



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. 65 OF 2018

M'MBUI M'RIMBERE..... 1ST APPELLANT/APPLICANT

JACOB KINYUA MBUI2ND APPELLANT/APPLICANT

MOSES MUTUMA MBUI ... 3RD APPELLANT/APPLICANT

EDWARD MWENDA MBUI.4TH APPELLANT/APPLICANT

KIGOROWE MBUI 5TH APPELLANT/APPLICANT

JOHN KIMATHI MBUI6TH APPELLANT/APPLICANT

VERSUS

DAVID GITONGA (Sued as legal representative of the estate of

MBERIA M'RIMBERERESPONDENT

RULING

1. The application before me is dated 15.1.2019 where applicant/appellants are seeking a stay of execution of the judgment delivered in Meru CMCC No. 717 of 1995 pending the appeal. The applicants aver that if execution of the lower court's decree takes place, then the applicant will suffer irreparable harm. Applicants have filed a supporting affidavit where they state that they are in danger of being evicted if the judgment read on 11.12.2018 is executed.

2. The respondent has opposed the application via a replying affidavit, dated 5.3.2019 where he avers that it would be improper to allow the applicants to continue enjoying the proceeds of illegally acquired property while denying him the fruits of the judgment.

3. I have considered all the arguments raised herein as well as the submissions of the parties.

4. The provisions of order 42 rule 6 (2) of the civil procedure rules stipulate that:

“No order for stay of execution shall be made under subrule (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”.

5. The respondent admits that the application was filed without delay. However he avers that applicant has not demonstrated that he stands to suffer substantial loss. The full judgment of the lower court has not been availed to this court hence I only have the decree as the guide. I find that even if there is no order of eviction, the contents of the decree clearly indicate that the titles of parcels of land in question are in the legal hands of the appellants (defendants in lower suit), which titles were to revert back to the respondent (the plaintiff in lower case). The fear of eviction is not farfetched, imaginary or unfounded.

6. The present case can be distinguished from the case of **Lucio Matingwany (suing as the administratrix of the estate of Kimalelu Matingwany - Deceased) vs Jeremia Chirchir and 4 others ELC No. 24 of 2007 Kericho** (cited by the respondent), where the court had stated that the threat of eviction was imaginary and unfounded.

7. As for the case of **Masisi Mwita vs Damaris Wanjiku Njeri Muranga Civil Appeal No. 107/15**, the court was dealing with an issue as to whether the respondent had the capabilities of repaying the sums in question i.e whether he was a man of straw.

8. I am inclined to find that applicants have met the criteria set out in order 42 rule 6 of the Civil Procedure Rules.

9. I have however noted that the lower court case was filed 24 years ago in 1995 and was not finalized until December 2018. The respondent's fear of delay is not unfounded since he has indeed waited for justice for decades. In the circumstances I allow the application for STAY of execution for a period of 8 (eight) months ONLY. The costs of this application shall abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 17TH DAY OF JULY, 2019 IN THE PRESENCE OF:-

C/A: Kananu

Mutungu for applicants/appellants

Kiogora M. hodling brief for B. Gitonga for respondent

1st applicant

HON. LUCY. N. MBUGUA

ELC JUDGE