



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. APPEAL NO. 19 OF 2019

BARON MATHENGE MUNYOKI.....APPELLANT

VERSUS

DEDAN MBANGULA KITHUSI.....RESPONDENT

RULING

1. In the Application dated 16th May, 2019, the Appellant has prayed for the following orders:

a. That this Honourable Court be pleased to issue stay of the implementation of the decree of the court issued on 6th February, 2019 pending the hearing and final determination of the Appeal vide HCCA No. 75 of 2018.

b. That this Honourable Court be pleased to order that the orders issued in prayers 2 and 3 herein be served upon the Land Registrar, Kitui for immediate compliance thereto.

c. That the Respondent be condemned to pay costs of this Application.

2. In support of the prayers being sought, the Appellant deponed that after the Judgment of the lower court was delivered on 14th August, 2018, he lodged the current Appeal and that on 26th February, 2019, he was served with a letter dated 1st October, 2018 by the District Surveyor, Kitui, indicating that he will visit the suit land to establish the boundary as directed by the court.

3. According to the Appellant, the District Surveyor moved into the suit land with speed, sub-divided the land in question and started the process of mutating the suit land; that unless the process of sub-division is stopped, the Appeal will be rendered nugatory and that in the interest of justice, the suit property should be preserved pending the hearing and determination of the Appeal.

4. The Respondent filed Grounds of Opposition in which he averred that this court does not have jurisdiction to entertain this Appeal; that the Judgment of the lower court having been delivered on 14th August, 2018, there has been unexplained delay in bringing the Application and that the Appellant has not shown the substantial loss that he will suffer if the Application is not allowed.

5. Both the Appellant and the Respondent filed submissions which I have considered. I have also considered the filed authorities.

6. The Appeal herein emanates from the decision of the Chief Magistrate Kitui, in Kitui CMCC No. 197 of 2013. In the Judgment of the lower court, the court dismissed the Appellant's Plaintiff and allowed the Respondent's Counter-claim. While allowing the Counter-claim, the court decreed that the Appellant holds title number Kyangwithya/Mulundi/2003 on behalf and in trust for the Defendant to the extent of 0.18 Ha and that a 6 metre access road exists to serve the said land. The court further directed that the suit property be transferred to the Respondent.

7. To the extent that the claim in the lower court was in respect to land, it is this court, and not the High Court, that has the requisite jurisdiction to entertain the Appeal.

8. The law that provides for the grant of a stay of execution of a decree or order is 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.”

9. The Appellant has deponed that after the Judgment of the lower court, the District Surveyor moved into the disputed land with alarming speed and sub-divided the land in question. The Appellant annexed a copy of the Surveyor’s letter dated 1st October, 2018.

10. The letter by the Surveyor dated 1st October, 2018 informed the parties herein that Surveyor will visit the suit property on 11th March, 2019 at 11.00a.m to carry out the survey exercise as ordered by the court. The Surveyor directed the parties to present themselves on that day for the survey exercise.

11. Although the effect of surveying the suit land has the effect of alienating the suit land, and removing it from the purview of the Appellant, the filing of the Application dated 16th May, 2019 eight months after the decision of the court, and after the decree of the court had been implemented by the Surveyor, does not obligate this court to make a decision in favour of the Appellant.

12. Indeed, the reason why Order 42 Rule 6(2) of the Civil Procedure Rules requires a party to file an Application for stay of execution without unreasonable delay is to enable the court to stay the impending execution. However, where a party moves the court after the decree has already been executed, the court cannot grant such an Application.

13. Considering that the decree of the court was executed vide the mutation form dated 11th March, 2019, and in view of the delay in filing the current Application, I decline to allow the Appellant’s Application dated 16th May, 2019. The Application is dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 15TH DAY OF NOVEMBER, 2019.

O.A. ANGOTE

JUDGE