



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO. 6 OF 2018

GILBERT OPINYA OOGA..... PLAINTIFF/APPLICANT

VERSUS

HELLEN ADHIAMBO ODIT..... DEFENDANT/RESPONDENT

RULING

In the application dated 6/11/2020, the Plaintiff prays that an interim order of injunction do issue restraining the defendants either by themselves, their servants and or agents or anyone whomsoever claiming title or acting on their behalf from entering, remaining in, occupying/continuing to occupy, cultivating, constructing on, alienating selling or doing any act on land parcel known as Kisumu Manyatta/"A"/167 pending the full hearing and determination of the Appeal.

This court be pleased to issue an order staying any/all proceedings further to the ruling of Hon. Justice A. O. Ombwayo dated 27th April 2020 and all consequential orders flowing therefrom pending the hearing and determination of this Application.

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The application is based on grounds that the application has been made timeously and that the appeal has high chances of success and that the applicant has the risk of losing his land.

In the supporting affidavit, the Plaintiff states that the respondent filed a preliminary objection and the suit was dismissed. He has appealed against the decision. The ruling is unfair and did not address the issues according to the plaintiff. The defendant filed a bill of costs and is in the process of executing the same. According to the Plaintiff, if the court does not grant stay, he is likely to suffer serious losses and irreparable damage to their property can't be compensated.

The defendant filed grounds of opposition stating that there are no proceedings that can be stayed. The defendant states that the application is made 7 months after the judgment without an explanation of the unreasonable delay.

Moreover, the defendant states that substantive loss has not been established and that no security for the due performance of the order has been offered.

According to the defendant, the plaintiff has not demonstrated that he has an arguable appeal.

The defendant argues that no leave was sought and obtained under Section 73 (1) of the Civil Procedure Act AND OR Order 43 Rule 1 (3) of the Civil Procedure Rules 2020.

The Defendant argues that the plaintiff has not demonstrated that if they were to succeed, would be rendered nugatory or worthless if stay is not granted. Furthermore, that the decision delivered on 27/4/2020 was a negative order which hereby dismissed the Plaintiff's suit with costs.

Order 42 Rule t 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 appeal case of 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.

The issues the court should consider before granting stay of proceedings is as follows:

- (1) Whether the application has been filed without unreasonable delay.**
- (2) Whether the applicant is likely to suffer substantial loss if stay is not granted and he succeeds on appeal.**
- (3) Whether security has been offered.**

On the 1st issue, I do find that the ruling was delivered on 27/4/2020 whilst the application was made on the 6/11/2020. The application was made more than 6 months after the ruling. This court finds that a six months' delay is inordinate and unreasonable and needs an explanation. There is no explanation of this delay.

The second issue is on substantial loss. The only loss the plaintiff can suffer is the payment of the taxed bill of costs however, the Plaintiff has not demonstrated that the defendant will not be able to refund the same if he succeeds on appeal.

The defendant is in possession of the land and has been in possession for more than 20 years, the possession of the defendant can't be discerned as a loss to the plaintiff and therefore the plaintiff does not demonstrate substantial loss.

The prayer for injunction can't be granted as the same will amount to evicting the defendant from the suit parcel of land. The orders sought for by the Plaintiff pending appeal are superfluous as they seek to restrain the defendant from claiming title which is in the names of deceased persons that can only be transferred to the defendant by a legal way of transmission after a succession cause.

The plaintiff seeks to restrain the defendant from entering the land and yet the defendant is already in possession. If the order is granted, then it will amount to eviction as it is assumed that the defendant is not in possession.

The Plaintiff further seeks that the defendant be enjoined from remaining on the land, again if such an order is issued then it will amount to an eviction. There is no evidence that the defendant is selling the parcel of land. In fact, she has no capacity to sell the land as it is registered in the names of the defendant.

On the issue of stay of proceedings, I do find that there are no proceedings to be stayed as the process has culminated into a certificate of costs and what is pending is execution for costs. I do find the application not merited and is dismissed with costs.

DATED AT KISUMU THIS 24th DAY OF MARCH, 2021

ANTONY OMBWAYO

JUDGE

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2019.

ANTONY OMBWAYO

JUDGE