



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAROK

ELC APPEAL NO. 03 OF 2020

FRED WAFULA WAMALWA ...APPELLANT / APPLICANT

VERSUS

WILLIAM KALAYO NKEIYUA.....RESPONDENT

RULING

By a Notice of Motion dated 27th January, 2021 and brought under **Order 42 Rule 6(1) and (2) of the Civil Procedure Rules** and **Section 3 and 3A of the Civil Procedure Act** the Applicant sought for the following orders:-

1) Spent

2) That pending the hearing and determination of this application interpartes, this Honourable Court be pleased to stay the execution of the judgment delivered on the 27th February, 2020 in Kilgoris Principal Magistrate ELC No. 22 of 2019 (Fred Wafula Wamalwa versus William Kalayo Nkeiya), the ensuing decree or any consequential order.

3) That pending the hearing and determination of the appeal filed herewith, this Honourable Court be pleased to stay the execution of the judgment delivered on the 27th February, 2020 in Kilgoris Principal Magistrate ELC No. 22 of 2019 (Fred Wafula Wamalwa versus William Kalayo Nkeiyua), the ensuing decree or any consequential order.

5) That the costs be in the cause.

The application is based on the ground that judgment in the matter herein was issued on 27/2/2020 and if the decree is extracted, execution of the same will follow and his Appeal may be rendered nugatory. The Applicant further contends that the instant Appeal is made without undue delay and that he is ready to abide by any condition. That the court will set as a prerequisite for the orders sought being granted.

The Appeal was further supported by the Affidavit of the Applicant in which he depones that there is a real danger that execution of the decree is about to take place and the respondent will deal with the suit land in a manner that will be detrimental to his interest.

The Application was opposed by the respondent by way of grounds of opposition. The Respondent contends that the Application is scandalous and is meant to abuse the process of the court and further that it is meant to delay the recovery of costs. The respondent further contends that he has no interest on the plaintiff's parcel of land reference Number **Transmara / Shartuka/ 376** but land parcel number **Transmara / Shartuka / 153**.

I have considered the application and the Affidavit in support of the same with the submissions filed by the parties. The instant Application was mounted subsequent to judgment delivered by the Kilgoris Principal Magistrate's Court in ELC No. 22 of 2019. It is the Applicant contention that he has filed an appeal against the said judgment and pending the hearing of the same the court do grant him a stay of execution.

The Applicant states that if a stay of execution is not granted then he is likely to suffer as the Respondent may deal with the suit land in a manner that is detrimental to his interest. Over the time the courts have determined what conditions a party must fulfill before an order of stay of execution is executed as held in the case of **Antoine Ndiaye =vs= Africa Virtual University (2015) eKLR** and the condition are that substantial loss may result if the orders sought is not granted, that the Application was made without undue delay and lastly such security may be given by the Applicant.

The Applicant in the instant Application contends that he will suffer loss if the decree is executed, am aware that land in this country is emotive and is a factor of production and economic activity for the majority of people and in the likely event that execution commences

therein the Applicant will likely suffer loss. Furthermore, the Respondent in his response to the Application contends that he is not interested in the Applicants parcel of land that is Trasmara / Shartuka/ 376 but will have parcel number Transmara / Shartuka/1533 and therefore he may not suffer any prejudice.

On the second test whether the Applicant has filed without undue delay. It is evident that the judgment that the Applicant wants to stay was issued on 27/2/2020 and the instant Application was made on 27/1/2021 even though this was over a year. I take Judicial Notice that this was a period that the country was facing the Covid 19 pandemic and the courts closed and our general live collectively curtailed and thus the delay in filing the Appeal was justified.

Against the above reasons and the test applied to the granting of the Application for stay of execution. I am of the view that the Notice of Motion dated 27/1/2021 is merited and I will allow the same in terms of prayer 2, 3, and 4.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI THIS 30TH DAY OF NOVEMBER,2021

MOHAMED N. KULLOW

JUDGE

Ruling delivered in the presence of: -

Nonappearance for Appellant/Applicant`

Non appearance for Respondent

Tom Maurice -Court Assistant