



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CIVIL APPEAL NO. 11 OF 2014

TERESIAH SOMOKWONY KIBOR.....PLAINTIFF

VERSUS

PAUL CHEPKONGA BIWOTT.....1ST RESPONDENT

DANIEL KIPCHUMBA KIPROTICH.....2ND RESPONDENT

RULING

[NOTICE OF MOTION DATED THE 19TH DECEMBER, 2019]

1. The Appellant moved the Court through the Motion dated the 19th December, 2019 seeking for stay of execution of the judgment delivered on the 6th December, 2019 pending the hearing and determination of the appeal and costs. The application is based on the nine (9) grounds on its face and supported by the affidavit sworn by **Teresiah Somokwony Kibor** on the 19th December, 2019. The Appellant depones that the execution of the judgment would permanently injunct her from land parcel **MDA BLOCK 32 PLOT NO. 3**, the suit land, where she had developed her home, and where she resides with her children. That as she has lodged a notice of appeal to the Court of Appeal dated the 18th December, 2019, and has filed this application without unreasonable delay, the stay order prayed should be granted.

2. The application is opposed by the 1st Respondent through his replying affidavit sworn on the 20th January, 2020. He depones that the application is frivolous, vexatious and a gross abuse of the court process. That he is the one legally in possession of the land and the Appellant is in possession of an entirely different parcel. That he has been cultivating it until 2016 when he stopped due to disturbances by the Appellant. That there is no house on the land and that **MDA Block 32 Plot No. 3** no longer exists. That the Appellant has not shown what loss she is likely to suffer if the stay order is not granted.

3. The application came up for hearing on the 20th January, 2020 and after hearing Mr. Tororei and Wafula, the learned Counsel for the Appellant and 1st Respondent respectively, the Court made a visit to the suit land in the afternoon hours. The Court noted that the parcel in dispute was not cultivated. That to the left front part of the parcel was unroofed iron sheet walled structure without a door, which was reportedly used by the Appellant's children before the Court order of 18th February, 2015. The court then rescheduled the hearing of the application to the 26th February, 2020 when both Counsel made the oral submissions for and against the application.

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

(a) Whether the Appellant has established a case for stay order, pending the hearing of the appeal to issue.

(b) Who pays the costs?

5. The Court has carefully considered the grounds on the Motion, the affidavit evidence by both parties, the learned Counsel's submissions, the Court's observation during the visit to the suit land, and come to the following determinations;

(a) That this Court judgment dated the 6th December, 2019 dismissed the Appellant's appeal against the Lower Court decision delivered on the 26th November, 2014 which had among others permanently restrained the Appellant from the suit land. The Appellant has already filed a notice of appeal dated the 18th December, 2019, and now seeks for stay of execution pending the hearing and determination of that appeal.

(b) That during the visit on the suit land, the Appellant and wife to the 1st Respondent were present and confirmed to the Court that the suit land had not been used by either of the parties since the order of 18th February, 2015. The Lower Court record of 18th February, 2015 sets out the details of the consent order in the following terms;

“By consent, the application dated 28th January, 2015 be compromised in the following terms:

1. That the Plaintiff/Respondent is hereby restrained from selling the suit land pending the hearing and determination of Eldoret High Court Civil Appeal Number 11 of 2014.

2. The Plaintiff/Respondent is at liberty to use the suit land pending the outcome of the said appeal, and or any further orders”.

That the Plaintiff/Respondent in that consent order referred to the 1st Respondent in this appeal and application. That in paragraph 10 of the 1st Respondent’s replying affidavit sworn on the 20th January 2020, it is apparent that he stopped cultivating the suit land in 2016 which agrees with the Court’s observation during the visit of the 20th January 2020 that the parcel was not being cultivated.

(c) That on the parties admission that the last time the suit land was used by either of them was about 2015 and 2016, then it follows that the Appellant’s claim that she is likely to be permanently enjoined from the land where she lives with her children cannot be true. That indeed, during the court visit to the land, the Appellant pointed out her home which is on another plot bordering the suit land, and it is a shame that she had sworn an affidavit knowing very well that it contained lies and, in the process, perjuring herself.

(d) That flowing from the finding in (c) above, the Court finds the Appellant has not shown what loss of a substantial nature she is likely to suffer if the stay order sought is not granted. She should therefore meet the 1st Respondent’s costs in the application.

6. That in view of the foregoing, the Court finds no merit in the Appellant’s Motion dated the 19th December, 2019. That the said Motion is therefore dismissed with costs.

Orders accordingly.

Dated and delivered at Eldoret this 7th day of May, 2020.

S. M. KIBUNJA

JUDGE

Ruling read in absence of all Parties/Counsel and is to be digitally transmitted by the Deputy registrar through the e-mail addresses provided by Counsel.

Christine: Court Assistant