



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

CASE NO. 138 OF 2016

MARY NDUTA NGUGI.....PLAINTIFF

VERSUS

BEATRICE NGELESA.....1ST DEFENDANT

JUDY CHELONGEI.....2ND DEFENDANT

RULING

1. By a Notice of Motion dated 31/1/2020 brought under **Order 42 Rule 6 of the Civil Procure Rules of 2010, Section 1A, 1B & 3A of the Civil Procedure Act** and any other provisions of the law, the defendants/Applicants seeks the following orders:

(1) Spent...

(2) Spent...

(3) **That there be a stay of execution of the decree/judgment of this court dated 13th November 2019 pending the hearing and determination of the appeal.**

(4) **That this court do grant such other or further orders as may be necessary for the ends of justice to be met.**

5) **That costs of this application be provided for.**

2. The application is based on the grounds that judgment was granted in favour of the plaintiff; that a notice of appeal has been filed by the defendants; that the court should allow the defendants to ventilate their appeal by granting them a stay of execution in this matter; that the decree may be executed on and the defendants may consequently suffer substantial loss if the orders sought are not granted.

3. The application is supported by the affidavit of the 1st defendant sworn on 31/1/2020 which exhibits the copy of a Notice of Appeal and the request for proceedings in this matter.

4. The application is opposed. The plaintiff filed a sworn replying affidavit dated 14/2/2020. She depones that the lodging of a notice of appeal *per se* does not entitle the defendants to a stay order; that the applicants have been found to be in trespass; that the 1st defendant denied being on the plaintiff's land or that she is the person who erected the iron sheet structures on the land and therefore she would suffer no prejudice if the judgment was to be executed; that the 2nd defendant never testified at the trial and no evidence of any substantial loss has been demonstrated; that the payment of the costs is not irreparable loss as they may be refunded upon a successful appeal; that the defendants have not offered any security and that the iron sheet structure is an impediment to the plaintiff's development of the suit plot.

5. The issues that arise in the instant application are as follows:

(1) **Whether an order of stay of execution of judgment pending appeal should issue;**

(2) **Who should bear the costs of application?**

6. The conditions for a grant of stay of execution are contained in **Order 42 rule 6 of the Civil Procedure Rules** which provides as follows:-

“6.(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.

(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

7. Therefore in brief the 4 conditions that a court considers in an application for stay under **Order 42 Rule 6** are as follows:

(i). There is an appeal in place.

(ii). That the application must have been made without unreasonable delay;

(iii). Satisfaction by the court that substantial loss may result unless the order is made; and

(iii). That the Applicant is prepared to offer security.

8. A notice of appeal was filed in the matter on **27/11/2019**. An appeal is therefore deemed to be in place for the purposes of this application.

9. No objection has been raised by the plaintiff regarding delay and in my view, the application having been filed after two and a half months that is no inordinate delay.

As to whether substantial loss would result if the orders sought were not granted, this court notes that in her evidence the 1st defendant denied having erected the iron sheet structures on the suit land. She averred that the plot contiguous to the plaintiff's is owned by a third party. The 2nd defendant never testified in the suit.

10. The plaintiff has already been found to be the owner of the suit land on which the iron sheet structures have been erected.

11. In my view it is correct to state that the defendants have in the circumstances nothing to lose if the judgment is executed. There would be no need therefore to issue any orders of stay in the instant case.

12. In the case of **Kenya Railways Corporation v Quicklubes E.A. Limited [2015] eKLR** the Court Of Appeal (Mohamed JA) cited the decision in **M/S Portreitz Maternity -vs- James Karanga Kabia, Civil Appeal No. 63 of 1997**, where it was stated as follows:

“That right of appeal must be balanced against an equally weighty right that of the Plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the Plaintiff of that right.”

13. In this case I do not find any just cause for depriving the plaintiff of the fruits of her judgment any longer. The plaintiff must be left to enjoy the fruits of her judgment.

14. The instant application for stay of execution therefore has no merit and I hereby dismiss it with costs to the plaintiff.

Dated, signed and delivered at Kitale via electronic mail on this 30th day of June, 2020.

MWANGI NJORGE

JUDGE, ELC, KITALE.