



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO

CIVIL SUIT NO.27 OF 2002

JAMES KIBET SOI.....PLAINTIFF

VERSUS

KIPKURGAT MITEY.....1ST DEFENDANT

DAVID KIPLANGAT KURGAT.....2ND DEFENDANT

R U L I N G

1. This Ruling is in respect of the Notice of Motion dated 4th September, 2014 filed by the Defendant/Applicant and brought under **Order 22 Rule 22 (1), 25 and Order 40 (1) (a), Order 51 Rule 1** of the the **Civil Procedure Rules, Sections 1A, 1B, 3, 3A and 63 (e)** of the **Civil Procedure Act**. Prayer (a) and (b) of the said application have been dealt with.
2. The remaining prayer is (c) which is for the grant of stay of execution of the judgment and decree of this Honourable Court dated 29th August, 2014 and all consequential orders. The Applicant also prays for costs of the application.
3. The Application is supported by the grounds on the face of the application which are as follows:-

(i) THAT the 2nd Defendant/Applicant has preferred an appeal against the Judgment and decree of this Honourable Court dated 29th August, 2014.

(ii) THAT the grounds upon which the intended appeal is premised are overwhelming with high chances of success.

(iii) THAT unless the orders herein are granted the intended appeal may be rendered nugatory thus occasioning the 2nd Defendant/Applicant to suffer irreparable loss and damages.

(iv) THAT the Plaintiff/Respondent will not be prejudiced in any way as eventually he has chance to benefit from the Judgment should the appeal herein be found to be unmeritorious.

4. It is further supported by the Applicant's affidavit sworn on 4th September, 2014. In it he says he has preferred an appeal against the judgment and decree of this court delivered on 29th August, 2014. He is challenging the finding that the Plaintiff/Respondent had acquired the subject parcel of land by way of prescriptive rights.
5. The Applicant deposes that unless the orders sought are granted, he stands to suffer irreparable loss and damages which might not be adequately compensated in monetary terms. That the

Plaintiff/Respondent will not be prejudiced in any way should the orders herein be granted as he eventually has a chance to benefit from the judgment should the appeal be found unmeritorious.

Above all he says his appeal has high chances of success.

6. The Plaintiff/Respondent opposing the application filed a Replying Affidavit deposing that there were no good grounds advanced to justify his deprivation of the fruits of the judgment.
7. He is particularly not happy with the way he was forcefully evicted from the suit land by the 2nd Defendant/Applicant. He outlines this in paragraph 4a-d of his affidavit.
8. He deposes that the Applicant has failed to demonstrate either through his Supporting Affidavit or a draft Memorandum of Appeal that he has an arguable appeal. He has also failed to show any substantial loss he will suffer if stay is not granted. Finally, he has not offered any security for due performance of the decree.
9. When the application came for hearing both Counsels agreed to dispose of it by way of written submissions which they did file.

10. The Applicants Submissions

Mr. Orina for the 2nd Defendant/Applicant submitted that in line with the holding in **SILVERSTEIN VS CHESONI (22) 1 KLR 867** the applicant has proved that the intended appeal is arguable and not frivolous and further that unless the court grants an order of stay the intended appeal, if successful will be rendered nugatory.

11. It was his further submission that in the cases of **DAMJI PRAGJI VS SARA LEE HOUSEHOLD & BODY CARE (K) LTD CIVIL APPLICATION NO. 345 OF 2005 & KENYA AIRPORTS AUTHORITY VS MITU BELL WELFARE SOCIETY & ANOR. (2014) eKLR** the Court of Appeal stated that an arguable appeal is no more than one that raises a legitimate point or points deserving judiciary determination. Mr. Orina also referred to other authorities like **GITHUNGURI VS JIMBA CREDIT CORD LTD NOR (1988) KLR 838**, and **BUTT VS RENT RESTRICTION TRIBUNAL (1982) KLR 417**.

12. He urged the Court to find that the 2nd Defendant/Applicant had satisfied all the grounds for granting stay pending appeal.

13. The 2nd Defendant/Respondent's Submissions

Mrs. Bett for the 2nd Defendant/Applicant urged the Court to disallow the application for stay of execution. She submitted that the applicant had only satisfied one of the three (3) conditions for grant of stay pending appeal. The satisfied condition was that the application was made without unreasonable delay.

14. It was her submission that the Applicant had failed to demonstrate that he would suffer substantial loss if the order of stay is not given. She cited the case of **MACHIRA T/A MACHIRA & CO. VS E.A. STD NO.2 (2002) 2KLR 63** which was quoted in **SAMMY SOME KOSGEI VS GRACE JELEL BOIT (2013) eKLR**. The Court had stated the standard required to prove substantial loss when it stated as follows;

“..... It is not enough merely to state the substantial loss will result, or that the appeal if successful will be rendered nugatory. That will not do. If the applicant cites, as a ground, substantial loss, the kind of loss likely to be sustained must be given, and the conscience of the court, looking at what will happen unless a suspension or stay is ordered, must be satisfied that such loss will really ensue and that if it comes to pass, the applicant is likely to suffer substantial injury by letting the other party proceed further with

what may still be remaining to be done or in execution of an award or decree or order, before disposal of the applicant's business (e.g appeal or intended appeal)')at P 67).”

15. She stated that the 2nd Defendant/Applicant had failed to show what nature of loss he was likely to suffer, the current usage of the suit land and the details of the losses. He had also failed to show anything that the Plaintiff/Respondent would do to render the portion unavailable in case of a successful appeal. She referred to the case of **KENNEDY BOSIRE GICHANA VS REGED TRUSTEES, REDEEMED GOSPEL CHURCH (2009) eKLR** where the court declined to order stay of execution where it found that the Applicant neither had an arguable appeal nor did he stand to suffer substantial loss by reason of the successful litigant executing the decree.

16. Finally she submitted that the Applicant should not use the filing of an appeal as a bar to the execution of the judgment herein. The Plaintiff/Respondent should be allowed possession and use of the property pending the hearing and determination of the appeal.

17. Both counsels appearing for the parties herein have cited very useful authorities to the matter at hand and I am grateful for that. I have considered the application, affidavits, submissions and authorities.

18. This application is brought under **Order 42 Rule 6 (2)** of the **Civil Procedure Rules** which sets out the conditions for grant of stay pending appeal. These are;

(i) The Court must be satisfied that loss may result to the applicant unless the order is made.

(ii) The application has been made without unreasonable delay.

(iii) Such security as the Court orders for the due performance of such decree or order as may be ultimately be binding on him has been given by the applicant.

19. The issues that therefore fall for this court's consideration are:

(i) Whether the application was filed without unreasonable delay.

(ii) Whether the applicant has shown that he will suffer substantial loss if the order is not made.

(iii) Issue of furnishing security.

20. ISSUE NO. I

Whether the application was filed without unreasonable delay.

The Judgment and Decree were made on 29th August, 2014. The 2nd Defendant/Applicant filed a Notice of Appeal in the Court of Appeal dated 2nd September, 2014 was filed in the High Court Civil Registry Kericho on the same date. The present application dated 4th September, 2014 was filed on 5th September, 2014. By all standards this application was filed without unreasonable delay.

21. ISSUE NO. II

Whether the applicant has shown that he will suffer substantial loss if the order is not made.

It is under this head that the court considers whether the appeal is arguable, and whether it would be rendered nugatory, if the order of stay is not made.

22. The Judgment and decree of this court of 29th August, 2014 is to the effect that the Plaintiff/Respondent had acquired prescriptive rights over one (1) acre in the land parcel **No.**

Kericho/Kapsuser 3797.

That the said one (1) acre be excised from **L.R.No Kericho/Kapsuser/3797** and transferred to Plaintiff and a title issued to him.

The Defendant/Respondent was to get costs.

23.It is the above orders that the Defendant/Applicant seeks to stay as he pursues his appeal in the Court of Appeal.

Order 42 Rule 6 (4) of the **Civil Procedure Rules** provides;

“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.”

What is before me is therefore a Notice of Appeal which is deemed to be an appeal, under the above provision.

24.Under **Order 42 Rule 6 (1)** of the **Civil Procedure Rules**. A party who has filed an appeal or intends to file an appeal may apply for stay of execution before the court that gave the decree or order appealed from or before the court he/she intend to appeal to. My thinking is that the court appealed from may not be the best suited court to determine whether the grounds appealed from are arguable or not, or whether such an appeal has high chances of success.

25.In the case of **DUNCAN NDURACHA VS FUAD MOHAMMED & 2 OTHERS NRB COURT OF APPEAL CIVIL APPLICATION NO. 24 OF 2011 (2011) Eklr** the court stated thus;

“The law as regards the principles to be applied when considering an application brought under Rule 5 (2) (b) is now settled. The court is deciding such an application exercises unfettered discretionary powers which cannot be exercised capriciously nor upon the whims of the court. The Applicant has to demonstrate that the intended appeal or the appeal, where one has been filed is arguable, that is not frivolous.

Secondly, he has to demonstrate also that were the appeal or intended appeal as the case may be, to succeed, such success would be rendered nugatory by our refusal to grant the application.”

26.This court having rendered the Judgment appealed from, it would not be best placed to determine whether the intended appeal has arguable grounds of appeal and/or has high chances of success. In the above cited case the court of appeal was dealing with an application for stay of execution in an appeal that was before it. The said court was therefore able to evaluate the grounds which not the case here.

27.On whether the applicant has demonstrated substantial loss that may occur, I will refer to the case of **MACHIRA T/A MACHIRA & CO V E.A. STD NO.2** (*Supra*) which explains what needs to be demonstrated.

It was the submission of Mrs. Bett for the Plaintiff/Respondent that no such loss had been demonstrated and that there was nothing to show that in the unlikely event of a successful appeal the land would not be available.

28.If the judgment/decreed herein were to be executed the following would have to take place;

(i) Excise of one (1) acre from L.R.No. Kericho/Kapsuser/3797.

(ii) Eviction of the Defendant/Applicant if he does not voluntarily vacate from the one (1) acre portion.

(iii) Registration of the Plaintiff/Respondent as the new owner of the one (1) acre followed by the issuance of the title deed.

(iv) The Plaintiff/Respondent will also have the liberty to deal with the land as he wishes including disposing of it.

29. On the other hand, if the order sought is not granted and in the event of a successful appeal, all that will have happened in paragraph 28 above will have to be reversed in favour of the Defendant/Applicant, and this would come with its own challenges.

30. The evidence shows that the Plaintiff/Respondent was evicted from this land in the year 2008 when everything he had on the land was destroyed. He has to date not stepped on the said land. It has not come out clearly what the suit land is being used for. Is it under cultivation or it is the home of the Defendant/Applicant?

31. I am convinced that if no order of stay is granted the Plaintiff/Respondent would wish to fully utilize his one (1) acre of land, including putting up permanent structures and/or even disposing of it. This to me would cause other challenges if the appeal succeeded and the structures were to be demolished. All these challenges being alive in my mind I do find that the best option would be to maintain the status quo prevailing by granting stay of execution of the judgment/decree herein.

32. The Plaintiff/Respondent has been out of his land for seven (7) years but I am sure the appeal before the Court of Appeal following the decentralization of the Court of Appeal Registry will be disposed of within the shortest time.

33. ISSUE NO. III

Issue of furnishing security

The Defendant/Applicant at paragraph 11 of his supporting affidavit deposed;

“That I am ready and willing to abide by any such conditions this honourable court may deem fit and just to grant.”

Since the Plaintiff/Respondent has a judgment/decree in his favour his share of one (1) acre in the suit land must be protected by the Court. The Defendant/Applicant will therefore have to provide security as required under **Order 42 Rule 6 (2) (b)** of the **Civil Procedure Rules**.

34. Taking all the above into consideration I make the following orders;

(i) There shall be stay of execution pending appeal on the following conditions;

(a) The title deed in respect of land parcel no. **Kericho/Kapsuser No.3797** shall be deposited in Court within seven (7) days and remain in the Court's custody until the determination of the appeal or until such other orders are made in respect of the same.

(b) The Defendant/Applicant shall not sell, charge or in any other way dispose of the suit land.

(c) The Defendant/Applicant shall deposit Kshs.350,000 in Court within twenty-one (21) days as security for due performance of the decree in the event of a successful appeal.

(d) Costs of the application to abide the appeal.

Dated, signed and delivered in open court this 5th day of June, 2015.

H.I.ONG'UDI

JUDGE

In the presence of

Mr. Siele for Orina for 2nd Defendant/Applicant

N/A for or by the Plaintiff/Respondent

Kipyegon- court assistant