



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUSIA

ELC MISCELLANEOUS APPLICATION NO. 8 OF 2020

ZEBIO KWEYU APPLICANT

VERSUS

BENARD PETER OYAYO OTIENO RESPONDENT

R U L I N G

1. For the court's determination is the notice of motion application dated 3rd November 2020 brought under provisions of section 1A, 1B & 3A of Civil Procedure Act and order 42 of the Civil Procedure Rules. The Applicant for orders that;

1) Spent

2) Spent

3) That the Honourable Court be pleased to issue an order staying execution of the Ruling and Order issued by the SRM Court at Ukwala in ELC No. 25 of 2020 on 21st October 2020 pending the lodgement, hearing and determination of the intended appeal.

4) That costs of the application be provided for.

2. The application was supported by the Applicant's affidavit sworn on 3rd November 2020 and the grounds listed on its face *inter alia*;

(i) That the Applicant's intended appeal which has very high chances of succeeding with be rendered nugatory unless the honourable court grants the Applicant orders for stay of execution pending hearing and determination of this application as well as the intended appeal.

(ii) That the Applicant stand to suffer substantial and irreparable harm if orders for stay of execution are not issued urgently, as there is a real risks that that Respondent will proceed and clear the Applicant's sugarcane on the suit premises, which he planted in 2017 before the Respondent bought the suit property in 2018.

(iii) That the applicant has moved diligently and expeditiously in bringing this application.

3. The Applicant deposed that his intended appeal against the order has very high chances of success since the person who sold land to the Respondent had informed him the land had been leased to the Applicant until 2021. That the risk if the stay is not given is that the Respondent will proceed to clear his sugarcane rendering the intended appeal nugatory. The Applicant deposed that he is ready to offer any security or to comply with any order issued by the court as a condition for grant of the orders sought.

4. The Application is opposed by the Respondent who filed both a replying affidavit and grounds of opposition. In the replying affidavit sworn on 23/11/2020 the Respondent deposed that the allegation of verbal lease agreement has not been backed with any proof by way of an affidavit sworn by the alleged lessor. That the Applicant encroached on to the suit land in January 2019 when he started cultivating it. The Respondent deposes that the Applicant will not suffer any loss/prejudice since the court cannot be used to fulfil unlawful demands of trespassers who has declined a court order to vacate the land.

5. The parties agreed to argue the application by filing of written submissions. The Applicant submitted that he had leased the suit land Uhoro/Tingale/1886 in the year 2017 for a period of 54 months for purposes of planting sugarcane and harvesting two ratoons. He listed the issues for determination in this application as follows;

- (i) Whether the application was filed without undue delay.
- (ii) Whether he stands to suffer substantial loss.
- (iii) Whether he is ready to provide security for due performance of the decree.

6. In explaining the issue of substantial loss, the Applicant stated that the Respondent has never had possession of the suit land since purchasing it in 2018. Further that the Respondent would have seen the cane on the land before buying it if he did due diligence. That the Respondent will suffer no harm if the orders of stay are granted while the Applicant stands to suffer loss because he invested heavily in the long term plant (sugarcane). The Applicant cited the decision of *Teresia Wairimu Vs Wanjiku Mwangi (2018) eKLR* where the court observed thus;

“Even without going to the merit of appeal, if the Applicant was never in possession then if orders sought herein are not granted there is no evidence she will suffer substantial loss”

And case of *Paul Kamura Kirunge Vs John Peter Nganga (2019) eKLR* where the court observed thus;

“Though the Respondent has alleged that the Applicant would not suffer loss as the Court has already found in his favour and that he is entitled to benefit from the fruits of his judgment, he has also acknowledged that all along the Appellant/Applicant has been in possession and has been cultivating the suit land and rearing his cattle. Since the Applicant was in possession of the suit property and the fact that the orders that have been granted will serve the purpose of evicting him from the said land, this Court finds that the Applicant will suffer loss and his Appeal might be rendered nugatory in the event his Appeal is successful. This is so because the Applicant is fighting not to be evicted and if he is to lose possession of the suit land at this stage, it would probably mean that he has already been evicted and the Appeal would serve no purpose.”

7. The Respondent submitted that the Applicant does not meet the requisite threshold for grant of orders because he has no capacity to claim any rights on the property. That the Applicant in paragraph 16 submitted that the sugarcane is already mature and he only needs to harvest it and give vacant possession to the Respondent. The Respondent submitted that he agrees with the decision in *Machira T/A as Machira & Co. Advocates Vs East African Standard (NO. 2. (2002) KLR 3. Paragraph 21 of the applicant’s submissions)*. **The Applicant has not demonstrated the nature and extent of the substantial loss he is bound to suffer should he be ordered to harvest his already mature sugarcane from the respondent’s parcel of land. There is no loss in harvesting mature sugarcane.**

8. The Respondent submitted further that the Memo of Appeal was filed outside the 30 days as shown on the stamp in annexure **ZK-002** thus there is no substantive appeal to warrant grant of stay orders. He cited the case of *Dilpack Kenya Ltd Vs William Muthama Kitonyi (2018) eKLR*, **the court held that stay orders cannot be granted in vacuum, where the appeal has been filed out of time there is no substratum for granting the stay orders.**

9. It is not in dispute that the Applicant is in possession. It is also not in dispute that the Applicant has sugarcane on the land which cane the subordinate court allowed him 14 days from 21st October 2020 to harvest. The Applicant pleaded that through a verbal agreement he had leased the suit land for a period of 54 months from 2017 to 2021.

10. From the affidavit in support of the application he did not plead the commencement date of the lease or the age of the cane as at the time the impugned order was made. In my opinion, this evidence was necessary for determining the issue of substantial loss likely to be occasioned unless stay was granted. Whether or not the appeal is valid is immaterial at this stage but there is confirmation that indeed there is an appeal filed and on record. However, it is my finding that the Applicant has not demonstrated that he will suffer substantial loss. Consequently, I decline to grant the stay and proceed to dismiss the application for want of merit. Each party to bear their costs of the application.

Dated, signed and delivered at Busia this 10th day of June, 2021.

A. OMOLLO

JUDGE