



**REPUBLIC OF KENYA**

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

**ELC APPEAL CASE NO.16 OF 2020**

**NEBART OTANO.....1<sup>ST</sup> APPELLANT/APPLICANT**

**JOHN WAWERU MACHARIA.....2<sup>ND</sup> APPELLANT/ RESPONDENT**

**VERSUS**

**JOSEPH MACHARIA WAMBUGU.....RESPONDENT**

**RULING**

This ruling is in respect of an application dated 21<sup>st</sup> September 2020 by the appellant/applicant seeking for the following orders:

- a) Spent
- b) That this Honourable court be pleased to order stay of execution of the decree, Certificate of costs and all consequential orders arising from the Judgment delivered against the Appellants in Eldoret CMC E&L NO. 310 OF 2018 JOSEPH MACHARIA WAMBUGU vs- NEBART OTANO& 3 OTHERS pending the hearing and final determination of this application inter-partes.
- c) THAT this Honourable Court be pleased to order a stay of execution of the,  
  
Decree, Certificate of costs and all consequential orders arising from the  
  
Judgment delivered against the Appellants in Eldoret CMC E&L NO. 310 OF 2018 JOSEPH MACHARIA WAMBUGU vs- NEBART OTANO& 3 OTHERS pending the hearing and determination of this Appeal.
- d) THAT the costs of this application be provided for.

Counsel agreed to canvass the application vide written submissions and the same were duly filed.

**APPLICANTS'SUBMISSIONS**

Counsel relied on the grounds on the face of the application together with the applicant's supporting affidavit and listed the following issues for determination.

- a) Application filed without undue delay.
- b) That the applicant will suffer irreparable loss if the order is not granted
- c) Security for due performance of the decree.

On the first issue as to whether the application has been filed without undue delay, counsel submitted that the judgment appealed against was delivered on 19<sup>th</sup> June, 2020, the appeal was filed on 7<sup>th</sup> July, 2020 and the application was filed on 21<sup>st</sup> September, 2020 soon after the lower court delivered its ruling on 18<sup>th</sup> September, 2020 on the application for stay filed on 8<sup>th</sup> July, 2020.

Counsel relied on the case of **Cynthia Achieng Marere v Athanas Shibwom Asiavugwa [2015] eKLR** where the court observed that

*"...in determining the issue of delay, the courts' concern is not how much time has lapsed after the prescribed time, rather whether or not even with the delay justice can be done. "*

Further in the case of **Utalii Transport Company Limited & 3 Others v. NIC Bank Limited & Another [2014] eKLR** the court quoted with approval the case of Cynthia Achieng Marere(supra) and held that:

*“Whereas there is no precise measure of what amounts to inordinate delay. And whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable. On applying court's mind on the delay, caution is advised for courts not to take the word 'inordinate' in its dictionary meaning, but in the sense of excessive as compared to normality.”*”

On the issue of substantial loss, counsel submitted that it is not in dispute that the subject matter concerns a public access road which the Respondent has laid claim over and intends to fence it off to the detriment of the Appellants and other members of the public. That the Appellants' right to movement is under threat by the Respondent who is seeking to seal off the access road and render the appellants and other members of the public land locked hence there is no amount of damages capable of compensating the applicants in the event that the orders sought are not granted.

Counsel cited the case of Kitamaiyu **Limited v County Government - Kiambu& another [2018] eKLR** where the court held that:

*...It is trite that a crystalized right which is violated cannot be equated to compensation by damages.*

Further in the case of Maz **Mohammed Janmohammed... Vs... Commissioner for Lands & 4 Others (1996)eKLR**, quoted with approval in **Kitamaiyu Limited (supra)** the court held that:-

*"It is no answer to the prayer sought, that the Applicant may be compensated in damages. No amount of money can compensate the infringement of such right or atone for transgression against the law, if this turns out to have been the case. These considerations alone would entitle the Applicant to the grant of the orders sought"*

On the last issue on provision of security for the due performance of the decree, counsel relied on the case of Kiplagat Kotut v Rose JeborKipngok [2015] eKLR where Ombwayo J stated thus:

*in an application for stay, there are always two competing interests that must be considered, these are that a successful litigant should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted right of appeal should be safeguarded from his appeal being rendered nugatory. These two competing interests should always be balanced. ... In a bid to balance the two competing interests, the Courts usually make an Order for suitable security for the due performance of the Decree as the parties wait for the outcome of the Appeal. / do not see why the same should not be applicable in this case.*

Mr. Maina submitted that the appellant is ready and willing to abide by any orders of security that the court may grant. Counsel therefore urged the court to allow the application as prayed.

### **RESPONDENT'S SUBMISSIONS**

The respondent opposed the application and gave a brief background to the case in the lower court which led to the current appeal. Counsel submitted that the respondent extracted the decree on 25<sup>th</sup> June 2020 where Judgment and decree has been fully executed. That the appellants filed an application for stay of execution which was dismissed on 18<sup>th</sup> September 2020 for the reason that the Respondent had executed the decree fully.

On the issue whether the application was filed without undue delay, counsel submitted that when judgment appealed against was delivered on 19<sup>th</sup> June 2020, the Appellant/Applicant did not pray for stay of the execution of the judgment and the Respondent proceeded and executed the judgment in accordance with the law.

Counsel relied on the case of **Jaber Mohsen Ali & Another vs. Priscillah Boit & Another [2014] eKLR** was of the view that unreasonable delay depends on the circumstances of the case. The court stated:

*"The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter. In the case of **Christopher Kendagor v Christopher Kipkorir, Eldoret eKLR [ 2012]** the applicant had been given 14 days to vacate the suit land. He filed an application one day after the 14 days. The application was denied, the court holding that. the application ought to have come before .expire of the period given to vacate the land."*

Counsel therefore urged the court to dismiss the application as the decree has been fully executed.

### **ANALYSIS AND DETERMINATION**

The issues for determination in an application for stay of execution are as provided for under Order 42 Rule 6 of the Civil Procedure Rules which provides as follows :

*“No appeal or a 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 an application being made, to consider such application and to make such orders thereon as may to it seem just, 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 the orders set aside.”*

Order 42, rule 6 states:

*“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.”*

The respondent has stated that the decree has already been fully executed. The purpose of stay of execution is to preserve the subject matter. as was held in the case of **RWW vs. EKW [2019] eKLR**, as follows:

*“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”*

In a case where the decree has been executed, what would the court be staying? That is the reason why Order 42 Rule 6 requires filing of an application expeditiously without undue delay to avoid such scenarios of the respondent going ahead with execution.

Courts do not give orders in vain which are not capable of being implemented. I will therefore not go to the other limbs of the application as to whether the appellants will suffer any substantial loss or offer security for due performance of the decree.

Having said that I find that the application lacks merit and is therefore dismissed with costs to the respondent.

**DATED and DELIVERED at ELDORET this 16<sup>th</sup> DAY OF FEBRUARY, 2021**

**M. A. ODENY**

**JUDGE**