



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 1 OF 2014

**GILBERT KIPTOO (SUING ON BEHALF OF THE ESTATE
OF THE LATE KIPKOECH ARAP YATOR) LEAVE GRANTED
ON 10TH DECEMBER, 2015.....PLAINTIFF**

VERSUS

BENARD KIPROTICH SAMBU.....DEFENDANT

RULING

1. By Motion dated the 8th April 2019, Bernard Kiprotich Sambu, the defendant, seeks for stay of execution of the Decree passed on the 22nd February, 2019 pending the hearing and determination of the appeal in the Court of Appeal. The Defendant also prays for costs. The application is based on the seven (7) grounds on its face marked (a) to (g) and supported by the supporting and further affidavits sworn by Mr. Rotich Nyongio and Bernard Kiprotich Sambu on the 8th April, 2019 and 27th May, 2019 respectively.
2. The application is opposed by the plaintiff through the replying affidavit sworn by Gilbert Kiptoo on the 20th May, 2019.
3. The application came up for hearing on the 21st May, 2019 when the defendant was given seven (7) days to file a supplementary affidavit with the submissions. The plaintiff was also given a similar period to file submissions after service.
4. The learned counsel for the defendant and plaintiff filed their written submissions dated the 26th May, 2018 (sic) and 3rd June, 2019 respectively.

(a) The defendant's case is that he will suffer substantial loss unless stay of the decree is granted as he has been in occupation of all that parcel of land known as ***Meteitei/Meteitei/Block 4/100***, suit land, since 1981 while the plaintiff has never been in possession, and would not be prejudiced if he awaited the outcome of the appeal. That the application was brought without undue delay as it was filed after 44 days from the date of the decree. That the title deed of the suit land now with the plaintiff may be deposited with the court, or retained in the custody of the plaintiff as security for the performance of the decree. The learned counsel referred to the following decided cases:

(i) Francis Kamau Njoroge & 2 Others Vs Willie Mwangi Ndegwa [2019] eKLR, paragraph 9 of page 2; and

(ii) Marion Kaari Mbui Vs Elisha Mbogo Nthiga [2019] eKLR.

(b) On the part of the plaintiff, his position is that the defendant has not met the conditions set in ***Order 42, Rules 6(1) and (2) of the Civil Procedure Rules*** for the stay order pending appeal to be issued. That the supporting affidavit filed with the application is by counsel, who is without capacity in view of the contentious issues therein and is in contravention of ***Rule 9 of the Advocates Practice Rules***. That the said affidavit is therefore improperly before the court and should be struck out. That there has been unreasonable delay in filing the application as it was filed after 45 days, and served after 65 days from the date of the Judgment. That the delay is intentional with the aim of frustrating and preventing the plaintiff from enjoying the fruits of the judgment. That the defendant has not demonstrated any substantial loss that he will suffer if stay order is not granted. That as the defendant has only filed a Notice of Appeal which is improper, there is no appeal that can be rendered nugatory if stay order is not granted. The learned counsel for the plaintiff referred to the following decided cases:

(a) Antoine Ndiaye Vs African Virtual University (2015) eKLR, and

(b) William T. Abira & 2 Others Vs Kenya Civil Aviation Authority [2016] eKLR.

5. The following are the issues for the court's determination;

(a) *Whether the defendant has established sufficient cause for stay 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, the affidavit evidence in support and in opposition to the application, the written submissions by both counsel and come to the following conclusions:

(a) That the supporting affidavit filed with the Motion subject matter of this ruling was sworn by Rotich Nyongio who in paragraph 1 is described as the **"counsel duly on record for the defendant/Applicant and hence competent to make this oath."** That as pointed out by the plaintiff through their replying affidavits and his counsel's written submissions, the supporting affidavit contains contentious matters at paragraph 6 which matters a counsel for a party should leave to the litigants to avoid becoming an active combatant in the dispute and to ensure compliance with **Order 18 Rule 3(1) of the Civil Procedure Rules**. That whereas there is no prayer by the plaintiff for the court to strike out any specific paragraph of the said supporting affidavit, he has at paragraph 3 of the replying affidavit sought for the supporting affidavit to be found improperly before the court and an abuse of the court process. That were the court to agree with the plaintiff, the Motion would be left without a supporting affidavit, but the further affidavit by the defendant sworn on the 27th May, 2019 would come in handy. The further affidavit was filed pursuant to the leave of the court of 21st May, 2019 following the oral application by counsel to respond to the replying affidavit. That the court therefore finds and hold that whatever defect may have occurred though counsel deponing the supporting affidavit has since been cured by the further affidavit by the defendant.

(b) That the Motion has invoked **Order 42 Rule 6 of the Civil Procedure Rules**. That **subrule (1) of Rule 6** leaves no doubt that this court is with jurisdiction to deal with the application, as the court that made the judgment or decree subject matter of the appeal. That **sub-rule (2)** dictates that before an order of stay of execution is made, the court must be satisfied that substantial loss may occur to the defendant unless the order is issued. That the court must further be satisfied that there was no unreasonable delay in filing the application and that security for the due performance of the decree has been given. That the defendant has through his further affidavit stated that having been in occupation of the land since 1981, he would suffer substantial loss if the order was not granted and that he filed the application on the 44th day from the date of the judgment. That he has further deponed that the original title deed of the suit land was with the plaintiff and could either be retained by him (plaintiff) or deposited in court as security for the performance of the decree as he (defendant) has **"no intentions whatsoever of dealing, selling and/or charging either portion of the land."** That the plaintiff has at paragraphs 9 to 11 of the replying affidavit deponed that the defendant has not offered any security for due performance of the decree. That there has been unreasonable delay in filing the application and that the defendant has not in any way demonstrated that he would suffer substantial loss if the order was not granted. That starting with the issue of substantial loss, the defendant's affidavit evidence is to the effect that the title documents of the suit land are with the plaintiff and further that he does not intend to deal, sell and or charge the suit land. That the court's judgment was to among others give the plaintiff 4.0 acres out of the suit land. That though the defendant did not particularize the nature of substantial loss that he is likely to suffer if that order was executed before the appeal is heard and determined, the court is of the view that the status of the suit land obtaining before the judgment delivered on the 22nd February, 2019 should in this case be maintained for a period of one year to enable the defendant pursue the appeal and or other order before the court of appeal. That this will ensure the suit property is protected, as to hold otherwise may result to the plaintiff dealing with the 4.0 acres decreed in his favour in a manner that may alter its legal status while the appeal is still pending, and hence result to substantial loss to the defendant should he be successful on appeal.

(c) That in view of the decided case cited by the defendant's learned counsel to the effect that a delay of 41 days was not unreasonable, and the fact that the decree was issued on the 5th April 2019, the court finds that there was no unreasonable delay in filing the Motion.

(d) That on the issue of the security for due performance of the decree, what the defendant is offering is the title deed in the custody of the plaintiff. That would appear insufficient as a security for due performance of the decree. That the court's judgment of 22nd February 2019 was for the defendant to subdivide the suit land and transfer 4.0 acres to the Estate of the late Kipkoech Arap Yator, represented by the plaintiff herein, and permanent injunction. That no costs were awarded for reasons that parties are related. That the due performance of the decree will definitely require funds for among others surveying, stamp duty and filing of transfer documents. That though the learned counsel did not address the court on this matter, an estimate of Kshs.300,000 (Three Hundred Thousands) would suffice for security for due performance of the decree.

(e) That on the issue of whether or not the Notice of Appeal filed herein was an abuse of the process of the court or is improperly before the court, that is an issue to be canvassed before the Court of Appeal.

7. That following from the foregoing, the court finds merit in the defendant's Motion dated the 8th April 2019 and orders as follows:

(a) That stay of execution of the decree passed on the 22nd February 2019 is hereby granted to be in force for one (1) year from today, on condition that the defendant deposits Kshs.300,000 (Three Hundred Thousands) in an interest having account with a bank in the joint names of the parties counsel in thirty (30) days from today, and in default, the stay order to lapse automatically.

(b) The costs of the application abide the outcome of the appeal.

Dated and delivered at Eldoret this 2nd day of October, 2019.

S. M. KIBUNJA

JUDGE

Ruling read in open court in the presence of:

M/s Tum for Plaintiff.

Mr. Rotich for Defendant.

Christine: Court Assistant