



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CIVIL SUIT NO. 87 OF 2010

BEN MUKHWANA WEPUKHULU PLAINTIFF

VERSUS

TOM DAVID WANYONYI DEFENDANT

RULING

1. This is a ruling in respect of a notice of motion dated 9th December, 2013. The applicant has not cited the provisions under which he is moving the court but from the nature of the application, it is meant to be brought under the provisions of Order 42 Rule 6(1) and (2) of the Civil Procedure Rules.
2. The applicant seeks stay of execution pending appeal. The Respondent in this application had sued the applicant in Kitale High Court Civil Case No. 87 of 2010. The case was fully heard and in a judgement delivered on 17th September, 2013, the applicant herein was ordered to vacate the plaintiff's land within 3 months.
3. The applicant being dissatisfied with the judgement of 17th December, 2013 intends to appeal to the court of Appeal against the said judgement.
4. The applicant contends that he has applied for typed proceedings and that his appeal has high chances of success. He therefore prays for stay of execution pending appeal.
5. The application is opposed by the respondent based on a replying affidavit sworn on 27th January, 2014 and filed in court on the same day. The respondent contends that the application has no merit as the applicant has not even filed a notice of appeal.
6. The respondent contends that the applicant has not demonstrated that he has high chances of success in his appeal and that the intended appeal is only meant to deny him from enjoying the fruits of his judgement.
7. Order 6 (2) provides as follows:-

“(2) No order for stay of execution shall be made under sub-rule (1) unless;-

(a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant”

8. In the *case of Carter & Sons Ltd and Deposit Protection Fund Board and 2 others Civil Appeal No. 291 of 1997*, the court of Appeal in considering the provisions of Order 41 Rule 4 sub-rule (2) of the former rules of the Civil Procedure Rules which is now contained in order 42 Rule 6

(2) quoted from the decision in the court of Appeal in **Vishram Ravji Halai & another – Vs- Thorntorn & Turpin (1963) Limited Civil Application No. NAI 15 of 1990** unreported in which it was stated as follows;-

“The Superior court's discretion is fettered by three conditions. Firstly, the applicant must establish a sufficient cause, secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay, and thirdly, the applicant must furnish security. The application must, of course, be made without unreasonable delay.”

9. The applicant applied to court almost three months after the judgement was delivered. I do not find this to be an unreasonable delay.

10. Order 6 Sub-rule 4 provides as follows;-

“(4) For the purposes of this rule an appeal to the court of Appeal shall be deemed to have been filed when under the Rules of the court notice of Appeal has been given.”

11. In the present application, there is no proof shown that the applicant has filed a notice of appeal as required. No notice has been exhibited in this application and none has been served upon the respondent.

12. The applicant has not demonstrated that he will suffer substantial loss if stay is not granted. The property is not in his name. The plaintiff/respondent had bought the suit land long before the applicant bought his portion from the same buyer

13. The applicant contends that his appeal has high chances of success. In the case cited above, the court of appeal stated as follows;-

“It was contended that the appeal has strong probability of success. In our view, the mere fact that there are strong grounds of appeal would not in itself justify an order for stay. A party is expected to prefer an appeal only when there are strong reasons for doing so.”

The court of Appeal Judges went on to state as follows;-

“An appeal is not automatically to operate as 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.”

14. The applicant herein has not filed a notice of appeal and if any was filed, he has not served or exhibited it. There is not even a draft appeal preferred. The court cannot therefore appreciate if his appeal has any chances of success.

15. I find that the applicant's application for stay has no merit. I do not therefore consider ordering that he furnishes security for costs. The upshot of this is that the applicant's application fails. The same is hereby dismissed with costs to the respondent.

It is so ordered.

Dated, signed and delivered at Kitale on this 27th day of February, 2014

E. OBAGA,

JUDGE

In the presence of Mr Ingosi for Mr Onyancha and the defendant/applicant in person. Court Clerk – Kassachoon.