REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

CASE NO. 102 OF 2004

JOHN CHERUIYOT MURSOI.....PLAINTIFF

VERSUS

AUSTINE CHEPKWONY MUREI.....1ST DEFENDANT

JOHN CHEPKWONY.....2ND DEFENDANT

RULING

1. By a Notice of Motion dated **19/5/2020** brought under **Order 42 Rule 6 of the Civil Procure Rules, Section 3A of the Civil Procedure Act**, the 2nd defendant/applicant seeks the following orders:

> **(a) Spent…**
>
> **(b) Spent…**
>
> **(c) That there be a stay of execution and/or further execution of the decree in this suit pending the hearing and determination of the appeal in the Court of Appeal at arising from the judgment in this suit.**
>
> **(d) That costs of this application be provided for.**

2. The application is supported by the affidavit of the 2nd defendant sworn on **19/3/2020**. The grounds on the face of the application are that the applicant herein **John Chepkwony** has preferred an appeal to the Court of Appeal as per the Notice of Appeal dated **30/1/2019** against the judgment of this court delivered on **29/1/2019**; that as can be discerned from the Draft Memorandum of Appeal annexed to the affidavit supporting this application, the applicant has an arguable appeal which raises fundamental issues of law with high chances of success and which appeal will be rendered nugatory should the respondent proceed with execution and/or further execution of the decree herein; that the application is willing to abide by any directions that this court may make as to security; that this application is brought in good faith and timeously.

3. The plaintiff filed a sworn replying affidavit dated **20/7/2020.** He states that the decree has been fully executed and the plaintiff has caused the survey of the suit land, carved out the appropriate portion and taken possession of it in accordance with the realigned boundaries and that the applicant has already settled the costs of the suit; he also avers that the application has therefore been overtaken by events.

4. The defendant/applicant filed his submissions on **30/7/2020**. The plaintiff/respondent did not file submissions on the application. I have considered the application, the response and the filed submissions.

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 this application?***

6. Order 42 rule 6 of the **Civil Procedure Rules** 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. In the instant application this court must therefore consider whether:

(i) Whether there is an appeal in place;

(ii) Whether the application was made without unreasonable delay.

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

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

8. A notice of appeal was filed in the record on **30/1/2019**. This court is convinced that for the purposes of this application an appeal is therefore in place.

9. As to whether the application was made without inordinate delay I note that the application was filed on **22/5/2020** while judgment was delivered on **29/1/2019.** A litigant must enjoy the fruits of his/her judgment. As long as there are no orders setting aside the judgment it is capable of being executed by the decree holder at any time. In this case there is no rebuttal to the allegation by the plaintiff that the judgment and decree have been executed. The action is sought to be prevented by the instant application having occurred, there is obviously nothing to stay.

10. In **Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63** the court observed as follows:

"The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court".

11. In the case of **Samwel Kimutai Korir (Suing as Personal and Legal Representative of Estate) of Chelangat Silevia v Nyanchwa Adventist Secondary School & Nyanchwa Adventist College [2017] eKLR** where there was a delay of 8 months in filing an application for stay of execution the court observed as follows:

"The applicant sat pretty after belatedly filing the Notice of Appeal until after the assessment of the respondent's bill of costs before asking for a stay of execution for 30 days, which stay was rightly construed by the respondent to have been intended to give them time to call for funds for settlement of the decretal only for the applicant to spring a surprise application for stay of execution pending an intended appeal. It is my observation that the conduct of the applicant during the period that preceded the filing of the instant application was that of an indolent litigant not worthy of the courts discretionary orders of stay of execution that it now seeks."

12. In **Joseph Ouma Onditi v Jane Kisaka Mung'au [2018] eKLR** the court dismissed an application for stay of execution which was made **4** months after the judgment was delivered. In **John Odhiambo V Sospeter Otieno [2010] eKLR** the court held that an **8** month delay in bringing a stay application was inordinate. In this suit, this court's judgment was delivered on **29/1/2019**. The instant application was filed on **22/5/2020**. Therefore the delay in filing the application for stay of execution in the instant suit is about **15** months.

13. This court is however conscious that delay should be assessed on a case by case basis. It was stated as follows in the case of **Utalii Transport Company Ltd & 3 Others -vs- NIC Bank Ltd & Another 2014 eKLR**:-

> **"Whereas there is no precise measure of what amounts to inordinate delay and whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case the subject matter of the case, the nature of the case, the explanation given for the delay and so on and so forth.**
>
> **Nevertheless inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable, conclusion that it is inordinate and therefore inexcusable. On applying the courts mind on the delay caution is advised for courts not to take the word "inordinate" in its dictionary measuring but in the sense of excessive as compared to normality".**

14. In view of the circumstances of this case, this court finds that the delay of **15 months** before the filing of the instant application is inordinate delay that is fatal to this application.

As to whether there would be substantial loss if the orders sought were not granted, this court has already observed as above that the decree in this matter has already been executed, and the issue of whether or not substantial loss would occur if the orders sought are not issued does not arise. Similarly I summarily find that the issue of security does not arise for the same reason.

15. In the case of **Kiraita Abuta Vs Richard Nyandika 2019 eKLR,** the court stated as follows:

> **"In the final analysis, the court must be satisfied that all the conditions set out in Order 42 rule 6 of the Civil Procedure Rules have been met. As stated by Mutungi J. In the case of Equity Bank Limited v Taiga Adams Company Limited [2006] eKLR it is not enough to satisfy 1 or 2 of the requirements under 42 Rule 6. All of the requirements must be met for the court to grant orders of stay pending appeal. The court in that case stated as follows:-**
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> ***"The pre-amble to sub-rule (2) of Rule 4 of Order 41 is couched in very clear language and words: "No order for stay of execution shall be made under sub-rule (1) unless….." then follows the requirements, above, which have not been met by the applicant herein.***
>
> ***Let me conclude by stressing that all the four, not one or some, must be met before this court can grant an order of stay."***

16. In the final analysis I find that not all the criteria for the grant of an application for stay of execution have been met by the applicant and the instant application is therefore lacking in merit and the same is hereby dismissed with costs to the respondent.

Dated, signed and delivered at Kitale via electronic mail on this 24th day of September, 2020.

MWANGI NJOROGE

JUDGE, ELC, KITALE.