



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 18 OF 2018**

**BASHIR GODANA.....APPELLANT**

**VERSUS**

**FATUMA GODANA TUPI.....RESPONDENT**

**RULING**

1. The application dated 29.5.2018 seeks orders as follows:

**(i) That the court do grant stay of execution of the decree and judgment in Maua CMCC 125/2013 read on 2.5.2018 pending inter-parties hearing.**

**(ii) That the court do grant stay of execution of the decree and judgment in Maua CMCC 125/2013 read on 2.5.2018 pending the hearing and determination of this suit.**

2. The grounds in support of this application are:

**(i) That the judgment delivered concerns a parcel of land which consists of the appellant's homestead and he may be evicted at any time which will render him and his family homeless and destitute.**

**(ii) That the eviction of the appellant from his homestead will occasion substantial loss to him.**

**(iii) That the application has been brought timeously.**

**(iv) That the appellant is ready to abide by any terms and conditions in form of furnishing security that the court may impose.**

**(v) That the appellant and respondent are brother and sister slogging it out over a piece of land.**

**(vi) The execution of the decree, by eviction will render the appeal nugatory.**

3. Applicant has also sworn an affidavit dated 29.5.2018 where he avers:

**(a) That he was the defendant in Maua CMCC no. 215/2013 as attested by a copy of the plaint annexed and marked BG 2 and BG 3 respectively.**

**(b) That in the judgment, the court granted the respondent's prayers to evict him from plot 2 located in Kiina Location.**

**(c) That indeed as discerned from the pleadings and the evidence on record, applicant does reside together with his family on the said plot whereby he has put up permanent stone dwelling houses whereby he lives with his family and has lived there for the last 30 years or so.**

**(d) That indeed all the children of the applicant live on the said plot which they all call home.**

**(e) That after the judgment was delivered the respondent in the company of armed youths have been milling around applicants said home threatening to execute the judgment by demolishing his houses and evicting him and his family and he has filed an appeal as attested by the annexed memorandum of appeal marked BG 5.**

(f) That the execution and consequent eviction will occasion him substantial loss and untold suffering since his family will be rendered homeless and destitute since they have no other home to go to.

(g) That the respondent is his blood sister.

(h) That applicant will heed to any terms and conditions in terms of provisions of security that the court imposes.

(i) That the execution of the decree will render this appeal nugatory.

4. The application is opposed through the affidavit of the respondent filed on 4.7.2018 where she avers:

(i) That the appellant is her brother.

(ii) That owing to her gender she took up her parcel of land and refused to cede possession hence her claim at the magistrate's court at Maua.

(iii) That her brother's conduct towards her was always influenced by much contempt owing to her gender and owing to the fact that she had already gotten married.

(iv) That the court at Maua rendered its judgment and agreed with the court's reasoning hence her humble request to be allowed to enjoy the fruits of her judgment.

(v) That she has not commenced execution and the appellant is clearly misleading the court.

(vi) That she is a law abiding citizen and if she were to execute judgment she will do so through a court guided process as she did by way of filing suit at Maua.

(vii) That it was utterly untrue that she has been milling around the suit land with armed youths and to show that such allegations lack veracity, there's no evidence of a police report or a report to the area chief by the appellant informing them of such alleged activities.

(viii) That the above allegation is only meant to persuade the court to issue orders for stay of execution yet the same lack factual backing.

5. On 12.7.2018, counsels for the parties requested the court to write a ruling based on the affidavits filed.

6. **Order 42 rule 6 (2) of the Civil procedure rules** provides that: **"No order for stay of execution shall be made under sub rule (1) unless 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...."**

7. **Section 63 (e) of the civil procedure act** provides that; **"in order to prevent the ends of justice from being defeated, the court may if it so prescribed make such other interlocutory orders as may appear to the court to be just and convenient"**.

8. Going by the prayers of eviction that were sought by the present respondent in CMCC No. 215/2013 , it is clear that defendant /applicant is the one in occupation of the suit land. Likewise in paragraph 5 of the replying affidavit, respondent avers that defendant is in possession of the land.

9. It follows that applicant stands to suffer substantial loss if the orders sought for are not granted since the Suitland is the place of abode for the applicant and his family.

10. In the case of **CFC Stanbic Bank Ltd vs John Kungu Kiarie & another, Court of Appeal No. 62/2016 (Nairobi)**, the court while dealing with an application for stay of execution of a decree, held that; **"The court balances two parallel positions first, that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without a just cause. The second factor is that if the execution of the decree will render the proposed appeal nugatory, the court will be inclined to grant a stay on terms"**.

11. In **Nairobi Commercial & admiralty division case no. 422/2006, Antoine Ndiaye vs African Virtual university, Judge Gikonyo** while dealing with the issue of stay of execution had made reference to the case of **Absalom Dora vs Turbo Transporters (2013) eKLR**, where it was stated that; **"The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court as such order do not introduce any disadvantage but administers the justice that the case deserves"**.

12. At this stage of the suit, this court is not seized of the issues in dispute as the appeal is yet to be heard. Since applicant/appellant (former defendant) and his family are the ones in occupation of the suit land, then in the interest of justice, it is only fair and just that they remain on the land until the appeal is heard.

13. Final orders:

(1) I hereby grant a stay of execution of the decree and judgment in Maua CMCC NO. 125/13 for a period of **8 months**.

(2) The costs shall abide those in the appeal.

(3) Appellant to move speedily to ensure that the Record of Appeal is filed.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 26<sup>TH</sup> DAY OF SEPTEMBER, 2018 IN THE PRESENCE OF:-**

**Court Assistant:** Janet/Galgalo

Thangichia holding brief for E. Kimathi for respondent

Ken Muriuki for appellant

Appellant

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**