



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

E & L CASE NO. 62 OF 2014

MARTHA CHELAL.....1ST PLAINTIFF

MICAH KIPYEGON.....2ND PLAINTIFF

(Legal representatives of the Estate of

KIPYEGOMEN CHELAL alias (KIPIAKOMENT CHELAL)

VERSUS

ELIJAH KIPKEMOI BOIYWO.....1ST DEFENDANT

JONAH KURGAT.....2ND DEFENDANT

THE DISTRICT LAND REGISTRAR UASIN-GISHU.....3RD DEFENDANT

RULING

This ruling is in respect of an application by the defendant applicant seeking for orders of stay of execution of the judgment directing the County Land Registrar to cancel the 1st defendant's title in respect of LR. No MOIBEN/MOIBEN BLOCK 4 (TUGEN) 115 and all consequential orders until the intended appeal is heard and determined.

The applicants argued that they have filed a notice of Appeal and unless the stay orders are granted the respondent is likely to execute the decree for the cancellation of the title to the suit land which may render the appeal nugatory.

The applicants also stated that they are apprehensive that the respondent may sell transfer or sell the resultant title after cancellation which will occasion substantial loss. Further that the respondent is in possession and continues to utilize the land hence no loss will be occasioned if the stay is granted.

The respondent submitted that the application for stay has not been filed in a timeous manner as the judgment was delivered on 7th August 2019. That the application is meant to frustrate the respondent from enjoying the fruits of her judgment. The respondent urged the court to dismiss the application with costs.

Analysis and Determination

The conditions to be met before stay is granted are provided under order 42 Rule 6(2) as follows:

“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.”

The Court of Appeal in **Butt v Rent Restriction Tribunal [1982] KLR 417** gave guidance on how a court should exercise discretion and held that:

“1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.

3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

The above summarizes the requirements for grant of stay of execution. If a party meets the threshold for grant of stay orders then the court would give such orders. It should be noted that the fact that a party has a strong ground of appeal is not in itself a ticket to getting a stay order as was held in the case of **CARTER & SONS LTD. V. DEPOSIT PROTECTION FUND BOARD & TWO OTHERS – Civil Appeal No. 291 of 1997, at Page 4 as follows:**

“ . . . the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay . . .the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would result from a refusal to grant a stay; and thirdly the applicant must furnish security, and the application must, of course, be made without unreasonable delay.”

The applicant stated that he has an arguable appeal which will be rendered nugatory if the stay orders are not granted. For an order of stay to be granted the applicant must meet the threshold as stipulated under order 42 rule 6. The Court’s has the discretion to order stay of execution of its order or decree if the three conditions are met namely, Sufficient cause, Substantial loss would ensue from a refusal to grant stay, that the applicant must furnish security and the application must be made without unreasonable delay.

Looking at the current application, the judgment was delivered on 7th August 2019 and the application was filed on 11th September 2019. This would pass even though it was filed after 30 day lapse.

On the issue of substantial loss, an applicant must establish that he or she will suffer substantial loss if the order is not granted. Mere allegation that a party will suffer substantial loss without substantiation is not enough. In the case of **James Wangalwa & Another V Agnes Naliaka Cheseto [2012] eKLR.**

The Court held the following view on the issue of substantial loss;

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 go further and demonstrate what substantial loss he or she is likely to suffer. This matter involves land and the applicant admitted that the respondent is in occupation and if the status quo is maintained the respondent is not likely to suffer any loss. The applicant did not substantiate the loss that he is likely to suffer if the stay order is not granted. It was a mere apprehension that the respondent might transfer, sell or charge the suit property if the title is cancelled.

The applicant has not stated what action the respondent has taken towards executing and/or selling the land. I find that the applicant has not proved that he will suffer any substantial loss if the execution is not stayed. The best that the court can do is to give a condition that the respondent should not charge, subdivide, sell or part with possession of the suit land until the intended appeal is heard and determined.

Having said that I find that the applicant has not met the threshold for grant of stay of execution but in the interest of justice I order that the respondent do remain in possession but is precluded from charging, subdividing, selling or parting with possession of the suit land until the intended appeal is heard and determined. The respondent to have costs of the application.

DATED AND DELIVERED AT ELDORET THIS 30TH DAY OF JANUARY, 2020

M. A. ODENY

JUDGE

RULING read in open court in the presence of Mr.Kagunza holding brief for Mr.Chepkilot for the Plaintiff and in the absence of Mr.Korir for Defendant/Applicant.

Mr. Yator – Court Assistant