

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC APPEAL NO. 14 OF 2015

MARY STEPHEN MUTHIANI KILAKA.....APPELLANT

-VERSUS -

JULIUS NZIOKI VINI RESPONDENT

RULING

What is before me is the Appellant's Notice of Motion application dated 9th May 2016 seeking a stay of execution of the judgment which was delivered on 26th August 2015 by Hon. E. M. Muiru R. M. in Makindu PMCC No. 97 of 2010 pending the hearing and determination of the appeal herein. The application was brought on the grounds that the Appellant was dissatisfied with the decision of the lower court aforesaid and has preferred this appeal against the same. The Appellant has contended that it would serve the interest of justice if the execution of the said judgment is stayed pending the hearing of this appeal. The Appellant has contended that she will suffer substantial loss and damage if the stay order is not granted. The Appellant has averred that she is ready to provide such security as may be ordered by the court for the performance of the decree of the lower court. The Appellant has averred the application herein was brought without unreasonable delay and that the appeal has good chances of success.

The application was opposed by the Respondent through a replying affidavit sworn on 20th June, 2016. The Respondent averred that the Appellant's application was brought after inordinate delay. The Respondent averred further that the appeal herein has no prospects of success since the same was filed out of time without leave of the court. The Respondent contended finally that the application has no merit and amounts to an abuse of the process of the court.

The application was argued by way of written submissions. I have considered the application together with the affidavit filed in support thereof. I have also considered the replying affidavit which was filed by the Respondent in opposition to the application. Finally I have considered the written submissions by the respective advocates for the parties and the authorities which were cited in support thereof. I am in agreement with the submission by the Respondent that the Appellant's application has no merit. The application was brought under Order 42 rule 6 of the Civil Procedure Rules which provides as follows in sub-rule 2:-

“(2) No order of 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.”

The judgment sought to be stayed was made on 26th August, 2015 while the appeal herein was filed on 23rd November, 2015. The application for stay of execution before the court was filed on 13th May, 2016, eight (8) months from the date of judgment and five (5) months after the filing of the appeal herein. The Appellant has not given any explanation for the delay in bringing the application herein. I am in agreement with the Respondent that the application herein has been brought after ordinate delay. The Appellant is therefore not entitled to the order sought. Apart from the delay, the Appellant has not demonstrated that she will suffer substantial loss unless the stay order is granted. From the material on

record, it appears that the Appellant has never occupied the property in dispute. The Respondent in whose favour the judgment sought to be stayed was entered has occupied the suit property since 1998. I am not persuaded that the applicant would suffer substantial loss if the stay sought is not granted.

For the foregoing reasons, the application dated 9th May, 2016 must fail. The same is dismissed with costs to the Respondent. Since the appeal was filed at Machakos, I direct that this file be returned to the ELC Machakos for further action.

Delivered and Signed at Nairobi this 27th day of June, 2017

S. OKONG'O

JUDGE

Ruling read in open court in presence of

N/A for Appellant

N/A for Respondent

Kajuju Court Assistant