



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 60 OF 2015

KIBAGENGE FARMERS CO-OPERATIVE

SOCIETY LIMITED.....1ST PLAINTIFF

PHILIP KIPKORIR LEITICH.....2ND PLAINTIFF

STEPHEN KIPCHIRCHIR MAIYO.....3RD PLAINTIFF

DANIEL BARNGETUNY SEUREL.....4TH PLAINTIFF

DANIEL KIPTANUI TARUS.....5TH PLAINTIFF

VERSUS

ISAAC KIPLETING MAIYO.....1ST DEFENDANT

DAVID KIPTARUS LELEI.....2ND DEFENDANT

RULING

1. The application dated 28/10/2020 and filed in court on 30/10/2020 has been brought by the plaintiffs under **Section 1A, 1B, 3, 3A, 63(e) & 79G** of the **Civil Procedure Act, Order 42 Rule 6** of the **Civil Procedure Rules**. The plaintiffs seek the following orders:-

(1) ...spent

(2) ...spent

(3) That pending the hearing and determination of the intended appeal this honourable court be pleased to grant a stay of execution of the judgment/decree issued on the 14/10/2020.

(4) That the costs of this application be provided for.

2. The application is supported by the affidavit sworn on 25/2/2020 by the 2nd plaintiff, the Chairman of the 1st plaintiff with authority from the other plaintiffs. The grounds upon which the application is made are that this court ordered the cancellation of the title in the name of the 1st plaintiff and its registration in the name of the Permanent Secretary to the Treasury as trustee on behalf of the public and that the applicants are dissatisfied with that decision and they intend to appeal it. They state that unless the stay order is granted the intended appeal shall be rendered nugatory and they shall suffer irreparable loss.

3. The 2nd defendant had passed on during the pendency of the suit and the suit against him was withdrawn.

4. In response to the application the 1st defendant filed a replying affidavit sworn on 27/11/2020. In it he finds fault with the applicants' application which he terms as an attempt to stay a declaratory judgment which is "*not capable of execution against them*"; that further after the judgment the applicants have proceeded to cut down trees on the suit land; that he speculates that if a stay order is granted, it is likely that further acts of waste will be committed on the suit land by the applicants; that the applicants have taken over the public cattle dip on the suit premises and they are charging members of the public for use of cattle dip services though the same is supposed to be run by the county government.

Submissions

5. The parties never filed any written submissions in this matter since it had been set down for an oral hearing on **2/12/2020** on which date no party or counsel appeared before court, and the court set down the application for delivery of a ruling on **2/2/2021**. I have taken note of the importance of this matter which involves public interest and I will endeavour to issue a substantive decision on the issues notwithstanding the default of the parties.

Determination

6. The main issue arising in the instant application is whether this court should issue a stay of execution order pending appeal.

7. The conditions for the grant of a stay of execution pending appeal are set out in **Order 42 Rule 6** which provides as follows:

“6.(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 subrule (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.

(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(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 that Court notice of appeal has been given.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

8. In brief, the court must consider whether:

(i) There is an appeal in place;

(ii) The application was made without unreasonable delay;

(iii) Substantial loss may result unless the order is made; and

(iii) The Applicant is prepared to offer security.

9. In have noted that there is a notice of appeal that was filed in the court record by the applicants on **22/10/2020** about **8 days** from the date of the delivery of the judgment and I therefore find that there is an appeal in place for the purposes of the instant application.

10. As regards whether the application was filed without unreasonable delay I note that the same was filed only **16 days** from the date of delivery of judgment and hence there was no unreasonable delay in its filing.

11. Would substantial loss result perchance the stay order sought is not made? I find that the 1st applicant does not own the land which was reserved for a public utility; it only held it in trust for the public. There appear to have been some wrangles regarding leadership of the 1st applicant society and this court's view the main interest is the suit land. The transfer to and registration of the suit land in the name of the Permanent Secretary to the Treasury would only have the effect of further safeguarding the land from illegal disposition by unauthorized persons including those purporting to be members or leaders of the 1st applicant society. It was the opinion of this court in **paragraph 41** of its judgment that the title to the suit land is not safe while still registered in the 1st applicant's name hence the order that it be transferred to another entity. In the light of the foregoing I find that the applicants have not demonstrated any possible substantial loss, and on the contrary, members of the general public and in particular public spirited members of the 1st applicant will be saved the agony of having to constantly fight off illegal alienation of the suit land.

12. The applicants have offered to abide by the court's orders as to security. However they have failed to demonstrate that all the first three

conditions requisite for the issuance of an order of stay have been met. In this court's view it is the usual position that all the four conditions, and not just one or some of them, must be met before the order of stay is issued.

13. Consequently, I find that the application dated **28/10/2020** is without merit and the same is dismissed with costs to the 1st respondent.

It is so ordered.

Dated, signed and delivered at Kitale via electronic mail on this 2nd day of February, 2021.

MWANGI NJOROGE

JUDGE, ELC, KITALE.