

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC APPEAL NO. 40 OF 2019

MOSES MUNGATIA MUTUNGI.....APPELLANT

VERSUS

HANNAH NYAGATHIRI NG'ANG'A.....1ST RESPONDENT

GODWIN MUTONGA NG'ANG'A.....2ND RESPONDENT

RULING

Through the application dated 20/05/2019, the Appellant seeks stay of execution of the judgement rendered between the parties in **Milimani CMCC No. 4366 of 2018** by Hon. Mr. P.N Gesora, Chief Magistrate. The application is based on grounds that the judgement, decree and consequential orders of the trial court were issued without notice to the Appellant and that the Appellant has filed an appeal with a high likelihood of success. The application was supported by the Appellant's affidavit sworn on 20/05/2019 in which he deponed that the judgement was delivered on 29/04/2019 without notice, and attached a copy of the handwritten judgement. He deponed that he became aware of the judgement and the decree on 13/05/2019 when he claims that goons went to the suit premises to evict him in the process of which he was injured. He also deponed that there is considerable fear that his property will be demolished at any time. He contended that he was not accorded a right to be heard on the issue of costs and that he was willing to furnish any security the court may direct. He urged that the appeal which he has filed will be rendered nugatory if the order of stay is not granted by this court.

The Respondents opposed the application. The 1st Respondent swore the replying affidavit dated 13/06/2019 in which he deponed that the trial court issued a judgement notice that was placed on the electronic Kenya Law Reports website, the court's notice board and the door of the trial court and that the Appellant and his Advocate were aware of the judgement date and were duly served with the decree of the court. She annexed the decree issued on 03/05/2019 and a copy of the judgement notice dated 23/04/2019. She further deponed that there had been no attempt to demolish the Appellant's structure on the suit premises. She averred that the Appellant participated in the trial up to its determination, and that the Respondents were justly awarded costs which have not been challenged by the Appellant, hence it is unfair for the Appellant not to comply with the trial court's judgement on ground that costs were awarded to the Respondents. She also deponed that the Appellant has not demonstrated that he has an arguable appeal, and that he should be compelled to deposit the costs awarded by the magistrate's court and the costs of the appeal.

In reply to the Respondent's replying affidavit, the Appellant swore a further affidavit dated 23/08/2019 and deponed that the Respondents attempted to evict him and in the process assaulted him. He claimed that he reported the matter to the police and that it gave rise to **Makadara Criminal Case No. 1941 of 2019**. He annexed a copy of the bond issued for him to attend court and a P3 form. He further deponed that the suit property is not on the Respondents' plot and it does not affect the Respondents in any way and that they shall not suffer any prejudice if the orders for stay are granted.

The court has considered the application, response, submissions and the law on stay of execution pending Appeal. Order 42 rule 6 (2) of the Civil Procedure Rules provides that the court may grant an order for stay of execution where it is satisfied that substantial loss may result to the applicant unless the order is made if the application is made without unreasonable delay.

Judgement was entered on 29/04/2019 and this application was filed on 20/05/2019. It is not in dispute that the judgement was delivered on notice. The Appellant claimed that he was not served with the judgement notice, while the Respondents argue that the notice was posted in the Kenya law reports website (eKLR). There is no evidence to show that the notice of delivery of judgement was served on the Appellant or his Advocate. There is no evidence that they were served with the decree either. Given these circumstances, the court finds that this application was filed within a reasonable time, as soon as the Appellant became aware that the judgement had been issued. The Appellant is in occupation of the suit land, where he has put up a shop. In the interest of justice, it is only fair and just that he remains on the land until the appeal is heard. The Respondents urged the court to compel the Appellant to deposit the costs of the magistrate's court as well as those for this appeal. The Appellant has indicated his readiness to furnish security for his performance of the decree.

The court grants the Appellant stay of execution of the judgement entered on 29/4/2019 pending hearing and determination of the appeal.

The Appellant is directed to deposit the sum of Kshs. 79,060.00 being the costs stated in the decree in an interest earning account in the joint names of the advocates for the Appellant and the Respondents within 30 days of the date of this ruling.

Dated and delivered at Nairobi this 15th day of October 2019

K.BOR

JUDGE

In the presence of: -

Mr. G. Kimyua for the Appellant

Mr. K. Wesonga for the Respondent

Mr. V. Owuor- Court Assistant