



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 141 OF 2014

JUDETHEUS KIPLAGAT MALAKWEN.....PLAINTIFF

VERSUS

NORMAN KIBITOK KOGO.....DEFENDANT

RULING

1. The Plaintiff moved the court vide the Motion dated 6th August, 2019 and filed on the 7th August, 2019 seeking for stay of execution of the court's decree pending the hearing and determination of the intended appeal. The application cites the provision of **Section 63 of the Civil Procedure Act and Order 42 and 43 of the Civil Procedure Rules**. The Motion is based on the seven (7) grounds marked (a) to (g) on its face and supported by the affidavit of **Judetheus Kiplangat Malakwen** sworn on the 6th August, 2019. That it is the Plaintiff's case that he stands to suffer substantial loss if the judgment of 1st August, 2019 is executed before his appeal is heard and determined as two (2) acres of his land is to be excised and transferred to the Defendant, who currently occupies about 0.1 acres, where his house is situated. That he has filed this application timeously and is ready to offer security.

2. The Defendant has opposed the application through the replying affidavit sworn on the 11th September, 2019. That it is his case that contrary to the Plaintiff's claim that he has been occupying 0.1 acres, the court has already found that he occupies two (2) acres. That the Plaintiff and his son named Shem Kiprop invaded part of the land on the 3rd August 2019 and erected a new housing structure that is unoccupied. That the application is an attempt to have a second bite at the case.

3. The learned Counsel for the Plaintiff and Defendant filed their written submissions dated the 3rd February, 2020 and 31st December, 2019 respectively.

4. The following are the issues for the court's determinations;

(a) Whether the Plaintiff has shown that he is likely to suffer substantial loss unless the stay of execution is granted.

(b) Whether the Plaintiff moved the court without unreasonable delay.

(c) Whether the Plaintiff has provided security for the due performance of the decree.

(d) Who pays the costs of the application?

5. The court has considered the grounds on the Motion, affidavit evidence by both parties, the written submissions by both Counsel, the cited decided cases, the provisions of the law and come to the following conclusions;

(a) That the instant application was filed on the seventh day after the delivery of the judgment and therefore, without delay.

(b) That throughout the proceedings in this matter and in the judgment delivered on the 1st August 2019, it is clear both the Plaintiff and Defendant have been in occupation of portions of the suit land. That while the Plaintiff's position is that the Defendant occupies 0.1 acres or ¼ (one quarter) of an acre of the suit land, the Defendant counterclaimed for two (2) acres which the court granted him. That there is no evidence tendered to show that the excision of the two (2) acres, and transfer of the same to the Defendant has been commenced or done. That is that exercise that the Plaintiff seeks to be stayed pending the hearing and determination of the intended appeal. That as the Plaintiff has already filed the Notice of Appeal dated the 1st August, 2019 and proceedings have been typed and a Certificate of delay issued on the 20th November 2019, the court finds no prejudice will be suffered by any of the parties if the process of excising and transferring two (2) acres of the suit land to the Defendant/Counterclaimant is stayed for one year to allow the intended appeal be heard and determined, or further directions of the Court of Appeal. This should not in any way result in the Plaintiff interfering with the portion of the suit land occupied by the Defendant as of the date of the Judgment of the 1st August,

2019.

(c) That as no costs were awarded in the judgment on the basis that the parties are relatives, and as the Plaintiff has indicated his willingness to offer security, the court is of the view that a deposit of Kshs.50,000 (Fifty Thousands) in an interest earning account in the joint names of the parties' Counsel, in a financial institution agreeable to both parties would be sufficient security for the due performance of the court's decree.

(d) That the costs of this application should abide the outcome of the intended appeal.

6. That flowing from the foregoing, the court finds merit in the Motion dated the 6th August, 2019 and filed on the 7th August, 2019 and orders as follows:

(a) That pending the hearing and determination of the Plaintiff's intended appeal, there be a one year stay of execution of the court's decree, arising out of the judgment of 1st August, 2019 on condition that the Plaintiff deposits Kshs.50,000 (Fifty Thousands Only) in an interest earning account in a financial institution agreed upon by both parties in the joint names of the parties' Counsel in sixty (60) days, to serve as security for due performance of the decree and in default, the stay order to lapse.

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

It is so ordered.

Dated and signed at Eldoret this 19th day of February, 2020.

S. M. KIBUNJA

JUDGE

Ruling read in open court in the presence of:

Mr. Maritim Advocate for Plaintiff.

No appearance for Defendant.

Court Assistant: Christine