



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KITALE**

**LAND CASE NO. 78 OF 2017**

**BENJAMIN KIPROP CHELIMO.....PLAINTIFF**

**VERSUS**

**EZEKIEL CHERUIYOT CHELANGA... DEFENDANT**

**RULING**

1. By a Notice of Motion dated 23/6/2020 and filed in court on 24/6/2020 brought under **Order 42 Rule 6**, the defendant/Applicant seeks the following orders:

**(1) ...spent**

**(2) That this honourable court be pleased to order stay of execution of judgment given on 29/5/2020, pending the hearing and determination of this application *inter partes*.**

**(3) That this honourable court be pleased to order stay of execution of judgment given on 29/5/2020, pending the hearing and determination of the intended appeal.**

**(4) That costs of this application be provided for.**

2. The application is supported by the affidavit of the defendant sworn on 23/6/2020. The grounds upon which the application is brought are that the defendant is aggrieved and dissatisfied by the judgment delivered on 28/5/2020 in this matter and intends to file an appeal against it and that towards that end, he has filed Notice of Appeal; that the appeal has high chances of success; that the defendant stands to suffer irreparable loss and damage and the appeal would be rendered nugatory if the orders sought in the application are not granted and that the application has been filed promptly and there has not been inordinate delay. He states that it is in the interests of justice that the orders be granted.

3. The plaintiff filed a sworn replying affidavit dated 30/7/2020. His grounds for opposing the application are that the application is a waste of judicial time, that the court gave a well-reasoned judgment, that the adjustments to the boundaries of the parties' parcels of land were effected by the County Surveyor after both parties consented to a resurvey of the land which exercise found that the applicant had encroached on the respondent's land, and that the respondent had already taken possession of his proper portion of land with the boundaries as re-aligned. Further he states that the application is belatedly filed and that there is nothing to be stayed at all by the orders of this court. The respondent also faults the intended appeal stating that it has no chances of success, that no substantial loss has been demonstrated and that no security has been deposited.

4. The defendant filed his submissions on 21/7/2020. The plaintiff filed his submissions on 30/7/2020. 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 application?**

6. The conditions for a grant of stay of execution are contained in **Order 42 rule 6** of the **Civil Procedure Rules**. It 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 brief the law therefore sets out the 4 conditions that a court must consider in an application for stay under **Order 42 Rule 6** as follows:

**(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. This court has noted from the record that a notice of appeal was filed in the matter on **17/6/2020**. This court is therefore convinced that for the purposes of this application that an appeal is in place.

9. As to whether the application was made without inordinate delay, I note that the application was filed on **24/6/2020** while judgment was delivered on **29/5/2020**. In the circumstances of this case I do not find the delay in the filing of the instant application, which amounts to one month and 5 days, to be inordinate.

10. As to whether there would be substantial loss that would render the appeal nugatory I note that loss sought to be forestalled by a stay application would presumably result from the execution of a judgment. The respondent’s uncontroverted response in the sworn replying affidavit is that he has already assumed possession of his rightful parcel of land with the boundaries as re-aligned by the County Surveyor. This court has no reason to disbelieve that evidence from the respondent. Nothing would have been easier for the applicant than to dispute the same in statements in a further affidavit with evidence annexed thereto. It appears that there was therefore nothing to be executed as at the end of the suit as parties had assumed possession of what they deemed to be theirs and this court’s judgment contained the following order which is a testament to that fact:

**“The boundaries to parcels Nos. 1146 and 1269 shall be maintained as re-aligned by the surveyor’s report dated 27/3/2018 which is filed in the court record.”**

11. Indeed it was the plaintiff’s evidence at the hearing that he fenced off his land along the boundaries as re-aligned. In the circumstances I do not find any order that can be stayed by this court and if any orders are made as sought by the applicant, they may only muddle up the situation on the ground. It is also observable that perchance the applicant’s appeal is meritorious the subject matter is land and it can be reverted back to him.

12. Finally I have noted that the applicant is prepared to offer security for the grant of the orders sought but in this Court’s view, there being nothing to be stayed as observed in the foregoing paragraphs, I find that the instant application has no merit. The application is therefore dismissed with costs to the respondent.

**Dated, signed and delivered at Kitale via electronic mail on this 22<sup>nd</sup> day of September, 2020.**

**MWANGI NJOROGE**

JUDGE, ELC, KITALE.