



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAROK**

**APPEAL NO. 3 OF 2019**

**ELIZABETH K. ESHO.....APPELLANT/APPLICANT**

**-VERSUS-**

**SUIYANKA MAYUNE.....RESPONDENT/DEFENDANT**

**RULING**

By a Notice of Motion dated 8<sup>th</sup> April, 2019 the Appellant/Applicant sought to the following orders:-

1. Spent
2. Spent
3. That there be a stay of execution of the judgment delivered herein on 20<sup>th</sup> March, 2019 and all consequential orders thereto pending the hearing and determination of the applicant's appeal filed in court.
4. That such other orders that the court deem just, convenient and appropriate.

The application was based on the grounds that an *ex parte* judgement has been entered against the applicant and that this is an appeal with overwhelming success and in the event that the orders sought are not granted he will suffer substantial loss. The application was further supported by the affidavit of the appellant in which she deponed that Judgement was entered against her on 20<sup>th</sup> March, 2019 in Narok CMCC ELC No. 133 of 2018 in a suit that was undefended despite filing a defence and a counter claim and on the date that the suit was to be heard her then advocate on record had failed to address the court and defend the suit therein.

The applicant further contended that since her advocate did not attend court on the hearing of the matter they did not also attend on the date of the judgement and hence no stay of execution was granted by the trial court and in the event that the orders are not granted she will suffer irreparable loss.

The application was opposed by the respondent by way of a replying affidavit. The respondent contends that it is not true that she was not represented on the date of the hearing of the suit as one Ms. Kudate Advocate was present holding brief for her advocate but they refused to pay the previous court adjournment fees and further that both the appellant and a Mr Kiruti advocate were present when judgement in the matter was delivered.

The respondent further averred that there was inordinate delay on the part of the appellant to have the matter heard and the court was justified to proceed in the absence of her advocate. Further to the above the respondent also alleges that the appellant had previously referred to various orders that were issued by the lower court despite the existence of a court order directing the maintenance of status quo.

The respondent contends that the continuous litigation of this matter has prejudiced him since he had to incur advocates costs, court fees and that the costs of registrar and surveyors and alleges that the appellant has demonstrated what substantial loss she will incur as the suit relates to a boundary dispute.

I have considered the application before me and the submissions filed by the parties and the grounds upon which a stay of execution may be granted is now well settled. A party seeking to appeal will suffer substantial loss if the appeal has overwhelming success and last if the application was filed without inordinate delay.

On whether the appeal has overwhelming chances of success the appellant contends that he tried to have the matter reopened but the same

was disregarded she has not stated the manner in which the reopening was done furthermore the substantive appeal is in respect of the judgment delivered on 20<sup>th</sup> March, 2019 and not on application for review that was disregarded.

I have noted the facts in the affidavit of the notice of motion seeking for stay of execution the appellant also faulted her previous advocate for her tribulations, however when the matter proceeded for hearing, her advocates were present fact which the applicant has not controverted.

On whether the applicant will suffer irreparable loss the applicant contends that the suit land relates to a parcel of land measuring 2.57 ha with mature trees and a quarry and if a stay is granted the respondent will proceed to cut the trees and utilize the quarry. The respondent on its part states that the suit land was in respect of a boundary dispute and the parties despite engaging in arbitration by the elders, the appellant has not been cooperative. It is not disputed by the parties that the suit relates to a boundary dispute of two adjoining parcels belonging to the appellant and the respondent respectively to which both parcels are registered. The trial court having rightly ordered the registrar and the surveyors to determine and fix the boundary this pursuant to the provisions of section 19 of the Land Registration Act I find that the applicant shall not suffer any substantial loss as claimed.

Having stated above I find that the applicant has not met the threshold for the court to grant a stay of execution and I consequently find that the notice of motion dated 8<sup>th</sup> April, 2019 lacks merit and I thus dismiss the same with costs. I consequently discharge the interim orders issued on 19<sup>th</sup> April, 2019.

**DATED, SIGNED and DELIVERED IN OPEN COURT at NAROK on this 20<sup>th</sup> day of MAY, 2020.**

**Mohammed Kullow**

**Judge**

**20<sup>th</sup> May, 2020**

In the presence of:-

CA:Chuma

Mr Langat for the appellant applicant

Ms Nchoe for Muigai for the respondent