



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL NO. 71 OF 2019

CHARLES NTEERE MBOROKIAPPELLANT/APPLICANT

VERSUS

JAMES GICHURU1ST RESPONDENT

JOSPHAT MUKARIA M'MBOROKI.....2ND RESPONDENT

RULING

1. In the application before me dated 15.5.2019, applicant seeks the following orders:

- (i) That this honourable court be pleased to certify this application urgent and proceed to consider the same exparte at the first instance and make appropriate orders accordingly.
- (ii) That this honourable court be pleased to issue a temporary order for stay of execution, implementation and/or enforcement of the decision, order and/or judgment of the court made and delivered on the 9th day of May 2019 in Meru CMCC no. 84 of 2016 pending the inter-parties hearing and determination of this application and thereafter as the court shall order.
- (iii) That this honourable court be pleased to issue an order for stay of execution implementation and/or enforcement of the decision, order and/or judgment of the court, made and delivered on the 9th day of May 2019 in Meru CMCC No. 84 of 2016 pending the hearing and determination of the appeal herein and thereafter as the court shall order.

2. The grounds in support of the application are:

- (a) That judgment dismissing the appellant/applicant's suit was delivered on 9.5.2019.
- (b) That the trial court went further to order that the appellant/applicant be removed from the parcel of land he has occupied for over 50 years.
- (c) The appellant/being dissatisfied with the lower court's decision has preferred appeal herein.
- (d) The respondents are now on the verge of evicting the applicant from the suit land which the applicant has established his homestead and extensively developed.
- (e) The appeal has very high chances of success.

(f) That if the decision is executed and/or implemented this appeal will be rendered nugatory.

(g) The interest of justice, fairness and reasonability will be better served if the prayers are granted as sought.

3. Applicant has also sworn an affidavit reiterating the grounds set out in the application.

4. The application is opposed via the replying affidavit of James Gichuru where he has deponed as follows: That the appellants application is an afterthought, incompetent, defective and abuse of court processes and that he was surprised on how the appellant had peddled naked lies to steal a judicial match and that it was not true that the appellant had lived on the suit land for 50 years. He also deponed that the appellant/applicant and the respondents are siblings being the children of the late Henry M' Mboroki Mukindia who died in October 2003 and was the initial owner of parcels of land no. Ntima/Igoki/991 and Ntima/Igoki/2018. The respondents also averred that the Meru West Divisional Land Control Board gave its respective consents on 2nd July, 2002 inter alia to transfer land parcel No. Ntima Igoki/6397 measuring about 0.10 ha to them and Ntima/Igoki/6398 measuring about 0.54 ha to the 2nd respondent and Ntima/Igoki/6399 measuring about 0.32 ha to the appellant/applicant.

5. The respondent's claim that their father transferred the aforesaid subdivisions Ntima/Igoki/6397 and 6398 on 14th August 2002 and 6th September, 2002 to them (respondents). They aver that their father had called a clan meeting to expel the appellant/applicant from land parcel No. Ntima/Igoki/991 (as it then was) for constantly insulting him to move and settle on land parcel number Kiirua/Nkando/3844 but after the appellant/applicant apologized, the elders intervened and their father shelved the intended expulsion.

6. The respondents also stated that the applicant filed Meru LDT no. 22 of 2003 against them and the same was quashed by the High court in Meru Misc. Application 132 of 2004. The 1st respondent avers that he was only seven years old when his father gave him the land. He also stated that his father had requested the 2nd respondent to vacate his semi-permanent houses and other developments in the parcel no. Ntima/Igoki/6399 to live with him on land parcel no. Ntima/Igoki/6398 where the 1st respondent lived taking care of the deceased father till his demise in 2003.

7. The 1st respondent also avers that it was not true that the appellant/applicant had extensively developed the suit land since the 1st respondent was the registered owner of all the parcels of land numbers Ntima/Igoki/6397 and 2018 while Ntima/Igoki/6398 belongs to the 2nd respondent with the absolute ownership of those parcels of land together with all rights and privileges belonging or appurtenant thereto. He avers that he was the one who carried out the developments on land parcels Ntima/Igoki/6397 and 6398 whilst the developments on land parcel no. Ntima/Igoki/6399 were carried out by the 2nd respondent before their deceased father asked the 2nd respondent and his family to shift to land parcel number Ntima/Igoki/6398 and that the 2nd respondent and the deceased father were the ones who carried the developments.

8. He averred that in May 2014 the applicant moved and forcefully evicted the respondents and took possession of the suit land and the developments thereof. The respondents also stated that the appellant had not satisfied that he would suffer substantial loss as there were no extensive developments, he has made on the suit land and that he should vacate from the suit land and occupy his parcel of land which had a house. The respondents pray for the suit to be dismissed.

9. The appellant has filed a further affidavit where he has deponed that the affidavit by the respondents contains lies and that if the judgment of the lower court will be executed then the appeal will be rendered a mere academic exercise. He also expressed a need for the status quo to be maintained pending the determination of the appeal since the implementation of the trial court's judgment and the consequent eviction would occasion substantial loss and suffering such that his family will be rendered homeless and destitute since. The applicant in his further affidavit also stated that respondents will not be prejudiced in any way if this application would be allowed.

10. I have weighed all the arguments raised herein. I find that the appellants suit before the lower court was dismissed which means that the parties reverted back to the position they were before the filing of the suit. What then would the court be staying.

11. In the case of **Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya) [2015] eKLR** Kantai JA stated thus:

“An order for stay of execution [pending appeal] is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a Judgment. The delay of performance presupposes the existence of a situation to stay – called a “positive order” – either an order that has not been complied with or has partly been complied with. See, for this general proposition, the holding of the Court of Appeal of Uganda in Mugenyi & Co. Advocates v National Insurance Corporation (Civil Appeal No. 13 of 1984) where it was stated: ‘..... an order for stay of execution must be intended to serve a purpose’ (emphasis supplied).

12. In the present matter, there is nothing to stay as the lower court did not give any orders for performance of an act save the discharge of the interlocutory orders which in my event cannot subsist when there is no suit.

13. The upshot of my findings are that the application is unmerited. The same is dismissed with costs to respondent.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 13TH DAY OF NOVEMBER, 2019 IN THE PRESENCE OF:-

C/A: Kananu

Kimaita for Mithega for applicant

Kirimi for respondent

Plaintiff

2nd respondent

HON. LUCY. N. MBUGUA

ELC JUDGE



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