



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAROK

CIVIL APPEAL NO. 3 OF 2016

SAITOTI OLE KIOK.....APPELLANT

-VERSUS-

SIRERE OLE KOIKAI.....RESPONDENT

RULING

1. Before me is the Appellant's application filed on 14th June, 2016 seeking stay of execution pending appeal. The application was brought primarily under Order 42 Rule 6 of the Civil Procedure Rules. The application was supported by the affidavit of sworn by Saitoti Ole Kiok. The gist thereof being that his appeal will be rendered nugatory if the order for stay is denied, as the Respondent has commenced the transfer of the suit property, the subject of the impugned decree of the lower court. Although it is irrelevant for the purposes of this application, the Appellant asserts that he has an arguable appeal.
2. The Respondent filed a Replying affidavit in opposition to the application. He confirms that he has already effected the transfer of the property into his name pursuant to the decree and hence the application by the Appellant has been overtaken by events, due to his own indolence.
3. Pursuant to directions given by the court, the parties filed written submissions in respect of the application. Briefly, the Appellant's submissions reiterate the conditions guiding the grant of stay orders in Order 42 Rule 6 (2) of the Civil Procedure Rules. He argues that there was no undue delay in making the application and that the application has not, contrary to the Respondent's assertion, been overtaken by events. The Appellant has submitted that the appeal filed if successful will be rendered nugatory if stay is not granted.
4. Some the arguments raised in the submissions as regards the worthiness of the appeal have no place in such an application. Ditto arguments on a *prima facie* case, irreparable loss and balance of convenience, erroneously referred to as balance of probability. These latter considerations relate to an injunction. Yet no such prayer is contained in the Notice of Motion.
5. The Respondent's brief submissions reiterate the fact that the decree has been fully executed thus the application cannot be granted. Reliance was placed on the case of **Charles Gichana Mwangi –Vs- Henry Mukora Mwangi (2000) KLR**. That there is nothing to stay as the order arising from the judgment was a negative one. The Respondent points out that the application came after a six months delay.
6. The court has considered the material canvassed by the parties. The subject matter of the dispute between the parties in the lower court suit was a plot of land identified as **No. 120 Ololulung'a** allocated by the County Council of Narok in 2001. The Appellant's case was dismissed By the learned Magistrate at the close of trial. Judgment was delivered on 22/10/2015 but it was not until 18/4/2016 that an

application to file an appeal out of time was made, which the court granted on 28th April 2016. Although the appeal was filed timeously (on 29th April) the present application was filed almost two months later.

7. I note too, from the judgment of the lower court annexed to the instant application, that one of the main reasons for the dismissal of the Appellant's suit was statutory limitation. Whether this was a correct application of the law or not, it is clear that the Appellant did not act with dispatch in bringing his appeal and the subsequent application. It would seem that as a result of his delay the Respondent was able to take certain steps in execution of the judgment of the lower court.

8. I cannot accept however that the application has since been rendered otiose as no formal current documents from the concerned authority have been tendered by the Respondent to confirm the alleged transfer of the plot to him.

9. In my view, the requirement under Order 42 Rule 6 (2) of the Civil Procedure Rules for timeous filing of application is intended to safeguard the interest of a decree holder, who having obtained judgment moves diligently to execute his judgment, believing that there is no intended appeal; and secondly to protect the integrity of the court process from abuse through issuance of orders that cannot be effected. It is evident that by waiting for close to 8 months before making the application, the Appellant, is guilty of laches.

10. With regard to whether the intended appeal will be rendered nugatory, I note that the subject matter is a piece of land. Although land ownership evokes high passions amongst many claimants, it is not impossible to quantify its value and to compensate adequately those who have lost land parcel. In this case, there is no evidence whatsoever that the Respondent would, in the event of the appeal succeeding be unable to replace the monetary value of the plot in dispute, if necessary.

11. In the case of **Kenya Shell Ltd -Vs- Benjamin Karuga Kibiru and Another (1986) eKLR** the Court of Appeal observed that:-

“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms; is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the Respondents should be kept out of their money.”

12. The Appellant has not offered any security to the court. The Respondent's argument that the impugned lower court decision being a dismissal cannot be stayed are disingenuous and contradict the Respondent's arguments that the decree has been executed. The direct consequence of the dismissal of the Appellant's suit in the lower court is that the ownership of the plot in dispute was formally vested by the court in the Respondent.

13. The above notwithstanding, I am not persuaded that this is a proper case for the issuance of an order for stay pending appeal. The application dated 14th June, 2016 is dismissed with costs. This being a matter related to land ownership, I direct that it be transferred to the Environment and Land Court Registry Nakuru for necessary directions as to hearing.

Delivered and signed at Narok, this 28th day of **October, 2016.**

In the presence of:-

Mr. Kamwaro holding brief for Mr. Yienko for the Respondent

Ms Mogere holding brief for Mr. Maina for the Applicant

Court Assistant : Barasa

C. MEOLI

JUDGE