



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**E & L CASE NO. 285 OF 2013**

**JOHN MICHAEL WANJAO.....PLAINTIFF**

**VERSUS**

**COUNTY GOVERNMENT OF UASIN GISHU.....DEFENDANT**

**RULING**

1. The Defendant seeks for stay of execution of the decree issued on the 28<sup>th</sup> February, 2019 pending the hearing and determination of their appeal. The application is based on the six (6) grounds on its face and supported by the affidavit sworn by S. K. Lel, the Defendant's County Attorney on the 29<sup>th</sup> March, 2019. It is the Defendant's case that after the judgment of 21<sup>st</sup> February, 2019 in favour of the Plaintiff, they were dissatisfied and filed notice of appeal dated the 27<sup>th</sup> February, 2019 and lodged it with the registry on the 6<sup>th</sup> March, 2019. That they have applied for the typed proceedings and as the decree was issued on the 28<sup>th</sup> February 2019, the stay order should be granted to await the determination of the appeal.

2. The application is opposed by the Plaintiff through his replying affidavit sworn on the 28<sup>th</sup> May, 2019. It is the Plaintiff's case that the application is frivolous and an abuse of the court's process. That he should be allowed to enjoy the fruits of the judgment as he is capable of repaying the costs if the Defendant succeeds on appeal.

3. The learned Counsel for the Defendant and the Plaintiff filed the written submissions for and against the application dated the 20<sup>th</sup> November, 2019 and 21<sup>st</sup> November, 2019 respectively.

A. The learned Counsel for the Defendant submits that the Defendant has satisfied the requirements of **Order 42 Rule 6(2) of the Civil Procedure Rules**. That if stay is not granted, their appeal will be rendered nugatory. That this is a money decree and as the Plaintiff has not tendered evidence of his liquidity, the Defendant is likely to suffer substantial loss should the stay order not be granted. That the Defendant has filed this application without delay. That the Defendant being a County Government is willing to abide by any condition the court may direct as to security. The learned Counsel referred the court to the following superior court's decisions; **Global Tours and Travels Limited Nairobi Hccc Winding Cause No. 45 of 2000, Kenya Power & Lighting Company Ltd Vs Esther Wanjiro Wokabi [2014] eKLR, Reliance Bank Ltd Vs Norlake Investment Ltd [2002] 1. E.A. 227, Stanley Karanja Wainaina & Another Vs Radon Ayangu Mutubwa Nairobi HCCA 427 of 2015, National Industrial Credit Bank Ltd Vs Aquinas Francis Wasike & Another (U.R.) C. A. 238 of 2005 and Onesmus Mburu Njuguna Vs Samson Kitire Njuguna Vs Samson Kitire Kuna alias Samson Keter [2007] eKLR.**

B. The learned Counsel for the Plaintiff submits that the Defendant has not demonstrated that it stands to suffer substantial loss in the event the stay order is not granted as no Memorandum of Appeal has been filed. That no appeal has been filed as required by Rule 82 of the Court of Appeal Rules which sets sixty days as the period within which to file one. That no application for extension of time has been filed. That this application was filed after 79 days from the date of judgment and there has been unreasonable delay. That the notice of appeal is also time barred. That the Defendant has not furnished security for the due performance of the decree and the application should be dismissed with costs. The learned Counsel cited the following superior court decisions; **Kenya Shell Ltd Vs Kariga 1982-88 1 KAR, Joseph Ngigi Ibare Vs Kyovi James & Another (2016) eKLR, Jaber Mohsen Ali & Another Vs Priscillah Boit & Another E&L No. 200 of 2012 [2014] eKLR, M/s Port Reitz Maternity Vs James Karanja Kabia Civil Appeal No. 63 of 1997 and Winfred Nyawira Maina Vs Peterson Onyiego Gichana [2015] eKLR.**

4. The following are the issues for the Court's determination;

- (a) *Whether the Defendant has shown that it stands to suffer substantial loss if the stay order is not granted.*
- (b) *Whether the application was filed without unreasonable delay.*
- (c) *Whether the Defendant has offered adequate security for the due performance of the decree.*

**(d) Who pays the costs of the application?**

5. The Court has after considering the grounds on the Motion, affidavit evidence, written submissions and the superior court's decisions cited therein, and the record come to the following findings;

(a) That the Plaintiff had sued the Defendant vide the Amended Plaint dated 3<sup>rd</sup> October, 2013 seeking for declaration that the withdrawal of development approval and stoppage of construction work on Eldoret Municipality Block 11/1143 was unlawful, illegal and vitiated by payment of damages; permanent injunction and costs. That the court in its judgment delivered on the 21<sup>st</sup> February, 2019 found that the "withdrawal of the approval plans without affording the Plaintiff a hearing was a breach of the Plaintiff's right to fair administrative action and precisely legitimate expectation that he would be heard", that the Plaintiff is entitled to **"general damages for loss of investment and I do give a global figure of Kshs.3,000,000"**. That the Court further granted a **"declaration that the Plaintiff as the registered proprietor can use the land parcel No. Eldoret Municipality Block 11/1143 as per the conditions of the lease and "permanent injunction to restrain the Defendant... from interfering with the Plaintiff's quiet enjoyment and use of land parcel No. Eldoret Municipality Block 11/1143" and costs of the suit.** That the foregoing shows that apart from the money award for general damages, the court also issued declaratory and injunctive orders. That the Defendant's application is therefore seeking to stay the decree arising out of the said judgment.

(b) That the application dated the 29<sup>th</sup> March, 2019 was filed on the 10<sup>th</sup> April, 2019 which was about forty-eight (48) days from the date of judgment. That the Plaintiff has termed that period to amount to unreasonable delay and referred the court to what Munyao, J said about unreasonable delay in Jaber Mohsen Ali & Another (supra), where he observed that **"even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter"**. The Defendant has submitted that the **"delay in filing our application of close to 2 months cannot be deemed to be unreasonable"**. That even though that submission does not explain why the application was not filed earlier the court finds that the delay was not unreasonable.

(c) That the Defendant's greatest fear as discerned from their application, affidavit evidence and submission is that should the money decree be executed and it later succeeds on appeal they will have **"to file another suit to recover the same"** as the Plaintiff has not tendered evidence of his liquidity. That such a scenario would render their appeal nugatory and that amounts to substantial loss if stay order is not granted. That having considered that the Defendant resources comes from the public covers, to which the Plaintiff and others contributes to through the various taxation regimes, and even though the court takes judicial notice that the Plaintiff owns the suit property, the probability that the recovery of the money if the Defendant is successful on appeal would be lengthy and expensive exercise is evidence of the substantial loss it is likely to suffer.

(d) That even though the Defendant has not offered any specific security for the due performance of the decree, it has expressed through the submissions its readiness to abide by the orders the court would issue. The court having found that the application was filed without unreasonable delay, and that Defendant is likely to suffer substantial loss if the stay order is not granted, and with a view of ensuring that resources to substantially satisfy the decree are availed in case the Defendant fails in its appeal, the court will require that the amount in the decree be deposited in an interest earning account.

(e) That the costs of this application will abide the outcome of the appeal.

(f) That so as to guard against the Defendant failing to pursue their appeal without undue delay, the stay order will be for one year and thereafter as the Court of Appeal may direct.

6. That flowing from the foregoing, the court finds merit in the Defendant's Motion dated the 29<sup>th</sup> March, 2019 and filed on the 10<sup>th</sup> April, 2019 and orders as follows:

(a) That there be a stay of execution of the decree issued on the 28<sup>th</sup> February, 2019 arising from the judgment delivered on 21<sup>st</sup> February, 2019 for a period of one (1) year pending the hearing and determination of the Defendant's appeal, on condition that the Defendant do deposits Kshs.3,000,000 (Three Million) as security for the due performance of the decree within sixty (60) days in an interest earning account in a financial institution agreed upon by the parties in the joint names of the parties Counsel and in default, the stay order to automatically lapse.

(b) The costs of the application abide the outcome of the appeal.

Orders accordingly.

**Dated and signed at Eldoret this 19<sup>th</sup> day of February, 2020.**

**S. M. KIBUNJA**

**JUDGE**

Ruling read in open court in the presence of:

Mr. Mathai Advocate for Plaintiff.

Mr. Odhiambo Advocate for Defendant.

Court Assistant: Christine