



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 89 OF 2012

JOHN GITHUI GATUA (Suing as personal representative of

MICHAEL KABURIA THEURI (Deceased).....PLAINTIFF

VERSUS

THE COUNTY GOVERNMENT OF TURKANA.....1STDEFENDANT

MEJA LODUNG.....2ND DEFENDANT/APPLICANT

RULING

The Application

1. The application dated **10/9/2020** and filed in court on **15/3/2021**, has been brought under **Order 42 Rule 6(1), (2) and (6)** of the **Civil Procedure Rules, Sections 1A, 3 and 3A** of the **Civil Procedure Act**. The **2nd** defendant seeks the following orders:-

1. ...spent

2. That this honourable court to order a stay of execution of the judgment/decree made by the court on 20/5/2020 pending the hearing and determination of this application and that of the 2nd applicant's appeal.

3. The costs of this application be provided for.

2. The application is supported by the affidavit sworn on **5/3/2021** by the plaintiff. The grounds upon which the application is made are that the **2nd** applicant has filed a notice of appeal and sought certified copies of proceedings; that he has an arguable appeal with great probability of success; that if execution not stayed then he would suffer irreparable loss and damage and his appeal would be rendered nugatory and that he is ready and willing to abide by any terms as to security as the court may impose.

The Response

3. The **2nd** defendant filed a replying affidavit on **22/4/2021**. He deponed that the application does not satisfy the threshold for granting stay of execution as no risk of substantial loss has been demonstrated and that there has been considerable delay in filing the application, which he states is inordinate as the application has been brought **7 months** from the date of the lapse of the interim order of stay. The plaintiff further avers that the **2nd** defendant has continued to develop the property in issue in the suit even as at the date of the filing of the reply to the application. This last claim by the plaintiff has not been denied.

Submissions

4. The plaintiff filed his written submissions on **4/5/2021**. The **2nd** defendants filed his written submissions on **15/5/2021**.

Determination

5. I have considered the application, the response and the submissions filed the parties.

6. Stay of execution is governed by **Order 42 rule 6** which states 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 sub rule (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.”

7. The issues that arise in the instant application are whether there is an appeal in place, whether the application has been brought timeously, and if the applicant has demonstrated that he would suffer irreparable loss if the orders sought were not granted.

8. I have noted that a copy of the notice of appeal filed by the applicant is in the court record and that satisfied this court that there is an appeal in place at least for the purposes of the stay of execution application.

9. As to whether the application has been brought timeously it is stated by the parties that an interim stay had been granted for **90 days** after the judgment. The judgment was delivered on **20/5/2020**. The application was filed on **15/3/2021**. The interim stay must have lapsed on **19/8/2020** or thereabouts. There has been actual delay of about **7 months** as stated by the plaintiff. That in my view amounts to inordinate delay that must be explained for the applicant to merit the orders of stay.

10. An applicant in a stay application must explain any delay in seeking an order of stay of execution after a decree has been passed against him. I have scoured through the application for stay and the supporting affidavit and I find no explanation for the delay of **7 months** since the interim orders of stay lapsed. The application must fail on this ground.

11. Though the applicant has stated that he would be ready and willing to abide by any conditions as to security as may be ordered by the court it is clear that the conditions for the grant of a stay of execution are supposed to exist without the exception of any. Since the applicant has failed to explain the inordinate delay in bringing the application I find no need to delve into the issue of security.

12. The upshot of the foregoing is that the 2nd defendant's application dated is dismissed with costs to the plaintiff.

It is so ordered.

Dated, signed and delivered at Kitale via electronic mail on this 9th day of June, 2021.

MWANGI NJOROGE

JUDGE, ELC, KITALE.