



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & LC. NO.231 OF 2014

JOHN CHELIMO KIPKENERPLAINTIFF

VERSUS

MOSES KIBET KIPKURUIDEFENDANT

AND

ELJIAH KIPLAGAT KEITANY.....INTERESTED PARTY

RULING

[Notice of motion dated the 24th March 2021]

1. The Plaintiff filed the notice of motion dated the 24th March, 2021 seeking for *inter alia*, that a stay of execution of the court's decree emanating from the Judgment delivered on 11th November, 2020 be issued pending the hearing and final determination of the Appeal. The application is based on the seven (7) grounds marked (a) to (g) on its face and supported by the affidavit sworn by John Chelimo Kipkener, the Plaintiff, on the 24th March, 2021. It is the Plaintiff's case that after the judgement was delivered, the stay of execution that was granted has now lapsed, and therefore this application should be granted. That he has filed a notice of appeal, and stand to suffer immensely unless the order sought is granted, as the Interested Party has started destroying his developments on the suit land.

2. The Interested Party opposed the application through the replying affidavit sworn by Elijah Kiplagat Keitany on the 23rd April, 2021. It is his case that the Plaintiff has not demonstrated that he has lodged an appeal against the judgment of the court issued on 11th November, 2020; that there has been unreasonable delay in the filing of the instant application as about four (4) months have lapsed since the court delivered its judgment; that the Plaintiff will not suffer any substantial loss because the court in its judgment directed the Defendant to refund to the Plaintiff the sum of Kshs. 1.9 Million, plus interests at court rates from the date of filing the suit. That he is already in possession of the suit land and should be allowed to use it as the legal owner.

3. The directions on filing and serving replying and supplementary affidavits, and submissions were issued on the 13th April 2021, 31st May 2021 and the 28th October, 2021. The learned counsel for the Plaintiff and the Interested Party filed their submissions dated the 26th October, 2021 and 8th July, 2021 respectively.

4. The following are the issues for determinations by the court;

a. Whether the Plaintiff has established a reasonable case for stay of execution order to issue pending appeal.

b. Who pays the costs of the application.

5. The court has carefully considered the grounds on the notice of motion, affidavit evidence, submissions, superior courts decisions cited thereon and come to the following conclusions;

a. That the record confirms that the judgment dated the 23rd October, 2020 was delivered on the 11th November, 2020 settling the parties claims as follows;

“The upshot of the above is that the plaintiff's claim is dismissed and the Interested Party claim is granted thus a declaration is hereby issued that the Interested Party herein is the legal owner of the suit land and that the purported sale of the suit land between the Defendant to the Plaintiff is unlawfully (sic).

The court further grants a permanent injunction against the defendant and the plaintiff jointly and severally their agents servant process from entering tilting farming selling fencing and/or in any way interfering with the interested party's possession and use of the said land.

The defendant is hereby ordered to refund the plaintiff Kshs. 1.9 million being money he received unconscionably, plus interest at court rates from the date of filing the suit. Costs to the suit to be borne by the Defendant.”

That though the Plaintiff had made reference to the notice of appeal in his supporting affidavit in support of the application, no copy was annexed thereto. However, a perusal of the record confirms that the notice of appeal dated the 20th November, 2020 was filed on the 25th November, 2020.

b. That the plaintiff has stated and submitted that the application was filed without unreasonable delay, while the Interested Party pointed out that the application was filed after about four (4) months from the date of delivery of the judgment. That the claim by the plaintiff that he filed this application without unreasonable delay without explaining why he waited for over four months leaves a lot to be desired. The thirty (30) days temporary stay granted after the delivery of the judgement had long lapsed by the time the application was filed, and the plaintiff appeared unbothered. The court is aware of the decision in the case of **AMAL HAULIERS LIMITED V ABDULNASIR ABUKAR HASSAN [2017] eKLR** where it was held that a delay of four (4) months is not inordinate, noting that the applicant has been prompt in filing an Appeal soon after delivery of judgment, even though the Applicant's counsel filed the application for stay after receiving communication from counsel for the Respondent of their intentions to execute. In the case of **RISHARD ABDULREHMAN KHATOR V IDHA MARIE AHMED & 2 OTHERS [2020] eKLR** the court held that a delay of four (4) months in filing an application for stay of execution is inordinate, as it was not sufficient to explain away the delay by stating that the delay was occasioned by lack of funds. That the having considered the circumstances in this suit, and the nature of the orders given by the court through the judgement of 11th November, 2020 altering the parties' relationship to the suit property, I find the delay, though of slightly above four (4) months was not only unreasonable, but also inordinate.

c. That both counsel for the parties are in agreement through their submissions that applications for stay of execution are provided for, and guided by Order 42 Rule 6 of the Civil Procedure Rules. That a look at the heading of the notice of motion filed herein shows it has invoked “**sections 1A, 1B and 63(e), 79G the Civil Procedure Act, Order 50 Rule 1 of the Civil Procedure Rules, and Article 159 of the Constitution of Kenya.**” That though Order 42 Rule 6 of the Civil Procedure Rules has not been invoked in the application, it is clear that the invocation of inapplicable law is not fatal to an application as the court is duty bound to do substantive justice by proceeding to consider the matter before it on its merits, and in light of the applicable law.

d. That although the Interested Party has contended that the Plaintiff has not lodged a notice of appeal, and therefore there is no basis of granting stay, the court has as shown above noted that a notice of appeal dated the 20th November, 2020 and filed on 25th November, 2020 is in the record. The said notice was filed on the 14th day from the date the judgement was delivered, and is therefore, valid. That what the plaintiff appear to have failed to do is to attach it to their supporting affidavit, and or to serve the Interested Party with a copy after filing.

e. Whether or not to grant an order of stay of execution pending appeal is a matter of judicial discretion. That position of the law is confirmed by the decision in the case of; **SOLOME NALIKA WABWILE V ALFRED OKUMU MUSINAKA [2021] eKLR** where the court observed as follows when faced with an application seeking an order of stay of execution:

“Whether or not to grant the remedy of stay of execution pending appeal is a matter of judicial discretion. Such discretion must therefore be exercised on sound basis, rationally and not capriciously or whimsically.

In so doing, the Court must bear in mind the need to balance between the two competing interests of a party who has a Judgment in his favour and another who is desirous of exercising his right of appeal. The onus is however on the party seeking a stay to prove that he has met the threshold set out in Order 42 of the Civil Procedure Rules.”

The Provisions of Order 42 Rule 6(1) and (2) of the Rules provide as follows:

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(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.”

And in the case of **ELENA DOUDOLADOVA KORIR V KENYATTA UNIVERSITY [2014] eKLR** the court stated as follows:

“It is trite law that an application for stay of execution pending appeal is to be made timeously. The application must meet a

criteria set out in precedent and the criteria is best captured in the case of *Halai & Another v Thornton & Turpin (1963) Ltd [1990] KLR 365* where the Court of Appeal Gicheru JA, Chesoni & Cockar Ag. JA (as they all were) held that;

“The High Court’s discretion to order a stay of execution of its order or decree 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 stay and thirdly the applicant must furnish security. The application must of course be made without unreasonable delay.”

An addition the issue of whether the intended appeal will be rendered nugatory is critical as was held in the case of *Hassan Guyo Wakalo v Straman East Africa Ltd [2013] eKLR* as follows:

“In addition, the Applicant must prove that if the orders sought are not granted and his Appeal eventually succeeds, then the same shall have been rendered nugatory. These twin principles go hand in hand and failure to prove one dislodges the other.”

f. The Plaintiff has at paragraph 8 of his supporting affidavit indicated that he has invested in the development of the suit land and the aforesaid developments will go to waste once the Interested Party gains entry to the suit land. The Interested Party has countered that through paragraphs 6 and 7 of the replying affidavit, stating that he is in occupation of the suit land and the plaintiff will not suffer any loss as the judgement directed the defendant to refund him Kshs.1,900,000 plus interests at courts rate. That the fact that some loss may occur does not suffice for an order of stay pending appeal to issue. The loss must be substantial and the plaintiff herein, as the applicant, has the duty to establish it before the court. In the case of **James Wangalwa & Another V Agnes Naliaka Cheseto [2012] eKLR** the court pronounced itself as follows;

“No doubt, in law, the fact the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of CPR. This is because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party on appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

That while the plaintiff has through the submissions alleged he was in possession of the suit land, he had at paragraphs 8 of the supporting affidavit stated that the Interested Party had entered onto the land. That was confirmed by the Interested Party through paragraph 7 of the replying affidavit when he stated that “ .. I am currently in occupation of the suit subject matter ..” . That from the available evidence, the Plaintiff has failed to show that he is the one in occupation as the suit land.

g. That from the foregoing, the court finds the Plaintiff has failed to establish the nature of the substantial loss that he is likely to suffer unless the stay order is issued. He has also failed to offer seasonable explanation for the delay in filing the application. That even if the plaintiff has at ground (e) expressed his readiness to abide by any reasonable conditions as may be imposed, the court finds he has failed to meet the threshold or the requirements of Order 42 Rule 6 of the Civil Procedure Rules, to be deserving of the prayer sought.

h. That the Plaintiff having failed to succeed in his application should under section 27 of the Civil Procedure Act chapter 21 of the Laws of Kenya, pay the Interested Party costs of the notice of motion.

6. That flowing from above the Plaintiff’s notice of motion dated the 24th March 2021 is without merit and is dismissed with costs to the Interested Party.

It is so ordered.

DATED AND VIRTUALLY DELIVERED THIS16th DAY OF MARCH 2022.

S.M.KIBUNJA,J.

ELC ELDORET

IN THE VIRTUAL PRESENCE OF;

PLAINTIFF:

DEFENDANT: Absent

INTERESTED PARTY:

COUNSEL:Ms. Chege for Interested Party.....

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COURT ASSISTANT: ONIALA

S.M.KIBUNJA,J.

ELC ELDORET