



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KERICHO**

**ELC CASE NO. 42 OF 2014**

**PAULO KIPSEREM A. CHEPKWONY alias**

**KIPSEREM CHEPKWONY (suing through his legal Attorney**

**RICHARD KIPKORIR SEREM).....APPLICANT**

**VERSUS**

**ANNAH CHEBET SEREM (Sued as the Administrator of the estate of**

**BERNARD KIPROTICH SEREM).....RESPONDENT**

**RULING**

1. Pursuant to a judgment that was delivered by the Court on the 28<sup>th</sup> May 2020, the Applicant has now filed the present Application by way of a Notice of Motion dated 6<sup>th</sup> July 2020, brought under the provisions of Section 3A, of the Civil Procedure Act and Order 42 Rule 6(1) (2) (4) and (6) of the Civil Procedure Rules and all enabling provisions of the Law where he seeks for orders of stay of execution of the judgement pending the hearing and determination of his intended Appeal .
2. The said Application is supported by the grounds set on its face as well as on the Applicant's supporting affidavit dated the 6<sup>th</sup> July 2020.
3. The Application was opposed vide the Respondent's Replying Affidavit dated the 9<sup>th</sup> September 2020 in which the Respondent sought for the same to be dismissed for being malafide, vexatious and otherwise an abuse of the Court process being that the impugned judgement did not direct any of the parties to do anything, the Applicant's suit having been dismissed.
4. The application was disposed of by way of written submissions where the Applicant submitted that pursuant to a judgment that was delivered on 28<sup>th</sup> May 2020 dismissing his suit, he had challenged the said decision in the Court of Appeal and had lodged a Notice of Appeal dated 14<sup>th</sup> June 2020.
5. The Applicant framed his issues for determination as follows:
  - i. Whether or not his Appeal was arguable and will be rendered nugatory if the orders for stay are not granted.
  - ii. Whether or not the Applicant will suffer substantial loss if stay is not granted.
6. On the first issue for determination, it was his submission that he had lived on the suit premises and had developed the same thereby earning his livelihood from growing subsistence crops and tea bushes and therefore he would be rendered homeless if he was to be evicted from the suit land. That the Respondent had already started to plough the suit land with an intention to plant crops and should the Court not grant the orders sought to preserve the suit property, his Appeal , which had high chances of success would be rendered nugatory.
7. On the second issue for determination, it was his submission that since he and 6 (six) family members were in occupation of the suit property, should the Court not grant the orders sought, they faced the danger of being evicted and rendered homeless which in turn would occasion him substantial loss.
8. Reliance was placed on the decided case in **Charles Kariuki Njuri vs Francis Kimaru Rwara (suing as Administrator of Estate of Rwara Kimaru alias Benson Rwara Kimaru (Deceased) [2020] eKLR.**

9. The application was opposed by the Respondent through her written submissions to the effect that the same was frivolous, vexatious and otherwise a waste of the Court's precious time. That the impugned judgment dismissed the Applicant's suit with no orders as to costs and therefore the judgment stood executed and there was nothing to stay.

10. The Respondent framed her issue for determination as being whether after taking into consideration the orders issued by this Court, an order for stay was feasible. The Respondent's argument was that the judgment appealed from was a negative order incapable of being stayed and therefore the provisions under Order 42 Rule 6(1) of the Civil Procedure Rules did not apply to it.

11. Reliance was placed on the decided case in **Republic vs Retirement Benefits Appeal Tribunal ex-parte Heritage A.I.I Insurance Co. Ltd. Retirement Benefits Scheme [2017] eKLR** to submit that the intended Appeal was against dismissed suit which the Applicant was at liberty to Appeal, but the order of stay of the impugned judgment was incapable of being granted as the judgment itself was a negative order incapable of being stayed.

#### **Determination.**

12. I have considered the averments in both the supporting affidavit and the replying affidavit as well as the parties' submissions for and against the Application dated the 6<sup>th</sup> July 2020 by way of a Notice of Motion wherein the Applicant seeks for orders of stay of execution pending an intended Appeal .

13. I find two issues for determination arising therein namely:

i. Whether the Applicant has satisfactorily discharged the conditions warranting the grant of stay of execution of decree pending Appeal .

ii. What orders this Court should make.

14. On the issue of whether the Applicant is deserving of the orders of stay of execution of decree pending the hearing and determination of the Appeal herein, the law applicable is Order 42 Rule 6 of the Civil Procedure Rules which stipulates as follows:

*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.*

15. There are three conditions for granting of stay order pending an Appeal under Order 42 Rule (6) (2) of the Civil Procedure Rules to which :

a) The Court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered;

b) The application is brought without undue delay and

c) 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.

16. Evidently, the three (3) prerequisite conditions set out in the said Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed. The key word is "**and**" which connotes that all three (3) conditions must be met simultaneously.

17. Having said so, and having regard to the Application before me, I note that the orders issued vide the judgment delivered by the Court on the 28<sup>th</sup> May 2020, were as follows:

*Although the Plaintiff pleaded fraud and gave the particulars of fraud in paragraph 5 of the plaint, the evidence of fraud did not meet the required standard which is higher than a balance of probabilities. The Defendant was not cross-examined on what process her late husband undertook in order to have the suit property transferred to him and the issue of the transfer documents and consent of the Land Control Board was only raised by counsel in his submissions. The evidence of the Principal Plaintiff was to the effect that he divided the suit property among his three sons but he did not seem to have a problem with the fact that the deceased registered that suit property in his name. This is because he did not bother to intervene when his sons had a dispute before the elders in respect of the suit property. Similarly, the Principal Plaintiff took a neutral stand in the instant suit as he stated that he had not sued the Defendant and he was not aware of this suit. As far as he is concerned, the suit property is big enough to be shared between*

his son Richard and the Defendant.

*In view of the foregoing, it is my finding that the Plaintiff has not proved fraud to the required standard and he is therefore not entitled to the reliefs sought. Consequently, the Plaintiff's suit is dismissed.*

*Since the suit involves members of the same family, each party shall bear his own costs.*

18. These orders, were in my humble opinion and in agreement with the Respondent's submission, negative orders.

19. In the case of **Milcah Jeruto vs Fina Bank Ltd [2013] eKLR** the Court had held that an order for stay cannot be granted where a negative order had been issued.

20. Under Section 2 of the Civil Procedure Act, the definition of a decree holder alludes to an order that was capable of being executed. It defines a decree holder as:

*any person in whose favour a decree has been passed or **an order capable of execution** has been made...*"

21. It therefore obtains that there are orders that are capable of execution while others are not.

22. In the present judgment, the Court did not order the Applicant to do anything or to abstain from doing anything or to pay any sum of money.

23. In the case of **Western college of Arts and Applied Sciences vs. Oronga (1976) KLR 63** at p. 66 Law V P said:-

*"But what is there to be executed under the judgment, the subject of the intended appeal? The High Court has merely dismissed the suit with costs. Any execution can only be in respect of costs ... In the instant case, the High Court has not ordered any of the parties to do anything or refrain from doing anything or to pay any sum. There is nothing arising out of the High Court judgment for this Court in an application for stay, to enforce or to restrain by injunction."*

24. In the decided case of **Sonalux Limited & Another v Barclays Bank of Kenya Limited & 2 Others [2008] eKLR** the Court of Appeal held:

*'As regards the matter before us all we can say is that the ruling of the superior Court (Kasango, J.) in no way ordered any of the parties to do anything or to abstain from doing anything or to pay any sum of money. Consequently, it is incapable of execution. It therefore follows that no order of stay can properly issue relating to that ruling.'*

25. For the foregoing reasons, the upshot of this Court's Ruling is that the Applicant's Notice of Motion Application dated the 6<sup>th</sup> July 2020 and filed on 8<sup>th</sup> July 2020 is not merited and the same is hereby dismissed with costs to the Respondent.

**DATED AND DELIVERED AT KERICHO THIS 18TH DAY OF FEBRUARY 2021.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**