



**REPUBLIC OF KENYA**

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

**AT NAKURU**

**ELC 109 OF 2015**

**MICHAEL KIPLANGAT CHERUIYOT .....PLAINTIFF**

**VERSUS**

**JOSEPH KIPKOECH KORIR.....DEFENDANT**

**R U L I N G**

1. The Court in this matter delivered judgment on 1<sup>st</sup> October, 2019. The Court dismissed the plaintiff's suit but allowed the defendant's counterclaim. The plaintiff was ordered to vacate land parcel **Nakuru /Ngongoreri/1026** within 30 days and in default execution to issue. The plaintiff filed a Notice of Appeal on 11<sup>th</sup> October 2019 signifying his intention to appeal to the Court of Appeal against the entire judgment delivered by Munyao, J on the said date.

2. The plaintiff on the 24<sup>th</sup> October 2019 filed a Notice of Motion application expressed to be brought under Sections 1,1A,3,3A of the Civil Procedure Act, Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules. The application seeks the following substantive order under prayer (3) of the application.

*(3) That this Honourable Court be pleased to issue an order of stay of execution of the judgment and consequential orders and decree and orders delivered by Hon. Justice Munyao Sila on 1<sup>st</sup> day of October, 2019 in the Environment and Land Court Civil Suit No.109 of 2015 pending hearing and determination of the intended Appeal.*

3. The application was predicated on the grounds enumerated on the face of the application and the affidavit sworn in support thereof by the plaintiff, Michael Kiplangat Cheruiyot. The plaintiff inter alia contends the defendant /respondent had illegally and fraudulently obtained title to the land parcel purportedly known as **Nakuru /Ngongonger/1026** and that had on the strength of forged documents laid claim to the plaintiff's parcels of land known as **Nakuru/Ngongonger/1040** by claiming that the plaintiff had trespassed and occupied his parcel of land thus leading to the institution of this suit by the plaintiff /applicant. That, if the defendant executed the judgment and the plaintiff is evicted, the plaintiff would be dispossessed of his land which he had occupied since he was allocated in 1997. That if the judgment is executed and the plaintiff evicted from the suit land the appeal would be rendered nugatory and the plaintiff would suffer prejudice and irreparable damages/loss.

4. The defendant filed a detailed replying affidavit in response to the plaintiff's application and supporting affidavit in opposition to the application. The defendant contended that the plaintiff's application lacked merit as the intended appeal did not have any probability of succeeding; that the plaintiff stands to suffer no loss / or damage as it was he (the defendant), who was suffering loss and damage for being kept out of his land. The defendant insisted he had no claim or interest over the plaintiff's land parcel **Nakuru/Ngongonger/1040** and was only interested in his land parcel **Nakuru/Ngongonger/1026** which the plaintiff had unlawfully occupied. The plaintiff averred that the Survey Report produced in evidence following a ground inspection ordered by the Court showed that the plaintiff was occupying land parcel 1026 and not land parcel 1040 as the plaintiff claimed.

5. The parties argued the application by way of written submissions. I have reviewed and considered the application, the affidavit in support and in opposition together with the submissions of the parties. I take the following view of the matter.

Order 42 Rule 6(1) (2) (a) (b) provides for applications for stay of execution

*(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.*

(2) 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.

6. An appeal does not operate as an automatic stay of execution but the Court appealed from may for sufficient cause order stay of execution of the decree or order. The jurisdiction to grant stay is thus discretionary. What would constitute sufficient cause is defendant on the facts and the circumstances of each case. While under order 42 Rule 6 the probability or chance of the appeal succeeding is not one of the conditions the Court appealed from is required to consider, the court must always be cautious a losing party could engage in delaying justice to the successful party by filing what would otherwise constitute a frivolous appeal. It is thus essential without expressing itself on the viability of the appeal to take a broad view of the matter in determining who between the parties stand to suffer greater loss if stay is granted and/or refused.

7. Under Order 42(6) 2(a) &(b) the Court may, only order stay if it is satisfied that substantial loss may result to the applicant unless the order is made and in such eventuality may also order security to be furnished by the applicant for the due performance of the decree should the decree ultimately be binding on applicant. In the premises in the instant matter, the applicant has to demonstrate the substantial loss he is likely to suffer if the order for stay is not granted. The evidence during the trial established there were indeed two parcels of land namely **Nakuru /Ngongongeri/1026** and **1040**. Defence witness 2, Benson Njue Nyaga, a government surveyor, Nakuru County was emphatic that the two parcels of land indeed existed on the ground and were not adjacent to each other. He stated the two parcels of land were roughly 2 Kms apart. As per his evidence the plaintiff was occupying land parcel Nakuru/**Ngongongeri/1026** and not 1040 as he claimed. On the face of this evidence which was not rebutted, the Court came to the finding that indeed it was the plaintiff who was occupying the defendant's land and hence the consequential order for the plaintiff to vacate the land.

8. The primary issue for determination in the suit was where the physical location of land parcels 1026 and 1040 were on the ground. The Court in my view properly accepted the technical evidence that was tendered by DW2 as contained in the joint report by the district Land Registrar and District Surveyor of Nakuru dated 14<sup>th</sup> July 2015 prepared pursuant to an order of reference by the court made on 18<sup>th</sup> July 2016. On the evidence, even though the plaintiff may have an arguable appeal, I am not able to hold that the appeal has high chances of succeeding.

9. The plaintiff does not himself reside on the suit property. In his evidence also corroborated by PW4 it was a worker who lived on the plot and carried on cultivation thereon. The plaintiff asserted that he had no interest in land parcel 1026 but in land parcel 1040. The surveyor and the Land Registrar established that the two parcels of land existed on the Registry Index Map (RIM) and on the ground and were separate. I am not persuaded the plaintiff has demonstrated he would suffer any substantial loss if stay is not granted. The plaintiff's land parcel 1040 will not be interfered with and will be available for the plaintiff as he is the registered proprietor in the event the applicant is successful on appeal. It is not possible that two distinct parcels of land can sit on the same spot on the ground. The technical evidence availed at the trial was clear on the point.

10. I am not satisfied the conditions for grant of stay under Order 42 Rule 6 (1) & (2) and I accordingly dismiss the plaintiff's Notice of Motion dated 17<sup>th</sup> October 2019 with costs to the defendant.

11. Orders accordingly.

**Ruling dated signed and delivered electronically at Nakuru this 30<sup>th</sup> Day of April 2020**

**J M MUTUNGI**

**JUDGE**