



REPUBLIC OF KENYA
IN The ENVIRONMENT AND LAND COURT
AT ELDORET

ELC APPEAL NO. 10 OF 2020

WILFRED KIBET KANDA.....1ST APPELLANT

NAHASHON KIPLIMO KANDA.....2ND APPELLANT

VERSUS

BENJAMIN KIPROTICH.....RESPONDENT

RULING

This ruling is in respect of the appellant/applicants an application dated 15th September 2020 seeking for the following orders:

- a. Spent.
- b. That there be temporary proceedings herein and execution of court orders issued on 30th April 2020 in Iten ELC No 20 of 2018 pending the hearing and determination of this application inter partes.
- c. That there be a temporary stay of proceedings and execution of this court's orders issued on 30th April 2020 in Iten ELC No 20 of 2018 pending the hearing and determination of this Appeal/

The basis of the application is that the lower court declined to grant orders of stay vide a ruling delivered on 2nd September 2020.

The appellant filed this application under certificate of urgency whereby the court granted orders status quo to be maintained pending the inter partes hearing and determination of this application.

Counsel agreed to canvass the application vide written submissions which were duly filed. Counsel urged the court to note that the respondent's submissions are in respect of the main appeal and not for the preliminary application for stay of execution.

Counsel submitted that the issue for determination is whether the Appellant/Applicants have made out a reasonable case for stay of execution order to issue pending hearing of the appeal.

On this issue counsel relied on Order 42 Rule 6(2) of the Civil Procedure Rules (2010) on stay of execution which provides that:

"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 due performance of such decree or order as may ultimately be binding on him has been given by the applicant."

Counsel further cited the case of **Butt versus Rent Restriction Tribunal (1982) KLR 419**, as follows:-

"It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the courts as a general rule out to exercise its best discretion in a way not to prevent the appeal if, successful from being nugatory...The court will grant a stay where special circumstances of the case so require..."

It was counsel's submission that the applicants have satisfied that the appeal will be rendered nugatory and that they will suffer substantial loss unless the orders sought are issued. That the court on the 30th April, 2020 confirmed the orders earlier issued as follows:

"That there be a temporary order restraining the Defendants, their servants and or agents from digging and/or interfering with the Applicants Land Parcel Number E/Marakwet/Kapsowar/841 measuring 0.8 ha in a manner that will change, alter, qualify and or extinguish the interests of the Plaintiff pending the hearing and determination of the suit"

Counsel also submitted that it is not disputed that the Applicants are in possession of the suit land together with their respective families and that they have been in continuous occupation whereby they plough and fully depend on the suit land for their daily upkeep. The order if implemented means that the Applicants are technically barred from doing anything on the suit land including grazing of livestock.

Counsel cited the case of Jane **Jeptoo Sawe versus Estate of Sylvester Kimagut Sang Represented by Jennifer Chebet Sang, Civil App No.49 of 2015**, where the Court of Appeal held that: -

"The order of stay of execution that the Applicant seeks has been overtaken by events and cannot in the present circumstances be granted as it would serve no useful purpose".

On the issue of security for the due performance of the decree counsel relied on the case of **Anne Nieri Mwanai versus Muzaffer Musafee Essaie & another,(2014)eKLR** where the court held that;

“.As regards Rule 6(2)(b) in relation to security for costs, the Court in Kenya Tanzania Uganda Leasina Co. Ltd v Mukenya Ndunda [2013] eKLR Mabeya, J held as follows;-

"As I stated in the case of Kenya Commercial Bank Limited =Versus= Sun City Properties Limited & 5 Others [2012] eKLR '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. I do not see, why the same should not be applicable in this case."

Counsel therefore submitted that the order sought to be stayed does not warrant an order for deposit of security as it is a temporary order which is not final in nature such order of eviction not applicable in this case. Counsel urged the court to grant the orders as prayed.

The respondent's counsel's submissions did not address the application but the appeal.

ANALYSIS AND DETERMINATION

In an application for stay of execution pending appeal, an applicant must satisfy the provisions of order 42 Rule 6 of the CPR. The applicant must have filed the application without undue delay, must establish that he or she will suffer substantial loss and that he or she is ready and willing to abide by such security for the due performance of the decree as may be set by the court to be binding on the applicant.

In the current case the applicant has not demonstrated that he will suffer any substantial loss is the orders of stay are not granted. Further counsel submitted that the applicant is under no obligation to meet one of the requirements for security for due performance of the decree. This kind of argument alone disentitles the applicant from benefiting from the court's discretion to grant an order of stay of execution.

The threshold for grant of stay of execution are as per Order 42 Rule 6 of the Civil Procedure Rules and there are no two ways about it. We cannot reinvent the wheel and look for other ingredients. The fact the applicant is in occupation does not change the threshold to be met in applications for stay of execution.

It is not enough for the applicant to claim that he/she will suffer substantial loss without establishing the same. The fact that a party is in occupation is not a ticket for proof of substantial loss as such occupation might have been adjudged as either trespass or illegal.

In the case of **Peter Rugu Gikanga & another v Weston Gitonga & 10 others** [2014] eKLR, the court held as follows;

" It is clear from the Replying Affidavit of the Peter Rugu Gikanga, that some of the Defendants/Applicants have moved out of the suit land in obedience to the order of court. The majority do not live on the land, but are said to have structures thereon. Only the 3rd and 10th Defendants/Applicants persist on living on the land, allegedly because they have no alternative land. This, with respect, is no ground for granting a stay of execution. In **CHARLES WAHOME GETH/ VS. ANGELA WA/R/MU GETH/ (Court of Appeal Civil Application No. NAI 302 of 2007 UR 205/2007)**, the Court of Appeal held -

... it is not enough for the applicants to say that they live or reside on the suit land and that they will suffer substantial loss. The Applicants must go further and show the substantial loss that the applicants stand to suffer if the Respondent execute the decree in this suit against them. "

On the issue of stay of proceedings in the case of **Re Global Tours & Travel Ltd HCWC No. 43 of 2000 Ringera, J** (as he then was) held that:

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matter, it should bear in mind such factors as the need for expeditious disposal of case, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”

I have considered the application, the submissions of counsel and the relevant authorities and come to the conclusion that the applicant has not met the threshold for grant of stay of execution. The application is hereby dismissed with costs.

DATED AND DELIVERED AT ELDORET THIS 4TH DAY OF MARCH, 2021

M. A. ODENY

JUDGE