



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

E & L CASE NO. 207 OF 2012

TITUS GATITU NJAU.....PLAINTIFF

VERSUS

MUNICIPAL COUNCIL OF ELDORET.....DEFENDANT

RULING

The application herein is dated 17.3.2015 wherein the applicant seeks orders that there be stay of execution of judgment and decree herein or any consequential orders pending the hearing and determination of the appeal to the Court of Appeal. The application is based on grounds that the applicant is aggrieved and dissatisfied with the judgment and decree herein and has appealed against it. The decretal dues awarded herein are colossal hence if the same is paid to the respondent, he will be unable to refund the same in the event that the appeal to the Court of Appeal is successful hence unless stay is granted the appeal will be rendered nugatory and the applicants will suffer substantial loss.

The respondent shall not in any way suffer prejudice if the orders sought are granted and that this application has been made without undue delay and in good faith. In any event the applicants are ready and willing to offer security for due performance of the decree and abide by any other conditions in terms of security as the honourable court may deem fit. That it is just and fair that the application be allowed and the applicants accorded an opportunity of being heard on their appeal.

The application is supported by the affidavit of Peter Lelei, the County Secretary, Uasin Gishu County Government who states the defendant is dissatisfied by the judgment and decree herein and has lodged a notice of appeal against the same. Unless formal orders of stay of execution are in force the respondent is likely to initiate execution proceedings thus rendering the appeal preferred and filed against the judgment herein nugatory. The sum awarded in this judgment is colossal and there is no proof that the respondent would be in a position to refund the same in the event that the appeal is successful. That furthermore, the process of recovery of the said decretal dues is likely to be complex. That in the premises unless execution herein is stayed, the defendant stands to suffer substantial loss as the intended appeal shall be rendered nugatory.

The applicant believes that this application has been made without undue delay and in good faith and the defendant is willing and ready to deposit the decretal sum in a joint interest earning account in the joint names of the Advocates on record for the parties herein as security pending appeal. That in the circumstance, it is just and fair to allow the application filed herein. He believes further that the respondent will suffer no prejudice if the instant application is allowed because the defendant is willing to give security for due performance of the decree.

The application is opposed by the respondent who states that on the 27.04.2005, the then Municipal Council of Eldoret demolished his standing developments, despite having been served with a court order restraining the council from undertaking the demolition. That he owns the land where the demolition was carried out and the same is Eldoret Municipality Block 4/337. That he also own the land comprised in Title No. Eldoret Municipality Block 4/336 and the same was alluded to in the proceedings and which are situated in the heart of Eldoret town. That he also owns the land comprised in Title No. Pioneer/Langas Block 1/270 which is developed and there are shops and residential premises in the property. The value of his said plots is far above the decretal sum and costs in the present suit. In its judgment, the court awarded him Kshs.15,500,000/= plus costs and interest. an amount he can for sure and without strain, refund in the unlikely event of the appeal succeeding. That he should be allowed to enjoy the fruits of the judgment, without any further delay. That there is no way the appeal can be rendered nugatory.

According to the respondent, the applicant has not shown what substantial loss it would suffer, if the application is not allowed. On the flip-side, he would suffer great prejudice if made to wait beyond the ten years that has now lapsed since the cause of action. Moreover, that the applicant has not shown “**sufficient cause**” for an order of stay of execution pending appeal. That even depositing the decretal sum in a joint interest earning account would still prejudice his position.

The principles for granting a stay of execution pending appeal are clearly set out in Order 42, Rule 6 of the Civil Procedure Rules, 2010, thus:-

“6.(1) No appeal or second appeal shall operate as a stay of 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 sub-rule (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.”

The above Rule was discussed in the case PETER ONDANDE T/A SPREAWETT CHEMIS –Vs- JOSEPHINE WANGARI KARANJA [2006] Eklr-

“The issue for determination by this court is whether the applicant has established a case to enable this court grant him the order of stay of execution sought. For this court to grant stay of execution, it must be satisfied that substantial loss may result to the applicant if stay is not granted. Further, the applicant must have filed the application for stay of execution without unreasonable delay. Finally, the applicant must provide such security as may ultimately be binding upon him.”

The power bestowed upon this court to grant stay of execution pending appeal is discretionary which discretion is unfettered. However, the discretion ought to be exercised judiciously and not capriciously on sufficient cause. Moreover, the application ought to be brought to court timeously without unreasonable delay. The court must be satisfied that substantial loss may result to the applicant unless the order is made.

Lastly, the court should not grant stay unless such security as the court orders for the due performance of such decree or order may ultimately be binding on him has been given by the applicant.

This court finds that the application has been made timeously and therefore, there is no unreasonable delay as the decree was issued on 30.3.2015 and the application is made on 17.3.2015 14 days prior to the issuance of decree.

On substantial loss, I do find that the applicant has not demonstrated the substantial loss likely to be suffered and that the respondent/plaintiff cannot refund the money. It is the burden of the respondent to prove that the plaintiff/respondent will not be able to pay the money back if the appeal succeeds. The respondent on the other hand has demonstrated that he is a person of means and therefore capable of refunding the money in the event that the appeal succeeds.

However, the decretal amount being colossal and likely to be paid from public funds, I do order that there be a stay of execution pending appeal and the decretal amount to be deposited in a fixed interest earning account opened in a reputable commercial bank within the next 15 days in the names of the firms of Advocates representing the applicant and respondent respectively. Costs of the application to the respondent.

DATED AND DELIVERED AT ELDORET THIS 1ST DAY OF APRIL, 2016.

ANTONY OMBWAYO

JUDGE