



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NAIROBI
MILIMANI LAW COURTS
ELC. APPEAL CASE NO. 18 'B' OF 2014

MUTHUI KITEME.....APPELLANT

VERSUS

MWONGA MAITHYA MUUMBO.....RESPONDENT

RULING

Coming up before me for determination is the Notice of Motion dated and filed on 19th January 2014 in which the Appellant/Applicant seeks for an order of stay of execution of the Judgment delivered on 13th May 2014 in **Kyuso PMCC No. 7 of 2013 Mwonga Maithya versus Muthui Kiteme** (hereinafter referred to as the "Judgment") pending the hearing and determination of this Appeal.

The Application is premised on the grounds appearing on its face together with the Supporting Affidavit of the Appellant/Applicant, Muthui Kiteme, sworn on 19th January 2016 in which he averred that the Judgment was delivered against him on 13th May 2014 upon which he lodged this Appeal on 13th June 2014 and filed a Record of Appeal on 21st August 2014. He averred further that he made a similar application in the lower court which was denied. He added that the delay in presenting this Application was occasioned by the loss of the court file from the court registry necessitating him to file Miscellaneous Application No. 294 of 2015 seeking the reconstruction of the file which was heard and allowed on 9th December 2015. He further indicated that the Respondent has commenced execution of the Judgment and has taken out a Notice to Show Cause why execution should not issue against him dated 15th October 2015 which is pending determination before the lower court. He added that if the stay of execution is not granted he will suffer substantial and irreparable loss since the suit property is where his family and he reside and they are likely to be evicted therefrom. He asserted that this Appeal has overwhelming chances of success and that unless granted the orders sought herein the Appeal will be rendered nugatory.

The Application is contested. The Respondent, Mwonga Maithya Muumbo, filed his Replying Affidavit sworn on 3rd March 2016 in which he denied the Plaintiff's assertion that he and his family reside on the suit property, stating that it is only the Appellant's son who has constructed a house thereon which is yet to be occupied. He added that the Appellant/Applicant is therefore not likely to suffer any damage or substantial loss as alleged should this Application not be allowed. He also stated that the Appellant/Applicant stands no chance of eviction out of the suit property. He also stated that if granted the order of stay of execution, then the Appellant/Applicant should be ordered to provide security for costs both in this court and in the lower court estimated at Kshs. 400,000/-. He also stated that in

addition, the Appellant/Applicant should be ordered to stop cultivating on or grazing on the suit property and to stop further construction of the house thereon. He asserted that the Appellant/Applicant will not suffer any substantial loss or at all because he has his own land where he cultivates and grazes. He also pointed out that the Appellant/Applicant made a similar application in the lower court which was dismissed. On those grounds, he sought for the dismissal of this Application.

The issue for determination is whether or not to issue an order of stay of execution of the Judgment.

The applicable law on this issue is **Order 42 rule 6(1) and (6)** of the **Civil Procedure Rules, 2010** which states as follows:

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”

Order 42 Rule 6(2) provides as follows:

“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.”

On the issue of whether the Appellant/Applicant stands to suffer substantial loss if the order of stay is not granted, I rely on the position taken by the court in **Machira t/a Machira & Co vs. East African Standard No.2 (2002) 2 KLR 63** where it was held that:

“It is not enough merely to state that substantial loss will result, or that the appeal if successful will be rendered nugatory. That will not do. If the applicant cites, as a ground, substantial loss, the kind of loss likely to be sustained must be specified, details or particulars thereof must be given, and the conscience of the court, looking at what will happen unless a suspension or stay is ordered, must be satisfied that such loss will really ensue and that if it comes to pass, the applicant is likely to suffer substantial injury by letting the other party proceed further with what may still be remaining to be done or in execution of an award or decree or order, before disposal of the applicant's business (eg appeal or intended appeal)”

In this Application, the Appellant/Applicant has averred that both he and his family reside on the suit property and they stand the risk of being evicted therefrom should the stay not be granted. The Respondent has however contradicted that assertion with his claim that the Appellant/Applicant does not in fact reside on the suit property but simply cultivates it and grazes his livestock there. The Respondent also averred that there is an incomplete house being constructed by the Appellant/Applicant's son which remains unoccupied. The Respondent further asserted that the Appellant/Applicant resides with his family on another parcel of land which he also cultivates and grazes on. The Appellant/Applicant did not respond to these assertions. That being the position, this court is inclined to believe the position being that indeed the Appellant/Applicant does not reside on the suit property and therefore stands no chance of being evicted therefrom should this Application be denied. Clearly, no substantial loss has been demonstrated by the Appellant/Applicant should this Application not be allowed. Having made this finding, I will not proceed to interrogate whether or not this Application was made without unreasonable delay or consider the issue of security.

In light of the foregoing, this Application is hereby dismissed with costs to the Respondent.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 19TH DAY OF MAY 2017.

MARY M. GITUMBI

JUDGE