



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIVASHA

CIVIL APPEAL NO. 12 OF 2015

(Being an appeal from a Judgment of the CM'S Court Narok by A. Ithuku (SPM) in Civil Case No. 176 of 2013)

BERNARD M. KOIKAIAPPELLANT

-VERSUS-

SAMSON OLOSHORUA NTAYIA.....RESPONDENT

R U L I N G

1. By the Notice of Motion filed on 2nd December, 2015 the Applicant who was unsuccessful in the lower court sought an order staying execution pending appeal. On grounds, inter alia, that he was in occupation of **Plot No. 647 Block II (MD) in Narok Township** and that the Respondent has evinced an intention to evict him therefrom, in execution of the judgment of the lower court, against which the Appellant has lodged an appeal. These grounds form the gist of the affidavit sworn by the Applicant in support of the Notice of Motion.

2. The application was opposed through a Replying affidavit sworn by the Respondent. He disputes the assertion that the Applicant has occupied the suit premises over ten years and depones that he is in possession. Further that the Applicant has not demonstrated likelihood of suffering substantial loss. The parties' submissions took cue from the respective filed material.

3. I have considered all the matters canvassed. This being an application brought under Order 42 Rule 6 of the Civil Procedure Rules, the court must satisfy itself whether the conditions in Rule 6 (2) have been met.

4. Order 42 Rule 6 (2) of the Civil Procedure Rules provides as follows:

“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.”

5. The onus of proving likelihood of substantial loss lies with the Applicant. The Applicant's claim to be in possession of the suit property, out of which he fears eviction, is denied by the Respondent. It is difficult on the basis of the affidavit evidence tendered to establish which of the parties is actually in possession.

6. It would appear that the Applicant's apprehension that he will suffer substantial loss is hinged upon his alleged present possession of the suit properly. In failing to demonstrate such possession, the Applicant's assertion to likelihood of substantial loss falls on its face.

7. In **Kenya Shell Ltd –Vs- Kibiru** the court (**Platt J. A.**) stated interalia:-

“It is usually a god rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various terms; is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the Respondents should be kept out of their money.”

8. Granted, the **Shell** case involved a money decree, unlike the present case, but this does not lessen the burden on the Applicant herein to prove substantial loss. Whether a **“qualitative concept”** as described in the cases cited by the Applicant, substantial loss is the cornerstone of the court's exercise of jurisdiction under Order 42 Rule 6 (2) of the Civil Procedure Rules.

9. In this case, the Applicant has not demonstrated this essential element. Further, at this stage, the court is not concerned with the merits of the appeal, in considering an application for stay. In light of the foregoing, I find no merit in the application before me and will dismiss it with costs.

10. Further, I direct that this appeal be removed to the Environment and Land Court Registry at Nakuru for directions as to disposal.

Delivered and signed at Narok this **1st** day of **July, 2016**.

In the presence of:

Mr. Kamwaro for the Applicant

Mr. Onduso – N/A

Court Assistant : Barasa

C. W. MEOLI

JUDGE