



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

ELC CASE NO. 373 OF 2016

STANLEY KIPLAGAT RONO.....PLAINTIFF/RESPONDENT

WILLIAM RONO.....PLAINTIFF/RESPONDENT

VERSUS

WILLIAM KIPROTICH CHERUS.....DEFENDANT/APPLICANT

CONSOLIDATED WITH

ELDORET ENVIRONMENT & LAND CASE NO.136 OF 2017

WILLIAM KIPROTICH CHERUS (Suing as the legal Representative of the estate of

KIBUNEI TUITOEK CHERUS (deceased).....PLAINTIFF

VERSUS

MAGDALINE JEMUTAI RONO.....1ST DEFENDANT

STANLEY KIPLANGAT RONO.....2ND DEFENDANT

MICHAEL RONO.....3RD DEFENDANT

SAMURONO.....4TH DEFENDANT

SHADRACK RONO.....5TH DEFENDANT

DANIEL RONO.....6TH DEFENDANT

RULING

This ruling is in respect of an application dated 8th December 2020 by William Kiprotich Cherus the defendant/applicant seeking for the following order:

a) Spent

b) That the Honourable Court be pleased to order stay of execution of the Judgment and decree issued on 25/11/2020 in Eldoret ELC No. 373 of 2016 consolidated with Eldoret ELC No. 136 of 2017 and consequential orders therein pending the hearing and determination of this application.

c) That the Honourable Court be pleased to order stay of execution of the judgment and decree issued on 25/11/2020 in Eldoret ELC No.373 of 2016 consolidated with Eldoret ELC No. 136 of 2017 and all consequential orders therein pending the hearing and determination of the relevant appeal filed in the Court of Appeal.

Counsel agreed to file written submissions to the application which were duly filed.

DEFENDANT/APPLICANT'S SUBMISSION

Counsel for the applicant submitted that the applicant has preferred an appeal against the Judgment of this honorable court delivered on 25th November 2020 and relied on the grounds on the face of the application together with the supporting affidavit.

It was counsel's submission that the plaintiffs have begun illegal activities of felling mature indigenous trees on the suit land and that unless stay is granted the applicant is likely to suffer substantial loss. Counsel therefore urged the court to allow the application an order for the status quo to be maintained to preserve the substratum of the case.

PLAINTIFF/RESPONDENTS'SUBMISSIONS

Counsel for the plaintiff opposed the application and submitted that it is brought to deny the respondent the fruits of his judgment. Further that the applicant has not established the substantial loss that he will suffer if the orders are not granted

Counsel further submitted that the decree holders and the beneficiaries of the Estate of **Kiprono Arap Bondet** have been in actual and physical possession of the suit property as clearly reflected in the court record and the valuation report dated 28th February 2017. Further that the applicant occupies a separate and distinct parcel with its title known as **LEMBUS/METIPSO/49** and therefore has not tendered any evidence showing any loss he would suffer if stay is not granted.

Counsel relied on the case of; **NAIROBI CIVIL SUIT NO. 1029 OF 1982, JOACKIM NGUGI KIARIE V UI-YATE & OTHERS** wherein the Honourable Judge at page 5 held that: -

"I am not satisfied that the defendants have demonstrated the substantial loss they would suffer. They are not the registered owners of the suit property and their claim for adverse possession was dismissed by the court while the plaintiff's claim was upheld and therefore until the judgment of the plaintiff is reversed he is entitled to the benefits that it bestows on him unless it occurs to the court that the judgment was patently wrong on the basis of the record".

Mr Kibii for the respondent further submitted that Applicant has offered no security for the due performance of the decree and that should stay be granted it should be on condition that the applicant surrenders and deposits in court the original title deed of the suit property, **LEMBUS/METIPSO/50** together with duly executed Transfer Forms in favour of the decree holders together with passport photos and copies of KRA Pins and national identity card as security to guarantee due performance of the decree and that upon doing so the same will serve as is sufficient security.

Counsel relied on the case of **JAMES WANGALWA ANOTHER VS AGNES NALIKA CHESETO [2012] eKLR** where Gikonyo J held

"the applicant must establish other factors which show that the execution will create a state of affairs that will create an irreparable affect"

Mr Kibii also cited the case of **EQUITY BANK LTD VS TAIGA ADAMS COMPANY LTD [2006] eKLR** and also in **ELENA D. KORIR VS KENYATTA UNIVERSITY [2012] eKLR, Justice Nzioki Wa Makau**, held that

" The High Court's discretion to order stay of execution of its order or decree is fettered by three conditions, namely: - Sufficient cause, Substantial loss would ensue from a refusal to grant stay, the applicant must furnish security, the application must be made without unreasonable delay. In addition, the applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in Hassan Guyo Wakalo vs Straman EA Ltd (2013) eKLR and Hassan Guyo Wakalo vs Straman FA Ltd [2013/eKLR in which it was held thus; "In addition, the applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall have been rendered nugatory. These twin principles go hand in hand and failure to prove one dislodges the other"

Counsel therefore urged the court to dismiss the application with costs to the plaintiff.

ANALYSIS AND DETERMINATION

The issues for determination in an application for stay of execution pending appeal are as provided for under **Order 42 rule 6 of the Civil Procedure Rules, 2010** which provide as follows;

".....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 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 of stay shall be made under sub rule (1) unless-

a The court is satisfied that substantial/ loss may result to the applicant unless the order is made and 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 ultimate/y be binding on him has been given by the applicant.

The purpose of stay pending appeal is to preserve the substratum of the case especially in land matters where the character of the suit property may be changed while the appeal is pending. The applicant must establish the he/or she will suffer substantial loss if the order of stay is not granted.

In the case of **RWW vs. EKW [2019] eKLR**, the court stated the purpose of stay of execution order pending appeal, in the following words:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

The court has the discretion to grant or refuse to grant an order of stay but the discretion must be applied judiciously. In the case of **KENYA POWER & LIGHTNING COMPANY LTD VS ESTHER WANJIRU WOKABI [2014] eKLR**, where the court held that;

Order 46 Rule 6(2) lays down the conditions which an applicant must satisfy in order to deserve the orders of stay of execution pending appeal. However, the court stated that it noted that the conditions set out in Order Rule 6 (2) only serve as guidelines which the court can use as beacons in exercising its unfettered discretion in deciding whether or not to grant stay of execution pending appeal depending on the circumstances of each case.

It should also be borne in mind that the court has to balance the right of the applicant to appeal and that of the successful litigant to enjoy the fruits of his/her judgment as was held in the case of **MACHIRA T/A MACHIRA & CO ADVOCATES VS. EAST AFRICAN STANDARD (NO 2) [2002] KLR 63** it was held that:

“to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court.”

The applicant averred that the plaintiffs have engaged in illegal logging of indigenous tress and as such he will suffer substantial loss. The indigenous trees are not recoverable once harvested as they take a long time to mature.

I also find that the application was filed timeously as the judgment was delivered on 25th November 2020 and the application together with the Notice of Appeal was filed on 26th November 2020.

I have considered the application, the submissions by counsel and order that the applicant deposits the title to LEMBUS/METIPSO/50 in court as security for due performance of the decree within 14 days failure to which the order lapses. Costs of the application to the respondents.

DATED and DELIVERED at ELDORET this 19TH DAY OF AUGUST, 2021

M. A. ODENY

JUDGE