter alia that the alleged brothers of the 2<sup>nd</sup> defendant, had threatened to evict the plaintiff hence the need for a stay pending an appeal to the minister.

5. Mr. Mutegi, counsel for the 1<sup>st</sup> defendant while relying on the affidavit sworn on 5<sup>th</sup> March 2019, contended that the court had already pronounced itself and that the plaintiff was trying to obtain an injunction. He further contended that stay orders are only granted where there is a positive judgment and that in the instant case there were no express orders for eviction since the court only dismissed the plaintiff's suit for being incompetent and that as such there was no order capable of being stayed.

6. I have carefully considered the instant application and the rival arguments by the parties. It is indeed not in dispute that the plaintiff instituted this suit vide an amended plaint filed in court on 22<sup>nd</sup> November 2012, seeking inter alia an order to compel the 3<sup>rd</sup> defendant to rectify Mbeu Adjudication Section's Register/record in respect of land parcel numbers 1711 and 6220 to reflect the name of the plaintiff instead of the name of the 1<sup>st</sup> defendant and in respect of land parcel number 1710 to reflect the name of the plaintiff instead of the 2<sup>nd</sup> defendant. It is also not in dispute that on 13<sup>th</sup> February 2019 the court dismissed the plaintiff's suit having come to the conclusion that the court had no jurisdiction to determine the matter at hand.

7. The plaintiff is essentially seeking a stay of the judgment delivered on 13<sup>th</sup> February 2019, in which the court found that it had no jurisdiction to determine the matter at hand. It is therefore imperative to note that there is nothing which the Court has ordered to be done or to refrain from being done. Similarly, the plaintiff's allegations that he was facing imminent eviction were not supported by any evidence.

8. It is trite law that stay orders can only be issued in respect of positive orders. In the case of **Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya) [2015] e KLR** Kantai JA stated thus:

***“An order for stay of execution pending appeal is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a Judgment. The delay of performance presupposes the existence of a situation to stay – called a “positive order” – either an order that has not been complied with or has partly been complied with. See, for this general proposition, the holding of the Court of Appeal of Uganda in Mugenyi & Co. Advocates v National***

Insurance Corporation (Civil Appeal No. 13 of 1984) where it was stated:

*‘..... an order for stay of execution must be intended to serve a purpose .....’*” (emphasis supplied).

9. In Western College of Arts and Applied Sciences v Oranga & Others (1976-80) 1 KLR, the Court of Appeal for East Africa stated in respect of stay of execution, as follows:

*“But what is there to be executed under the judgment, the subject of the intended appeal. The High Court has merely dismissed the suit with costs. Any execution can only be in respect of costs..... In the instant case the High Court has not ordered any parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court Judgment.....”*

10. More recently the Court of Appeal in Kenya Commercial Bank Limited v Tamarind Meadows Limited & 7 Ors [2016] eKLR, it was stated as follows;

*“In Kanwal Sarjit Singh Dhiman v. Keshavji Juvraj Shah [2008] eKLR, the Court of Appeal, while dealing with a similar application for stay of a negative order, held as follows:*

*“The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18<sup>th</sup> December, 2006. The order of 18<sup>th</sup> December, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only (see Western College of Arts & Applied Sciences vs. Oranga & Others [1976] KLR 63 at page 66 paragraph C.”*

11. I have taken into account that in dismissing the suit, this court had pronounced itself as follows;

*“This court has no jurisdiction to determine the dispute at hand”.*

12. The import of this pronouncement is that the court downed its tools. Granting a stay of the Judgment would in essence mean that the court is suspending its pronouncement on the issue which would amount to an absurdity. A court of law is duty bound to give a logical decision. I am in agreement with the Respondents that as far as this matter is concerned, this court is functus officio.

13. Taking into totality all the circumstances in this case, and in light of the fact that the court merely dismissed the plaintiff’s suit for want of jurisdiction, it is my considered opinion that there is no positive order capable of being stayed and as such there is nothing to stay. Accordingly, the plaintiff’s application dated 20<sup>th</sup> February 2019 is without merit and the same is hereby dismissed with costs to the defendants.

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

C/A: Kananu

Mwiti for plaintiff/applicant

Plaintiff

1<sup>st</sup> defendant

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**