



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**ELC NO. 32 OF 2016**

**JOHN KIMELI LELEI.....PLAINTIFF**

**-VERSUS-**

**CHRISTOPHER KISORO CHUMA.....DEFENDANT**

**RULING**

1. This is a ruling in respect of a Notice of Motion dated 14<sup>th</sup> July, 2021 in which the Defendant/Applicant seeks stay of execution pending appeal.
2. The Applicant contends that judgment against him was delivered on 6<sup>th</sup> July, 2021. Being dissatisfied with the said judgment, he has preferred an appeal against the same to the Court of Appeal. He therefore prays that there be stay of execution of the said judgment as he pursues the appeal before the Court of Appeal.
3. The Applicant's application is opposed by the Plaintiff/Respondent through a replying affidavit sworn on 3<sup>rd</sup> September, 2021. The Respondent contends that the Applicant has not met the threshold for grant of stay pending appeal. The Respondent states in the alternative that if the Court is minded to grant stay, it should be conditional upon the Applicant depositing kshs 1,000,000/- as security for costs in addition to depositing in Court the original title in respect of the suit property.
4. The parties were directed to file written submissions in respect of the application. The Applicant filed his submissions on 8<sup>th</sup> November, 2021. The Respondent filed his submission on 10<sup>th</sup> November, 2021. I have considered the submissions by the parties. The only issue for determination is whether the Applicant has met the threshold for grant of stay pending appeal.
5. The issue of whether to grant stay pending appeal is a matter of discretion. This discretion is fettered by four conditions. First, an applicant must demonstrate that there is just cause to grant stay. Second, the Applicant has to demonstrate that he or she will suffer substantial loss should stay not be granted. Third, there has to be security provided for the due performance of the decree as may ultimately be binding upon the Applicant. Fourth, the application has to be brought without unreasonable delay.
6. Judgment in this case was delivered on 6<sup>th</sup> July, 2021. The present application was filed on 15<sup>th</sup> July, 2021. The application was therefore filed without unreasonable delay. The Respondent was granted two acres out of LR No Uasin Gishu/Tapsagoi scheme/327 on grounds that he had acquired the same through adverse possession.
7. The Applicant contends that the Respondent has never been in exclusive possession of the suit property and as such, he has a justifiable cause to prefer an appeal to have that issue determined. A look at the proceedings shows that the Respondent had approached the Applicant to allow him put up a posho mill on his property.
8. The Applicant allowed the Respondent to put his posho mill on his property. It was agreed that the Applicant was to run the posho mill and take 10% of the profits as his commission. The Applicant later developed interest of acquiring the Posho mill. The Respondent agreed to the proposal in exchange of two acres of the Applicant's land. The Applicant denies the contention of exchange of two acres with a posho mill. There is therefore cause to have this issue interrogated by the Court of Appeal.
9. On whether the Applicant will suffer substantial loss if stay of execution is not granted, the Applicant submits that if the Respondent is allowed to excise the two acres, the two acres will become available to him and he will be at liberty to dispose of the land. If that happens, then the appeal will be rendered nugatory in case the land goes to a third party.
10. A successful party is entitled to fruits of his judgment. Equally, a party exercising his right of appeal ought to be afforded opportunity to do so if there is just cause. I note that if the Respondent were to execute the decree, the two acres will be transferred into his name and he might dispose of the same. If this were to happen, it will render the appeal nugatory as the two acres would have gone to a third party. As

there is no overwhelming hindrance, there is a strong case for grant of stay of execution pending appeal.

11. The Applicant has offered security for costs and even offered to deposit the original title deed in Court pending the hearing of the appeal. The Respondent is not averse to this. I therefore find that the Applicant's application has merits. The same is allowed on condition that the Applicant provides security for costs in the sum of Kshs 400,000/- to be deposited in a joint interest earning account in the names of the advocates for the parties herein within 45 days in addition to the Applicant depositing the original title deed to the suit property in Court within the same period failing which execution to proceed. The costs of this application shall await the outcome of the appeal.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 24TH DAY OF FEBRUARY, 2022.**

**E. OBAGA**

**JUDGE**

In the presence of;

Mr. Oburu for Ms. Kipseii for Applicant

Court Assistant –Albert

**E. OBAGA**

**JUDGE**

**23<sup>RD</sup> FEBRUARY, 2022**