



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**LAND CASE NO. 11 OF 2013**

**SARAH NASAMBU MUSUNDI .....PLAINTIFF**

**VERSUS**

**DAVID WAFULA TELA .....DEFENDANT**

**RULING**

1. The Applicant filed a Notice of Motion dated 9/3/2015 in which he seeks stay of execution pending appeal. The Applicant contends that the Respondent has moved to implement the orders of the court and that if this is done it will cause him substantial loss as his coffee will be destroyed and that that is his only source of livelihood.
2. The application was duly served upon the Advocate of the Respondent who neither filed grounds of opposition nor replying affidavit. The application was therefore argued ex-parte.
3. This is an application for stay pending appeal. It is brought under the provisions of **Order 42 Rule 6** of the **Civil Procedure Rules. Rule 6** of **order 42** provides that stay can only be granted if the court is satisfied that substantial loss may result if stay is not given. The application must also be brought without unreasonable delay. There has also to be such security for the due performance of the decree as may ultimately bind the Applicant.
4. In the instant case, the Judgement being appealed against was delivered on 19/1/2016. This application was filed on 9/3/2016. The application was therefore filed slightly over one month. I do not find the delay to be unreasonable in the circumstances.
5. An applicant must demonstrate that he will suffer substantial loss should stay not be granted. In the instant case, the Applicant contends that if the road of access is created, it will lead to destruction of his coffee plants which are his only source of livelihood. The applicant has merely said that his coffee will be uprooted in the process of creation of an access road. He has not demonstrated that there are coffee plants on the area where a road of access is supposed to be created. During the hearing, the Applicant had stated that he did not want an access road to be created because it will pass behind his house. He did not say that there were coffee trees behind his house. He should have at least annexed even a photograph to confirm that there are coffee trees. The court cannot take his word especially given his resolve to not only refuse to give the Respondent an access road but also kick her out of the land where she has lived for over 20 years.
6. Demonstration of substantial loss is the cornerstone for grant of stay of execution. Such demonstration has to be through evidence. An Applicant cannot just allege that he will suffer a particular loss without demonstration that that is the case. If the access road is created and the Applicant finally succeeds in his appeal, the appeal will not have been rendered nugatory as the position will revert i.e he will have his land back. As he has failed to demonstrate that there are any coffee trees which will be uprooted, I do not find any other thing which will render his appeal nugatory.
7. I do not have to consider security as this is normally considered if substantial loss is established. I therefore find that this application lacks merits. The same is hereby dismissed with no order as to costs.

It is so ordered.

Dated, signed and delivered at Kitale on this 19 th day of April 2016.

**E. OBAGA**

**JUDGE**

In the presence of M/s Khaoya for Applicant and M/s Arunga for Respondent.

Court Assistant – Isabellah

**E. OBAGA**

**JUDGE**

**19/4/16**