



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT ELDORET**

**SUCCESSION CAUSE NO. 243 OF 1999**

**IN THE MATTER OF THE ESTATE OF KIPKOSGEI ARAP MAINA ALIAS KIPKOSGEI KETER (DECEASED)**

**SABINA JEBORE INGOTE .....1<sup>ST</sup> PLAINTIFF/RESPONDENT**

**DAVID MOSONIK .....2<sup>ND</sup> PLAINTIFF/RESPONDENT**

**TABARNO KOSKEI .....3<sup>RD</sup> PLAINTIFF/RESPONDENT**

**VERSUS**

**CHERUIYOT ARAP KOSKEI.....DEFENDANT/APPLICANT**

**RULING**

The Applicant through summons dated 18<sup>th</sup> March, 2021 seek a stay of execution of the orders made on 22<sup>nd</sup> December, 2020 pending the hearing and determination of the intended Appeal. The application is brought under the provisions of Order 42 Rule 6 of the Civil Procedure Rules and Rule 73 of the Probate and Administration Rules. It is supported by an affidavit sworn by the Applicant Cheruiyot Arap Kosgei on 18<sup>th</sup> March, 2021.

The Applicant is aggrieved by the court's decision of 22<sup>nd</sup> December, 2020 reinstating the eviction orders of 27<sup>th</sup> September 2011 and has since filed a notice of appeal against the said decision. The Applicant is apprehensive that if stay orders are not granted, the appeal if it succeeds will be rendered nugatory and they will suffer substantial loss.

The Applicant avers that the Ruling was delivered during the Christmas recess and that time did not run between 22<sup>nd</sup> December, 2020 and 13<sup>th</sup> January, 2021. That upon learning of the said decision the Applicant lodged a notice of appeal on 21<sup>st</sup> January, 2021 and has since applied for certified copies of proceedings to enable them prepare the record of appeal.

The 1<sup>st</sup> Respondent filed a replying affidavit dated 31<sup>st</sup> March, 2021 stating that on 23<sup>rd</sup> March, 2021 she proceeded to execute the court orders of 22<sup>nd</sup> December, 2020 with assistance of the OCS, Kapsoya Police Station, Chepkanga area Chief and Uasin Gishu County Land Surveyor, who surveyed the land parcel SERGOIT/KOIWOPTAOI BLOCK 7 (SERGOIT) 70 measuring 20 Acres. That on the same date both the survey and eviction of the Applicant from the suit property took place successfully.

The 1<sup>st</sup> Respondent further averred that prior to this court's ruling of 22<sup>nd</sup> December, 2020 the Applicant failed to prosecute his application for stay dated 22<sup>nd</sup> November, 2012 and chose to sit on the interim orders, to the detriment of the Respondents. The 1<sup>st</sup> Respondent avers that it was vide their application dated 24<sup>th</sup> September, 2014 filed by the Respondents' advocate that this court reinstated eviction orders of 27<sup>th</sup> September, 2011 vide its Ruling dated 22<sup>nd</sup> December, 2020. That the Applicant had previously filed an appeal to Court of Appeal, challenging the orders made by Hon. Justice G. Dulu of 4<sup>th</sup> July 2005, of which appeal was dismissed with costs.

She avers that the Applicant has not demonstrated the loss he is likely to suffer, or the prejudice that will be occasioned if the stay orders are not granted. Further, she avers that the applicant is a vexatious litigant who brings frivolous applications whose sole aim is to deny the Respondents enjoyment of the fruits of the judgment.

The Applicant filed a supplementary affidavit dated 23<sup>rd</sup> April, 2021 in which he denied having been evicted from the suit property. He further averred that no returns had been filed by the Officer Commanding Kapsoya Police Station indicating that eviction orders had taken place pursuant to this court's ruling of 22<sup>nd</sup> December, 2020. He further contended that no evidence has been placed before this court to show that the purported survey ever took place. He also averred that in view of the foregoing, this instant application is still alive for determination by this court pending the hearing and determination of the intended appeal.

The application was canvassed by way of written submissions on the basis of the materials filed by the respective parties. The Applicant submitted that order 42 rule 6 of the Civil Procedure Rules, 2010 provides this court with powers to grant stay. The Applicant further argued that he has established that he will suffer substantial loss if the eviction orders were to be executed. He further contended that the intended eviction is based on ex-parte orders made in the year 2011 and without jurisdiction. He also argued that the application which was dismissed for want of prosecution was challenging the ex-parte orders.

The Applicant submitted that this is a land matter dealing with occupation rights and which this court has never had jurisdiction to deal with and to enforce an ex-parte eviction order which was made against a party who has not been heard. He further contended it would be unfair and will lead to substantial loss as the Applicant's entire family resides on suit property and would be ultimately evicted pursuant to an order issued by a court that has no jurisdiction. The Applicant further submitted that he has extensively developed the suit property and if the appeal succeeds, he will not be able to recover from the Respondents.

He relied on the following cases; *Murgar V Kunga [1988] eKLR, Edwin Mwai Kiruai V Peter Wambugu Gichomo [2010] eKLR, Re Estate of John Gakunga Njoroge (Deceased) [2018] eKLR and Re Estate of Kipchumba Toroitich Kiptengwa [2020] eKLR* in support of his case.

The Respondents submitted that the issues for determination are whether the Applicant has satisfied all the necessary conditions to warrant stay of execution, whether the appeal by the Applicant is arguable and lastly which party should bear costs.

The respondent submitted that the Court should be guided by *Order 42 Rule 6* of the *Civil Procedure Rules* that governs stay of execution pending appeal. They assert that this instant application has since been overtaken by events since execution of the eviction orders reinstated pursuant to the Ruling of 22<sup>nd</sup> December, 2020 have since been carried out. They further submitted that quite a number of semi-permanent houses were demolished and a few permanent houses were left intact as there were elderly and sickly individuals residing therein. They further contend that the eviction orders were carried out on 23<sup>rd</sup> March, 2021 and this instant application served on them on 24<sup>th</sup> March, 2021 evidently and undoubtedly late. They cited the case of *Richard Muthusi V Patrick Gituma Ngomo & Another [2017] eKLR* on the issue. It was their contention that the Respondents have clearly suffered prejudice and irreparable loss because the Applicant has been exclusively utilizing the suit property since 4<sup>th</sup> July, 2005 under the cover of interim stay of execution orders that were granted to him at the time.

They further contends that stay of execution should only be granted where the Applicant has exhibited sufficient cause to warrant stay of execution. They relied on the case of *Congress Rental South Africa V Kenyatta International Convention Centre; Co-operative Bank of Kenya Limited & Another (Garnishee) [2019] eKLR*. They submitted that sufficient cause is largely a question of fact and that courts in addition to looking at the provisions of the law should also pay attention to the conduct of the parties. They contend that the Applicant's previous and present conduct in this matter is a delaying tactic aimed at delaying the expeditious disposal of the same.

On the issue of whether the intended appeal is arguable and merited the Respondents relied on the case of *Mohamed Salim T/A Choice Butchery Vs Nasserpuria Memon Jamat [2013] eKLR*. The Respondents submitted that they have been deprived of the right to enjoy the fruits of their judgement which was delivered on 4<sup>th</sup> July, 2015. It is their contention that it is now 16 years since judgement in favor of the Plaintiffs was delivered, the Applicant herein has been employing the same delaying tactics over and over again and that no amount of compensation would suffice as relief to the Plaintiffs for the loss they have suffered in all these years.

They pray that the Applicant's application should be dismissed and that the Applicant should be condemned to pay costs.

#### **ANALYSIS AND DETERMINATION**

I have considered the application, the response thereto, and submissions by both counsels. The conditions for granting of stay of execution pending appeal are well settled. An order for stay is a discretionary remedy.

The principles for granting stay of execution are provided for under *Order 42, rule 6* of the *Civil Procedure Rules*.

#### **Order 42, rule 6**

*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.*

An Applicant therefore needs to satisfy the court on the following conditions before he or she can be granted the stay orders:

- a) Substantial loss may result to the applicant unless the order is made,*
- b) The application has been made without unreasonable delay, and*
- c) Such security as the court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.*

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 that of the successful litigant who should not be deprived the enjoyment of the fruits of his/her judgment. The court is also called upon to safeguard against a party suffering damages that cannot be compensated by an award for costs.

### **On the issue of substantial loss.**

The decision of the court on whether substantial loss will occur will depend on a balancing act between the rights of the parties; the applicant's right to his appeal and the right of the respondent to enjoy the fruits of his judgment. The onus of establishing that substantial loss will occur unless stay is granted rests upon and must be discharged accordingly, by the applicant. It is not enough to merely state that substantial loss will be occasioned; the applicant ought to show the substantial loss that it will suffer in the event the orders sought are not granted. On this issue, the court in *James Wangalwa & Another V Agnes Naliaka Cheseto [2012] eKLR* held;

*No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.*

*The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of Silverstein N. Chesoni [2002] 1KLR 867, and also in the case of Mukuma V Abuoga quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:*

*“...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”*

The Applicant has alleged that he will suffer substantial loss if stay of execution of the eviction orders is not granted. The Applicant herein has only stated in passing that he has extensively developed the suit property and if the intended appeal succeeds, he will not be able to recover from the Respondents. Apart from stating that he has extensively developed the suit property, the Applicant has not tendered any material evidence before this court to show that, and that he will suffer substantial loss if the orders sought are not granted. I find no proof that he is likely to suffer substantial loss. He has not established that if stay is not granted the appeal will be rendered nugatory. It is worth noting that the essence of succession causes is to have the assets and or properties of the deceased distributed among his or her beneficiaries. The Applicant was in the court's decision of 4<sup>th</sup> July, 2005 ordered to vacate the suit property and instead go and occupy his own portion as per the mode of distribution. The Applicant has been adamant in complying with the said orders hence prompting the Respondents to seek the eviction orders against him. It has been 16 years since the said decision was made and the Respondents herein have not enjoyed the fruits of their judgement. The Applicant has clearly over the years employed delaying tactics so as to deny the Respondents the right to enjoy their share of the deceased's estate. The evidence before this court shows that the Applicant filed his application dated 22<sup>nd</sup> November, 2012 and never set it down for hearing. *“He who comes to equity must come with clean hands”*. The Applicant had also previously filed an appeal against the decision of 4<sup>th</sup> July, 2005, of which appeal was dismissed.

In *Gideon Sitelu Konchella Vs Daima Bank Ltd [2013] eKLR citing Mobil Kitale Service station Vs Mobil Oil(K) Ltd and Another [2004] eKLR*, it was held:

*“It is the interest of justice that litigation must be conducted expeditiously and efficiently so that injustice by delay would be a thing of the past. Justice would be better served if we dispose of matters expeditiously. The overriding objectives of the Act and the Rules made thereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.”*

In *Samvir Trustee Limited vs. Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997* the court expressed itself as follows;

*“Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court...The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant...For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss...Whereas there is no doubt that the defendant is a bank, allegedly with substantial assets, the court is entitled to weigh the present and future circumstances which can destroy the substratum of the litigation...At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party's right should not defeat or derogate the right*

*of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the court to give an order of stay with certain conditions.”*

In view of the above, I am satisfied the Applicant has failed to establish, as is required by law and by evidence, that he stands to suffer substantial loss, if the lawful Court’s order is enforced and stay of execution denied. Therefore, I do find that his intended appeal would not be rendered nugatory by declining to grant the stay of execution, since substantial loss of which is the cornerstone of the Court jurisdiction to grant stay have not been established. I find no basis on which this Court, can legally deny the respondents the right to enjoy the fruits of their judgement.

**Security.**

As regards the furnishing of security, given that this is not a monetary claim, security does not well apply.

**On whether there was inordinate delay**

The Ruling of this Court was made on 22<sup>nd</sup> December, 2020. This application was filed on 18<sup>th</sup> March, 2021 almost two months from the date of the Ruling. The Notice of Appeal was filed on 21<sup>st</sup> January, 2021. The delay for 1 month in filing the application has not been explained. The Applicant has not filed any certificate for delay. I find that the applicant’s application is inordinately delayed and no reasonable explanation has been offered for such delay.

This being a succession matter, undoubtedly this court has jurisdiction to deal with it. It is not a land matter perse.

The bottom line is that the application dated 18/3/2021 lacks merit, and is hereby dismissed with costs to the respondents.

**S.M GITHINJI**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 7<sup>th</sup> day of June, 2021.**

In the presence of:-

Ms Cherono for the respondent

Mr. Kisuya for the applicant

Ms Gladys – Court assistant

**Mr. Kisuya:-**

I pray for stay pending formal application for stay in the court of appeal.

**Ms Cherono:**

Stay will further prejudice our client.

**COURT:**

A stay at this point will defeat the purpose of the ruling. It is declined.

**S.M GITHINJI**

**JUDGE**

**7/6/2021**