



REPUBLIC OF KENYA
IN THE ENVIROMENT AND LAND COURT AT MACHAKOS

CIVIL APPEAL NO. 71 OF 2015

FREDRICK MULE MANYELE.....APPELLANT

VERSUS

DANIEL MAKAU.....RESPONDENT

(Being an appeal from the Ruling of Senior Resident Magistrate, Kahuya I. M. Delivered on 1st April, 2015 in the Chief Magistrate's Court at Machakos in Case No. 1369 of 2010)

RULING

What is before me is the Appellant's Application dated 23rd February, 2016.

In the Application, the Appellant is seeking for the following orders:

- (a) This application be declared urgent and be heard *ex parte*.**
- (b) This Honourable Court do grant an Order of stay of the order/Decree appealed from the same having been refused by the Court appealed from.**
- (c) Cost of the Application.**

The Application is premised on the grounds that the Appellant will suffer irreparable damages unless an order of stay is granted; that to implement the order of the lower court would amount to re-arranging and replacing the altered boundary and that the Respondent will not be prejudiced by the order.

In his response, the Respondent deponed that the Appellant filed a similar Application which was dismissed on 18th February, 2016 by the lower court; that the Appellant has deprived him of the use and enjoyment of his land and that the lower court decreed that the Appellant had trespassed on his land.

According to the Respondent, there is already a map that exists which shows a clear boundary of his land and that the Appellant has not offered any security.

In his submissions, the Appellant's advocate submitted that if the Appellant is successful after the order of execution has been carried out, it will mean replacing the fence to its position; that the Respondent may not be in a financial position to replace the fence and that the Appellant may incur expenses in the process.

The Respondent's counsel submitted that the Applicant has not demonstrated the substantial loss that he would suffer if the Application for stay is not granted; that mere financial burden occasioned by a

judgment does not constitute substantial loss for purposes of granting an order of stay of execution and that the Application should be dismissed.

The Appellant/Applicant has filed a Memorandum of Appeal challenging the decision of the Chief Magistrate in Machakos Civil Case No. 1369 of 2010.

The Appellant's case is premised on the grounds that the learned Magistrate erred in holding that the Appellant had trespassed onto the Respondent's land without evidence of the plan drawn by the District Surveyor; that the drawing indicating the extent of the trespass was required and that the Magistrate failed to appreciate that the Appellant was not a party to the proceedings but proceeded to adjudicate upon him.

Order 6 Rule 1 and 2(a) of the Civil Procedure Rules mandates this court to grant an order of stay of execution pending the hearing of an appeal from the subordinate court even where such an Application has been denied by the trial court.

An order of stay of execution can only be made if the court is satisfied that substantial loss may result to the Applicant unless the order is made and if the Application has been made without unreasonable delay. The Applicant, in appropriate cases, is supposed to give such security as the court orders for the due performance of the decree that may ultimately be binding on him.

The execution of the decree of the subordinate court will obviously lead to the change or the shifting of the boundaries of the suit property. Such a change of the boundary is likely to come with other consequences like alienation or development of the land. If that happens, the Appellant will suffer substantial loss if it transpires that indeed he had not trespassed on the Respondent's land.

Until this court determines with finality that indeed the Appellant has trespassed on the Respondent's land, and the extent of the said trespass, the status quo prevailing now should be maintained.

Considering that the decree involves land, which is an immovable property, the Appellant need not deposit any security for the due performance of the decree.

It is for those reasons that I allow the Application dated 12th June, 2015 with no order as to costs.

Dated, signed and delivered at Machakos this 27th day of January, 2017.

O. A. ANGOTE

JUDGE