



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT ELDORET**

**E & L CASE NO. 737 OF 2012**

**JOSEPHINE SOTE KIPCHUMBA.....PLAINTIFF/DECREE HOLDER**

**VERSUS**

**JOHAKIM KIBET KIPCHUMBA.....1<sup>ST</sup> DEFENDANT/JUDGMENT DEBTOR**

**BARNABAS KIPROTICH KIPCHUMBA.....2<sup>ND</sup> DEFENDANT/JUDGMENT DEBTOR**

**RULING**

**[NOTICE OF MOTION DATED 11<sup>TH</sup> MAY, 2020 BY THE DEFENDANTS**

**AND PLAINTIFF'S NOTICE OF MOTION DATED 13<sup>TH</sup> MAY, 2020]**

1. The Defendants filed the Notice of Motion dated 11<sup>th</sup> May, 2020 seeking for stay of execution of the judgment delivered on the 9<sup>th</sup> April, 2020 and decree issued on the 11<sup>th</sup> May, 2020 pending the hearing and determination of the appeal. They also pray for costs. The application is based on the eight (8) grounds on its face and supported by the affidavit sworn by **Johakim K. Kipchumba** and **Barnabas K. Kipchumba**, the Defendants, on 11<sup>th</sup> May, 2020. The Defendants' case is that they are dissatisfied with the judgment delivered on the 9<sup>th</sup> April, 2020 and have filed a Notice of Appeal. That if the suit properties are transferred to the Plaintiff in execution of the decree, she is likely to sell them to the detriment of the Defendants and hence this application for stay. That should their appeal fail, the Plaintiff will have the suit properties transferred to her in addition to compensation for mesne profits.

2. The Plaintiff opposed the Defendants' Motion through her replying affidavit sworn on the 15<sup>th</sup> June, 2020. That it is her case that the application by the Defendants is incompetent as it offends **Order 1 Rule 13 of Civil Procedure Rules**, is devoid of merit and amounts to an abuse of the court process. That she was in possession of the suit properties at the institution and pendency of the suit, and Defendants contemptuously invaded and evicted her, and planted on the portion she had ploughed. That her livestock have nowhere to graze due to the Defendants' action. That instead of obeying the Court's judgment, the Defendants commenced indiscriminate and wanton cutting down trees. That the Defendants are not entitled to the equitable remedy, they seek as they have not purged the contempt of court proceedings by vacating the suit properties. That there has been inordinate delay in filing the application and the Defendants have not offered security for the due performance of the decree. That the Defendants have not demonstrated irreparable damage they stand to suffer if the court's decree is executed.

3. The Plaintiff filed the Motion dated the 13<sup>th</sup> May, 2020 seeking for the O.C.S., Kaptagat Police Station to provide security during the eviction of the Defendants from **Tembeleo/Elgeyo Border Block 4 (Kokwopturgut)/136, and 137**, the suit properties, and for the Deputy Registrar of this Court to execute all the requisite documents to facilitate the formal transfer of suit properties to the Plaintiff. The Plaintiff also prays for costs of the application. The application is based on the six (6) grounds on its face and is supported by the affidavit sworn by **Josephine Sote Kipchumba**, the Plaintiff, on the 13<sup>th</sup> May, 2020. It is the Plaintiff's case that the Defendants invaded the suit properties during the pendency of the judgment which was eventually delivered on 9<sup>th</sup> April, 2020 in her favour. That the Defendants are reluctant to sign the transfer documents, and have instead planted on the portion of the land she had ploughed, and have commenced indiscriminate and wanton cutting down of the trees and hence this application.

4. The defendants opposed the Plaintiff's application through the replying affidavit sworn by **Barnabas K. Kipchumba**, the 2<sup>nd</sup> Defendant, on the 3<sup>rd</sup> July, 2020. That it is their case that they have not invaded the suit properties or cut down trees as alleged. That it is the Plaintiff who relocated with all her livestock and things to Naiberi, Uasin Gishu on 3<sup>rd</sup> January, 2020 and left the land vacant. That they ploughed and planted the suit properties after the Plaintiff relocated. That the Plaintiff had not asked them to execute the transfer documents by the time they filed their application dated 11<sup>th</sup> May, 2020 for stay of execution. That should their application for stay fail, they will not hesitate to execute the transfer documents. That they are ready to comply with the conditions the Court may impose as security for stay pending

appeal including those proposed by the Plaintiff through the submissions dated the 15<sup>th</sup> June, 2020.

5. The two applications which had been filed under certificate of urgency of corresponding dates were on the 18<sup>th</sup> May, 2020 directed to be canvassed through written submissions. The learned Counsel for the Plaintiff and Defendants filed their written submissions dated 15<sup>th</sup> June, 2020 and 6<sup>th</sup> July, 2020 respectively.

6. The following are the issues for the Court's determinations on both applications;

**(a) Whether the Defendants have made a reasonable case for stay of execution pending appeal to issue.**

**(b) Whether the Plaintiff has made a case for execution order in the manner proposed to issue.**

**(c) Which party pays the costs in each of the two applications.**

7. The court has after considering the grounds on the two applications, affidavit evidence by both sides, the written submissions by both Counsel, and the record come to the following findings;

(a) That this suit was commenced by the Plaintiff through her originating summons dated the 26<sup>th</sup> July, 2011. That vide the Court's judgment delivered on the 9<sup>th</sup> April, 2020 after hearing the parties on merit, the Court found **"...that the Plaintiff has proved her case on balance of probabilities and do grant orders that the Defendants are holding the suit property in trust for the Plaintiff and that the suit parcels be transferred to the Plaintiff"**. That the Defendants and Plaintiff then filed the Motions dated the 11<sup>th</sup> May, 2020 and 13<sup>th</sup> May, 2020 which are at cross purposes.

(b) That a perusal of the affidavits filed with the originating summons, and the two applications leaves the Court with no doubts that the Plaintiff was all along in possession of the suit properties from the time of filing the suit in 2011, to early 2020. That according to the Plaintiff, she was evicted by the Defendants when they invaded the said lands, planted the portion she had ploughed, and embarked on wanton destruction by cutting down trees. That the Defendants have agreed taking possession of the suit properties, ploughing and planting thereon in January, 2020 but insist it was after the Plaintiff relocated to Naiberi in Uasin Gishu. That while the parties do not agree on the circumstances under which the Plaintiff left the suit properties, the record confirms that the judgment of the court was pending after the last court attendance on the 27<sup>th</sup> May, 2019 when further defence hearing took place. That there is no court order in existence allowing the Defendants to take possession of the suit properties. There is also no evidence that the Plaintiff had consented to the Defendants taking possession of the suit land in January, 2020 or any other time pending the delivery of the judgment. That now that the Plaintiff has expressed her displeasure with the Defendants' action through her motion dated the 13<sup>th</sup> May, 2020, and in view of the judgment of 9<sup>th</sup> April, 2020 in her favour, the Defendants have no legal basis of remaining on the suit properties, even as their appeal is heard and determined.

(c) That there is no evidence tendered by the Plaintiff that she had presented any of the documents required to be executed by the Defendants in execution of the Court's judgment of 9<sup>th</sup> April, 2020 and the decree thereof and they declined to sign. That such an attempt is necessary before seeking for an order that the Deputy Registrar be empowered to sign on their behalf. That the Court is happy with the Defendants' show of preparedness to sign the relevant documents when that time comes, under paragraph 9 of their Replying affidavit. They have also under paragraph 10 of the said affidavit expressed their readiness to comply with the conditions proposed by the Plaintiff through her learned Counsel's written submissions dated the 15<sup>th</sup> June, 2020. The conditions are that should the Court grant stay of execution, then the status quo ante be reinstated immediately, and that the Defendants do deposit in court the original title deed of the suit properties, together with duly executed transfer forms, and Land Control Board applications with passport photos, copies of Kenya Revenue Authority (KRA) PINs and Identity Cards as security for the due performance of the decree. That the Defendants' preparedness and readiness has been repeated at paragraphs 11 and 12 of the Defendants' learned Counsel's submissions. That it is the view of court that the preparedness and readiness expressed by the Defendants through their Replying affidavit and written submissions should have been considered by the parties, and their Counsel, as the basis of compromising both applications as the Court finds them fair and reasonable.

(d) That considering no costs were specifically awarded in the judgment of 9<sup>th</sup> April, 2020 possibly because the parties herein are reportedly mother and sons, and so as to foster good relations between the two sides, each party will bear his/her own costs in both applications.

8. That from the foregoing, the Court orders that the two applications dated the 11<sup>th</sup> May, 2020 and 13<sup>th</sup> May, 2020 be compromised in the following terms;

(a) That noting that the Defendants filed the Notice of Appeal dated the 13<sup>th</sup> April, 2020 and received by the Deputy Registrar on the 14<sup>th</sup> May, 2020 to the Court's judgment delivered on the 9<sup>th</sup> April 2020, the Court grants conditional stay of execution of the said judgment and the decree thereof issued on the 11<sup>th</sup> May, 2020 pending the hearing and determination of the appeal.

(b) That the status quo ante be reinstated immediately by the Defendants and or their agents stopping using in any way, including ploughing, tilling, planting on and cutting trees from the suit properties, unless with the written consent of the Plaintiff.

(c) That the Defendants do provide their Counsel on record with the original title documents of the suit properties, together with duly executed transfer forms, and Land Control Board application forms, in favour of the Plaintiff plus copies of their Kenya Revenue Authority PINs and National Identity Cards within fourteen (14) days. That the Defendants' Counsel is to transmit or forward the

said documents to the Counsel on record for the Plaintiff within fourteen **(14)** days from the date of receipt for safe keeping as security for the due performance of the decree once the appeal is determined.

(d) That upon the Plaintiff's Counsel receiving the documents detailed in (c) above from the Defendants' Counsel, the said documents shall not be released from their custody or presented for registration without express written consent of the parties or court order.

(e) That should the Defendants fail to comply with the conditions in **(b)** and **(c)** above, the stay order in **(a)** above to automatically lapse, and execution to proceed as prayed in prayers 2 and 3 of the Motion dated the 13<sup>th</sup> May, 2020.

Orders accordingly.

**Delivered virtually and dated at Eldoret this 28<sup>th</sup> day of October, 2020.**

**S. M. KIBUNJA**

**JUDGE**

**In the presence of:**

Plaintiff/Decree Holder: Absent.

Defendants/Judgment Debtors: Absent.

Counsel: Absent.

Court Assistant: Christine

and the Ruling is to be transmitted digitally by the Deputy Registrar to the Counsel on record through their e-mail addresses.