



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 64 OF 2015

DAVID WERE WAFULA.....PLAINTIFF

VERSUS

TITUS KIPKOSGEL.....DEFENDANT

RULING

1. The application dated **28/8/2019** and filed in court on **3/9/2019** has been brought by the plaintiff/applicant. It seeks an order of stay of execution of its judgment delivered on **18/7/2019** pending hearing and determination of the intended appeal.
2. The applicant has brought the application pursuant to **Section 3A and 63 (c) Civil Procedure Act, Order 42(1) Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules and Article 50 and 159 of the Constitution of Kenya.**
3. The grounds upon which the said application is premised are that the plaintiff has preferred an appeal to the Court of Appeal as the requisite notice of appeal has been filed and served; that the process of preparation, hearing and determination of the appeal may take long and thus it is necessary to preserve the subject matter herein pending determination of the appeal; that the subject matter of this suit being land the applicant will be left with no remedy if execution issues.
4. The application is supported by an affidavit of the applicant sworn on **28/8/2019**.
5. I have perused through the file record and found no response filed on behalf of the respondent. This application is for that reason unopposed.
6. The matter came up on **30/9/2019** when the court ordered parties to file submissions on application. The plaintiff filed his submissions on **25/10/2019**. I have perused through the record and found no submissions filed on behalf of the respondent. I have considered the application and the applicant's submissions.
7. The conditions for a grant of stay of execution are contained in **Order 42 rule 6** of the Civil Procedure Rules which provides as follows:-

“6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under subrule (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 the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

8. I am satisfied that an appeal is in existence as required by **Order 42 Rule 6(4)** as I have noted that a notice of appeal dated **31/7/2019** was apparently filed on the same date.

9. Will the plaintiff suffer substantial loss if the orders sought do not issue? This is purely a matter to be determined on the basis of available evidence. The supporting affidavit of the applicant states that the applicant has been occupation of the plot since 1992 and that the respondent showed up in 2014 and that he has heavily invested in the plot in question. No annexures are exhibited to that affidavit save the copy of notice of appeal. In my view no evidence of substantial loss has been established by the applicant.

10. As to whether the application has been made without unreasonable delay this court notes that the judgment in this matter was delivered on **18/7/2019** while the instant application was lodged on **31/7/2019**, some **13 days** later. I find that the application was timeously filed.

11. On the issue of security, none has been offered by the applicant. However this court is mindful of the fact that the proper interpretation of **Order 42 rule 6** is that an application for stay is not fatally defective for failure to offer security as the court may, subject to the success of the applicant in respect of the other grounds discussed hereinabove, impose such conditions as to security as it deems fit where none has been offered by the applicant.

12. However in this application the applicant has failed to establish that he would suffer substantial loss. All the conditions for the grant an order of stay of execution require to be in existence at any given time for those orders to issue. As substantial loss has not been proved the application must fail.

13. In conclusion the application dated **28/8/2019** has no merit and the same is dismissed with costs.

Dated, signed and delivered at Kitale on this 4th day of November, 2019.

MWANGI NJOROGE

JUDGE

4/11/2019

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Wanyonyi for plaintiff

N/A for defendant

COURT

Ruling delivered in open court at 3.05 p.m.

MWANGI NJOROGE

JUDGE

4/11/2019.