



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC NO. 407 OF 2015

THOMAS KIPTOO MASAI.....PLAINTIFF

VERSUS

FRANCIS KIBOR CHANGWONY.....1ST DEFENDANT

KIPROTICH JUMA.....2ND DEFENDANT

RULING

1. This is a ruling in respect of a Notice of Motion dated 21st June, 2021 in which the Plaintiff/Applicant seeks stay of execution pending appeal. The Applicant had filed a suit against the Defendants/Respondents in which he sought for an order that the agreement between him and the 1st Respondent dated 21st September, 2006 over LR.No.Plateau/Chepkongony Block 10(Kileges Farm) and the agreement made between him and the 2nd Respondent over parcel known as Soy Farm LR No.10018 have been rescinded or terminated.

2. The Respondents raised a counter claim in which they sought an order of specific performance against the Applicant. In a judgment delivered on 8th June, 2021, the Applicant's suit against the Respondents was dismissed and the Respondents counter claim was allowed. The Applicant was compelled to attend the Land Control Board to grant consent for the transfer of the suit property to the Respondents failing which the Deputy Registrar of this court was to do so on his behalf.

3. The Applicant contends that he was aggrieved with the judgment and has since filed a Notice of Appeal to the Court of Appeal. He argues that he has lived in the suit property for his entire life and that if stay was to be refused, he will be evicted and his buildings will be demolished. He therefore argues that he will suffer substantial loss and that he is willing to deposit such security as may be determined by the court.

4. The 1st Respondent opposed the Applicant's application based on a replying affidavit sworn on 21st July, 2021. The 1st Respondent contends that the Applicant has not met the threshold for grant of stay of execution pending appeal. He argues that the Applicant received the full purchase price and put him in possession. The Applicant then went and purchased land in Soy where he intended to re-locate to but that he has since refused to move out and has instead tried to annul the sale agreement between him and the Applicant on grounds of lack of consent of the Land Control Board.

5. The 1st Respondent further argues that he is occupying a larger portion of the suit property where he has put up permanent buildings and if stay was to be granted, it will amount to punishing him further as the Applicant has been enjoying orders of status quo. In the alternative, the 1st Respondent states that should the court be inclined to grant stay, it should order that the Applicant deposits the market value of the suit property in court in addition to deposit of the title to the suit property to avoid the Applicant using it to get loans.

6. The 2nd Respondent opposed the Applicant's application based on a replying affidavit sworn on 21st July, 2021 and grounds of opposition dated 21st July, 2021. The 2nd Respondent adopted the response by the 1st Respondent save to add that the Applicant will not suffer any substantial loss as he has land in Soy which he bought through the proceeds of the sale of the Kileges Farm property.

7. The parties were directed to file written submissions. The Applicant filed his submissions dated 24th September, 2021. The Respondents filed similar submissions dated 6th August, 2021. I have considered the Applicant's application as well as the opposition to the same by the Respondents. I have also considered the submissions by the parties. The only issue for determination is whether the Applicant has met the threshold for grant of stay of execution pending appeal.

8. Order 42 Rule 6 of the Civil Procedure Rules gives conditions upon which stay of execution may be granted. First, the application for stay has to be brought without unreasonable delay. Second, the Applicant must demonstrate that he will suffer substantial loss should stay be declined. Third, there has to be such security as may ultimately be binding on the Applicant in the decree.

9. In the instant case the impugned judgment was delivered on 8th June, 2021. The present application was filed on 21st June, 2021. I therefore find that the application was brought without unreasonable delay. The next consideration is whether the Applicant has demonstrated that he will suffer substantial loss if stay is not granted.

10. It is not contested that the Applicant sold the suit property and was given the full purchase price. He put the purchaser in possession and went on to purchase alternative land at Soy where he was to re-locate to. It is after he had put the purchaser in possession that he turned round and claimed that the transaction did not receive the consent of the Land Control Board and was therefore null and void.

11. The court ordered the Applicant to ensure that he gets the consent of the Land Control Board failing which the Deputy Registrar of this court signs the necessary forms to obtain consent. If the Deputy Registrar was to sign the forms and the suit property is transferred to the Respondents, that will not render the Appeal nugatory. The Respondents have stated on oath that they do not intend to create third party rights over the suit property. What will happen is that in case the Applicant's appeal succeeds, the entries in the register will simply be reversed. This will not render the Appeal nugatory.

12. The court will only grant stay in a case where the appeal will be rendered nugatory. As I have demonstrated herein above, the Applicant's appeal is not likely to be rendered nugatory. To this extent I do find that the Applicant has failed to demonstrate that he will suffer substantial loss. The issue of security would have been considered if the Applicant had demonstrated that he will suffer substantial loss. I therefore find no merit in the Applicant's application which is dismissed with costs to the Respondents. The stay orders which had been given herein are hereby discharged.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 4TH DAY OF NOVEMBER, 2021.

E.O. OBAGA

JUDGE

In the virtual presence of;-

M/S. Kipseii for Applicant

M/S. Kinyua for Mr.Kibii for 1st Defendant and Mr.Langat for 2nd Defendant

Court Assistant – Mercy

E.O. OBAGA

JUDGE