



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 37 OF 2013

WILLY KIMUTAI KITILITPLAINTIFF

VERSUS

MICHAEL KIBETDEFENDANT

RULING

1. The Applicant **Willy Kimutai Kitilit** filed a Notice of Motion dated 25/1/2016 in which he seeks stay of execution pending appeal. The Applicant contends that he has preferred an appeal against the judgement of this court delivered on 5/5/2015.
2. The Applicant contends that he is the one in possession of the suit property and that since January 2016, the Respondent has severally gone to the suit land seeking to take over. That if stay of execution is not granted, the appeal which he has preferred will be rendered nugatory.
3. The Respondent has opposed the Applicant's application based on a replying affidavit sworn on 3/2/2016 and filed in court on 4/2/2016. The Respondent contends that the Plaintiff filed the suit herein because he was in possession of the same. That the pleadings of the Plaintiff/Applicant are clear that he had taken possession and planted trees on the suit land and that the Applicant is seeking stay of execution as a means of removing him from the suit land by way of eviction through the back door.
4. The Respondent further contends that there is nothing which is happening which will render the appeal filed nugatory as he has not even taxed his costs. The Respondent further contends that the Applicant has not met the threshold for grant of stay pending appeal as provided for under **Order 42 Rule 6 of the Civil Procedure Rules**.
5. I have given due consideration of the application by the Applicant and the opposition thereto by the Respondent as well as submissions by counsel for both parties. The Applicant had filed a suit against the Respondent in which he sought for a declaration that the Respondent had no proprietary rights over **LR No. Kaplamai/Sirende Block 1/KIplongon/60**. He also sought an injunction restraining the Respondent with in any way interfering with the same parcel. The Respondent filed a defence and counter-claim in which he sought orders of specific performance or in the alternative an order for refund.
6. The Respondent had purchased two acres from the Applicant in 2008. The Applicant put him in possession of the two acres in 2009. However in 2013, the Applicant chased him away from the two acres using Kenya Police Reservists and then moved to court and filed this suit. After full hearing, the Plaintiff's /Applicant's suit was dismissed and the Defendant /Respondent's counter-claim for an order of specific performance was given.

7. This being an application for stay pending appeal, an Applicant must satisfy the conditions given in **Order 42 Rule 6** which are firstly that the application must be made without unreasonable delay. Secondly, the Applicant has to demonstrate that he will suffer substantial loss if stay is not granted. Thirdly, the Applicant has to provide such security for the due performance of the decree as may ultimately be binding on him.

8. The issue for determination is whether the Applicant has met the conditions required by **Order 42 Rule 6 of the Civil Procedure Rules**. The judgement being appealed against was delivered on 5/5/2015. This application for stay was filed on 25/1/2016. It therefore means that the application was filed after 8 months from the date of judgement and the filing of the Notice of Appeal which was made on or around 12/6/2015. In the circumstances of this case, I find that the delay by over 8 months is unreasonable in the circumstances.

9. The next issue to be considered is whether the Applicant has demonstrated that he will suffer substantial loss. The evidence which was adduced is that the Applicant was fully paid the purchase price by the year 2010. The Respondent had been put in possession of his two acres in 2009 after one who had leased the land moved out. The Applicant has not stated what substantial loss he will suffer if stay of execution is not granted. The process of execution has not started. If there was to be any execution it will be that the Respondent will be registered for the two acres for which he has already paid fully. If the appeal by the Applicant will finally succeed, it will not have been rendered nugatory as the process will be reversed. It is not fair to deny a successful litigant from enjoying the fruits of his judgement merely on the ground that an appeal has been preferred. I find that in the instant case, there is no demonstration of substantial loss by the Applicant.

10. The issue of security is normally considered if there is demonstration of substantial loss. I therefore find that the Applicant's application lacks merits. The same is hereby dismissed with costs to the Respondent.

It is so ordered.

Dated, signed and delivered at Kitale on this 30th day of March 2016.

E. OBAGA

JUDGE

In the presence of M/s Arunga for Applicant.

Court Assistant – Isabellah

E. OBAGGA

JUDGE

30/3/16