



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 54 OF 2010

MARY AJEMO GACHIRIGA PLAINTIFF

VERSUS

JEPHTER O. OPANDE DEFENDANT

RULING

1. The defendant/applicant filed a notice of motion dated 6/6/2016 in which he seeks stay of execution pending appeal. The applicant contends that he has filed a notice of appeal against this court's judgement which was delivered on 16/5/2016. He further contends that he will suffer substantial loss if execution proceeds and he is removed from the land which was the subject of the suit. That he has crops on the suitland and a fence round the same. He has put up a house for his workers who are staying on it.
2. The applicant further argues that his appeal has high chances of success and if stay is not granted and he is evicted the substratum of the appeal would have gone rendering the appeal nugatory.
3. The applicant's application is opposed by the respondent based on a replying affidavit sworn on 1/9/2016 and filed in court on 2/9/2016. The respondent contends that the applicant has not demonstrated that he will suffer substantial loss if stay of execution is not granted. That her rights have already been determined by this court and that it will be unfair to keep her away from the fruits of her judgement. That there are no structures on the suit property and that there is no fence round it. That the appeal has no chances of success.
4. I have carefully considered the applicant's application as well as the opposition thereto by the respondent. This being an application for stay pending appeal, this court's discretion to consider the same is fettered by conditions set out under Order 42 Rule 6(2) of the Civil Procedure Rules. First the application has to be made without unreasonable delay. Second, the court has to be satisfied that substantial loss may result to the applicant unless the order is made. Third, there has to be such security as the court orders for the due performance of such decree as may ultimately be binding on the applicant.
5. Now the only issue for determination in this application is whether the applicant has satisfied the three conditions. The respondent is the registered owner of the suitland. She had filed a suit against the applicant for eviction from the suitland. The applicant filed a defence and counter-claim alleging that the title held by the respondent was obtained fraudulently. The plaintiff's claim succeed and the defendant's counter-claim was dismissed in a judgement delivered on 16/5/2016.
6. The present application was filed within three weeks after the judgement. I therefore find that there was no delay in filing the same. The next consideration is whether there will be substantial loss if stay is not granted. It is clear from the applicant's application that he does not reside on the suitland . He is only growing maize on it. He has also a structure for his workers and has erected a fence round the suitland.

The suitland is registered in the name of the respondent. The respondent has been kept off her land since 2005 when she bought it. A court has already determined the case in her favour. This ruling is being made in October 2016. This court takes judicial notice that harvesting of maize in Trans – Nzoia takes place between September and November of every year. The respondent respondent has not extracted a decree and there is no immediate threat of eviction. If it is maize which had been planted on the land, it can be harvested. The applicant will therefore not suffer substantial loss.

7. The applicant has six acres bought by his wife. He does not reside on the suitland. If the structure for his workers is removed, this will not amount to substantial loss. A successful party is entitled to enjoy the fruits of her judgement. The property in question is in the name of the respondent. She cannot be kept out merely on the ground that the respondent has proffered an appeal. If the appeal succeeds, it will not have been rendered nugatory because the subject of this case is land which he can always regain entry.

8. In *Nairobi Court of Appeal Civil Appeal No 291 of 1997 between Carter & sons Ltd and Deposit protection Fund Board & 2 others*, the judges of appeal had this to say:-

“An appeal is not automatically to operate as a stay of execution and the right of a decree holder having been determined by a competent court it is not fair that he should be deprived of the fruits of his decree mainly because the judgement debtor prefers an appeal. The court however has a discretion to grant a stay provided the conditions prescribed in the subrule are satisfied.”

9. It is clear that stay of execution can only be granted if the conditions stipulated are met. Substantial loss is the cornerstone of the conditions. If it is not demonstrated that substantial loss will ensue if stay is not granted, then there can be no stay granted. In the instant case, the applicant has not demonstrated that he will suffer substantial loss. The issue of security will normally be considered is there is a likelihood of substantial loss. This is a clear case where a successful litigant should be kept out of the fruits of her judgement. As there is no substantial loss which will be suffered by the applicant, I find that this application is for dismissal. I proceed to dismiss the application with costs to the respondent.

It is so ordered.

Dated,, signed and delivered at Kitale on this 26th day of October 2016.

E. OBAGA

JUDGE

Court – Ruling signed in Court at 14.36 in the absence of parties who were aware of date and time of delivery of ruling.

Court Assistant – Isabellah.

E. OBAGA

JUDGE

26/10/16