



**REPUBLIC OF KENYA**

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

**AT ELDORET**

**ELC CASE NO. 1 OF 2012 (OS)**

**MICHAEL KIBERENGE.....PLAINTIFF/APPLICANT**

**VERSUS**

**PETER MUNGAI MUTHAMI.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**KIPROTICH ARAP CHEPKWONY.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**THE ATTORNEY GENERAL.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**THE SETTLEMENT FUND TRUSTEES.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

**[NOTICE OF MOTION UNDER CERTIFICATE OF URGENCY DATED 13<sup>TH</sup> FEBRUARY, 2020]**

1. The Plaintiff moved the Court through the Motion dated the 13<sup>th</sup> February, 2020 for stay of execution of the decree and or judgment issued on the 6<sup>th</sup> December, 2019 pending the hearing and determination of the intended appeal and costs. The application is predicated on the eight grounds on its face and supported by the affidavit sworn by **Michael Kiberenge Chumo**, the Plaintiff, on 10<sup>th</sup> February, 2020. It is the Plaintiff's case that he was aggrieved by the judgment delivered in favour of the 2<sup>nd</sup> Defendant on the 6<sup>th</sup> December, 2019 and has filed an appeal through the Notice of Appeal dated 16<sup>th</sup> December, 2019 and lodged with the Deputy Registrar on the 17<sup>th</sup> December, 2019. That unless stay of execution is issued, the 2<sup>nd</sup> Defendant is likely to undertake execution proceedings that would result to his eviction from the suit land on which his family home is situated, thus subjecting him to hardship and substantial loss. That he is ready to abide by any reasonable conditions, including being allowed to continue occupying the part of the land where his homestead is situated.

2. The application is opposed by the 2<sup>nd</sup> Defendant through the replying affidavit sworn on the 25<sup>th</sup> February, 2020. That it is his case that land parcel Uasin Gishu/Kimumu/1216, that is 12 acres, is a subdivision from Uasin Gishu/Kimumu/326 and is registered in his name. That the Plaintiff's homestead is not situated on that land, but on Uasin Gishu/Kimumu/1217. That the Plaintiff has over time encroached onto the 2<sup>nd</sup> defendant's parcel by about three acres. That the Plaintiff has not demonstrated the substantial loss he is likely to suffer if the Order he seeks is not granted. That he has waited for 25 years since the suit was filed in 1994, and should be allowed to enjoy the fruits of his judgment. That should the Court grant the stay order, the Plaintiff should furnish security for costs of the suit, delay and inconvenience at Kshs.5,000,000.

3. That following directions issued on the 26<sup>th</sup> February, 2020 and 21<sup>st</sup> May 2020, the learned Counsel for the Plaintiff and 2<sup>nd</sup> Defendant filed their written submissions dated 11<sup>th</sup> March, 2020 and 24<sup>th</sup> June, 2020 respectively.

4. The following are the issues for the court's determinations;

***(a) Whether the 2<sup>nd</sup> Defendant has made out a reasonable case for stay of execution order pending appeal to issue.***

***(b) Who pays the costs of the application?***

5. The Court has after carefully considering the grounds on the application, the affidavit evidence, the written submissions by both Counsel and the superior Court's decisions cited therein come to the following determinations;

(a) That the Plaintiff had commenced this suit seeking to be registered as proprietor of land parcel Uasin Gishu/Kimumu/326, that was later subdivided into parcels 1216 and 121,7 under adverse possession. The suit was filed through the originating summons dated the 27<sup>th</sup> February, 1994 that was subsequently amended.

(b) That after hearing the parties, the Court rendered its judgment on the 6<sup>th</sup> December, 2019 dismissing the Plaintiff's claim with costs. The Court further directed the Plaintiff to vacate the suit property in three months, failure to which the 2<sup>nd</sup> Defendant be at liberty to commence the process of his eviction. Thereafter, the Plaintiff filed the current application dated 13<sup>th</sup> February, 2020 on the 14<sup>th</sup> February, 2020. The matter was placed before the Judge on the 17<sup>th</sup> February, 2020 and directions to serve issued. That the three months within which the Plaintiff was required to give vacant possession of the suit land was expiring on or about 6<sup>th</sup> March, 2020.

(c) That in the judgment of 6<sup>th</sup> December 2019, the Court found, and the Plaintiff has not disputed, that the 2<sup>nd</sup> Defendant is the registered proprietor of land parcel Uasin Gishu/Kimumu/1216. That the 2<sup>nd</sup> Defendant has further deponed that the homestead of the Plaintiff is on land parcel Uasin Gishu/Kimumu/1217 and not 1216. He has further deponed that the Plaintiff has been using about (3) three acres of land parcel Uasin Gishu/Kimumu/1216 for cultivation. That the deposition by the 2<sup>nd</sup> Defendant that the Plaintiff's homestead is not situated on land parcel Uasin Gishu/Kimumu/1216 has not been rebutted, and no documentary evidence like a surveyor report has been availed to show a contrary position. That the 1<sup>st</sup> Defendant appear not to have participated in this application in any way, while the Counsel for the 3<sup>rd</sup> and 4<sup>th</sup> Defendants indicated that they would not participate in its hearing. That the foregoing notwithstanding, the order in the judgment of 6<sup>th</sup> December, 2019 to the effect that;

***“The Plaintiff is given 3 months to vacate the suit property, failure of which the 2<sup>nd</sup> Defendant to commence the process of eviction,”***

must be the one that prompted the Plaintiff to file this application. That while the Plaintiff may easily be ordered to stop farming on the three (3) acres of the 2<sup>nd</sup> Defendant's land without suffering substantial loss, the situation would be different if he was evicted from the home he has used with his family resulting to demolitions thereof, in the event he thereafter becomes successful in the pending appeal.

(d) That whether or not the Plaintiff's appeal has a high chance of success is a matter to be determined by the Court of Appeal. That as the Plaintiff has expressed his willingness to abide by the conditions the Court may issue, and as he would definitely suffer substantial loss if eviction from his home is carried out and he later succeeds on appeal, the Court finds merit in the application.

(e) That the costs of the application should abide the outcome of the appeal.

6. That having found merit in the Motion by the Plaintiff dated the 13<sup>th</sup> February 2020, the same is hereby allowed in the following terms;

(a) That pending the hearing and determination of the Plaintiff's appeal to the Court of Appeal, stay of execution of the judgment delivered on the 6<sup>th</sup> December, 2019 is hereby granted limited to allowing the Plaintiff to continue using the homestead that is reportedly on the suit land. That for avoidance of doubt, the stay order does not extend to the portion of three (3) or so acres of land parcel Uasin Gishu/Kimumu/1216 that he has reportedly been cultivating on.

(b) That the Plaintiff do deposit in thirty (30) days, Kshs.200,000 (Two Hundred Thousands) in an interest earning account with a financial institution in the joint names of his Counsel and that of the 2<sup>nd</sup> Defendant as security for the due performance of the decree that arises from the said judgment and in default, the stay order in (a) above to automatically lapse.

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: Absent.

Defendants: Absent.

Counsel: Mr. Chesoni for the Plaintiff.

Mr. Kuria for the 3<sup>rd</sup> and 4<sup>th</sup> Defendants.

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.