



**REPUBLIC OF KENYA**

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

**E & L CASE NO. 259 OF 2017**

**[FORMERLY ELDORET HCCC NO. 92 OF 2005]**

**ESTHER JEPOTIP CHEREKWENY.....PLAINTIFF**

**VERSUS**

**CHARLES KIMUTAI ROTICH.....1<sup>ST</sup> DEFENDANT**

**HENRY OKEMWA OCHARO.....2<sup>ND</sup> DEFENDANT**

**JAPHETH KIPKEMBOI MAGUT.....3<sup>RD</sup> DEFENDANT**

**RULING**

**[NOTICE OF MOTION DATED 28<sup>TH</sup> NOVEMBER, 2019]**

1. The 2<sup>nd</sup> Defendant vide the Motion dated the 28<sup>th</sup> November, 2019 seeks for stay of execution of the judgment, and decree of this Court delivered on the 17<sup>th</sup> October, 2019 pending the hearing and determination of the appeal. He also prays for costs. The application is based on the three (3) grounds marked (a) to (c) on its face, and supported by the affidavit of **Henry Ocharo Okemwa** sworn on the 28<sup>th</sup> November, 2019.

2. The application is opposed by the Plaintiff through her replying affidavit sworn on the 17<sup>th</sup> January, 2020.

3. The 3<sup>rd</sup> Defendant also opposed the application through the grounds of opposition dated the 21<sup>st</sup> January, 2020.

4. The Court issued directions on filing, and exchanging submissions on the 23<sup>rd</sup> January, 2020. That during the subsequent mention of 5<sup>th</sup> March 2020, only Counsel for the Plaintiff had filed their submissions dated the 17<sup>th</sup> February, 2020. The Counsel for the 3<sup>rd</sup> Defendant indicated that they will rely on their grounds of opposition. The Counsel for the 2<sup>nd</sup> Defendant did not file any submissions.

5. The following are the issues for the Court's determinations;

***(a) Whether the 2<sup>nd</sup> Defendant has made a reasonable case for stay of execution order to issue pending hearing and determination of the appeal.***

***(b) Who pays the costs?***

6. The Court has carefully considered the grounds on the Motion, affidavit evidence, grounds of opposition, submissions by the Plaintiff's Counsel and come to the following determinations;

(a) That the Plaintiff commenced the suit against the three named Defendants through the Amended Originating Summons dated the 16<sup>th</sup> August, 2006 seeking to be registered with land parcel **L. R. No. 12448/24 Eldoret Municipality** on the basis of having been in adverse possession since 1992. That vide the Court's judgment delivered on the 17<sup>th</sup> October, 2019, the Court found for the Plaintiff, and ordered as follows in the last two paragraphs;

***"The Plaintiff has established that she is in quiet, exclusive, uninterrupted and continuous occupation, and possession of the said parcel of land since 1992 to-date. The said possession and/or occupation has been open, notorious, adverse, continuous and undisturbed. It is therefore, hereby declared that...the proprietor's interest in the land parcel Number L. R. 12448/24 situated***

*within Eldoret Municipality within the Republic of Kenya be extinguished.*

***Moreover, that the Applicant ESTHER JEPOTIP CHEREKWENY be registered as the absolute proprietor of the said parcel Number L. R. 12448/24 situated within Eldoret Municipality within the Republic of Kenya. That the costs of this application are awarded to the Plaintiff. Orders accordingly.”***

That subsequent to the delivery of the judgment, the decree dated the 6<sup>th</sup> November, 2019 was issued. That the Motion dated the 28<sup>th</sup> November, 2019 subject matter of this ruling seeks to stay the execution of the said judgment, and decree emanating therefrom.

(b) That the record shows clearly that the 2<sup>nd</sup> Defendant filed a Notice of Appeal dated the 23<sup>rd</sup> October, 2019, and lodged at the registry on the 28<sup>th</sup> October, 2019. That the 2<sup>nd</sup> Defendant then filed the Motion dated the 28<sup>th</sup> November, 2019. That it is the 2<sup>nd</sup> Defendant's case as discerned from the grounds on the Motion, and the supporting affidavit that he will suffer substantial loss and be prejudiced if stay of execution order is not issued to protect the suit land pending the hearing and determination of the appeal. That the Plaintiff and 3<sup>rd</sup> Defendant case in opposing the application is that the 2<sup>nd</sup> Defendant has not satisfied the requirements of **Order 42 Rule 6 of Civil Procedure Rules**. That he has not demonstrated that he would suffer substantial loss, and that there has been delay in filing the application. That the provision of **Order 42 Rule 6 of Civil Procedure Rules** on stay in cases pending appeal empowers this Court, upon sufficient cause being shown, to order stay of execution of its judgment and decrees. That the party seeking for the stay order must satisfy the Court that substantial loss may result, that the application was made without unreasonable delay, and upon security for the due performance of the decree being provided.

(c) That from the grounds on the Motion, and supporting affidavit, there is no materials presented to demonstrate the nature of loss the 2<sup>nd</sup> Defendant is likely to suffer if stay order sought is not granted. That notwithstanding, it is clear the execution of the Court's judgment, and decree arising therefrom will have the effect of taking the legal title to the suit land from the 2<sup>nd</sup> Defendant, and conferring it upon the Plaintiff. That as the finding of the Court in the judgment is that the Plaintiff is the one who has always in possession of the suit land since 1992, the Court is of the view that the loss of legal title alone does not amount to substantial loss as an order restoring the legal title to the 2<sup>nd</sup> Defendant would be issued if successful on appeal.

(d) That the Plaintiff has at paragraph 10 of her replying affidavit deponed that what the 2<sup>nd</sup> Defendant seeks to stay has been ***“overtaken by events as the decree has been already forwarded to the Central Registry, Nairobi.”*** That deposition has not been rebutted, and as was held by the Court of Appeal in ***Jane Jeptoo Sawe Vs Estate of Sylvester Kimagut Sang represented by Jennifer Chebet Sang [2016] eKLR***, where the Applicant had already been evicted in execution of the Court order, ***“...an 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.”***

(e) That no explanation has been tendered as to why the 2<sup>nd</sup> Defendant did not move the court for stay orders at the time he was filing the notice of appeal. That though the application was filed about one month, and a half after the delivery of the judgment, which may not seem too long, by then the Plaintiff had reportedly forwarded the decree dated the 6<sup>th</sup> November, 2019 to the Land Registry for implementation. That had the 2<sup>nd</sup> Defendant acted earlier, possibly he would have arrested the execution. That the Court therefore, finds the 2<sup>nd</sup> defendant unreasonably delayed in filing the application.

(f) That though the 2<sup>nd</sup> Defendant has not offered security for due execution of the decree, the Court would have set the terms to be complied with had it found merit in the application. That as the 2<sup>nd</sup> Defendant has failed in the application, he will pay the costs in terms of **Section 27 of Civil Procedure Act Chapter 21 of Laws of Kenya**.

7. That the foregoing shows that the 2<sup>nd</sup> Defendant's Motion dated 28<sup>th</sup> November, 2019 has no merit, and is dismissed with costs.

Orders accordingly.

**Delivered and signed at Eldoret this 6<sup>th</sup> day of May, 2020**

**S. M. KIBUNJA**

**JUDGE**

Ruling read in the absence of all the Parties/Counsel and is to be transmitted by the Deputy Registrar digitally through the electronic mails supplied by the Counsel.

Court Assistant: Christine