



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ELC CAUSE NO. 286 OF 2017

FORMERLY KISII ELC NO. 372 OF 2015

MICHAEL LEKAKENY OLE KISASY.....PLAINTIFF/APPLICANT

VERSUS

JACKSON SERIAN1ST DEFENDANT/RESPONDENT

NKAMININ HILLARY SIWA.....2ND DEFENDANT/RESPONDENT

FREDRICK SERIAN.....3RD DEFENDANT/RESPONDENT

KILGORIS RESORTS LTD.....4TH DEFENDANT/RESPONDENT

RULING

By a Notice of Motion dated 6th November, 2020 the Applicant sought for orders of stay of execution of the Judgment of the court that was issued on 30th July, 2018 and the resultant decree pending the hearing and determination of the Applicants intended Appeal. The Application was based on the grounds that the Respondent herein was to be registered as the proprietor of land parcel Trans Mara/Poroko/107 and that subsequent to the filing of a Notice of Appeal the Respondent proceeded to sub-divide the suit land intending to transfer 35 acres of land which will render the Appeal nugatory and that the Appellant will suffer substantial loss. The Application was further based on the ground that the Application for stay was made without undue delay. The application was further supported by the affidavit of Erick Kivuva in which he deponed that the Respondent had commenced the process of sub-division of the suit land with the intention of living out 35 acres therefore following the Judgement of the court it stated that in the event the order of stay will not be granted the appeal will be nugatory. The Applicant further stated that he is willing to abide and provide security for costs.

The Application was opposed by the Respondent who filed a statement of grounds of opposition to the Application and stated that the Application is premature, misconceived and incompetent as the Applicants have not stated and/or highlighted the nature of the loss that they are likely to suffer and further that the Respondents have not met the condition for the grant of the orders of execution and the Applicants sole intention is to stop the Respondents from enjoying the fruits of his labour.

I have considered the Application before me the grounds of opposition filed by the Respondents and the Applicants submissions. This application is a routine post Judgement application in which a party is seeking for stay of execution of a judgement by the court. The Applicants in the instant case states that in the event that the stay of execution is not granted he will likely suffer substantial loss and further that the appeal will be rendered nugatory.

The grounds upon which a stay of execution is granted is now settled as contained under order 42 of the Civil Procedure Rules for an Application of this nature to succeed it is incumbent upon the Applicant to demonstrate that he will suffer substantial loss, that the application was filed without undue delay and provide security for costs.

In the instant Application it is evident that the applicant was diligent and had the application filed without undue delay. He applied for and obtained the proceedings and I thus find that the application was filed in time and there was no delay.

On what amounts to substantial loss which as applicant is seeking the discretionary order of stay must proof. The court of Appeal in Mukuma –Versus-Abuoga (1988)KLR 645 defined substantial loss as:

“Substantial loss is what has to be preserved by preserving the status quo because such loss will render the Appeal nugatory.”

In the instant application the applicant stated that the Respondent has commenced process of hiring out 35 acres from the suit land. The Respondent has not contradicted that assertion and the subject suit be heard which is emotive and also a factor of production and in the absence of the Respondent to rebut the application contention I find that the applicant will suffer substantial loss as the hired off portion could further be transferred and/or other encumbrances placed on it and for the above reasons I find that unless the subject land is not preserved the applicant will suffer substantial loss and his intended appeal will be rendered nugatory.

The upshot of the above is that the application is merited and I will allow the same and issue orders that there be a stay of execution of the judgment dated 30/7/2018 pending the hearing and determination of the Appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KILGORIS ON THIS 30TH DAY OF JUNE, 2021

Mohamed N. Kullow

Judge

30/6/2021

In the presence of:

CA:Chuma

Ms Muriranja for the Applicant/defendant

N/A for the respondent/plaintiff