



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL CASE NO. 87 OF 2006

ELINA J. SAINA 1ST PLAINTIFF

NAHASHON KIRWA SAINA 2ND PLAINTIFF

VERSUS

METHUSELLAH KIBIWOT KIRWA DEFENDANT

RULING

By Notice of Motion dated 13th of December, 2012 brought under Order 42 Rule 6 of the Civil Procedure Rules and Sections 1A and 3A of the Civil Procedure Act, the Defendant seeks orders, inter alia:-

(1) That there be stay of execution of the decree herein pending the hearing and determination of the appeal by the Court of Appeal.

The same is premised on the following grounds:-

1. That the Defendant was dissatisfied with the judgment delivered on the 10th day of October, 2012.
2. That the Defendant intends to lodge an appeal in the Court of Appeal to challenge the judgment.
3. That the said appeal is meritorious and has chances of success.
4. That should the Plaintiff execute the decree herein, the appeal shall be rendered nugatory and the Defendant/Applicant suffer irreparable loss and damage.
5. That it would therefore be in interest of justice that this Application be allowed and the prayers sought granted.
6. That this application has been brought promptly and in utmost good faith.
7. That the Respondent will not suffer any prejudice if the orders sought are granted.

It is further supported by the affidavit of the Defendant Methusellah Kiboi Kirwa sworn on 13th November, 2012. It is deposed that the decree gave an order of eviction from the suit land which order will largely jeopardize him and his family. That he has sub-divided the land into five (5)-acre plots of which he is in the process of selling to third parties and that therefore, if the decree is executed, will cause a lot of mental anguish to his family.

The application is opposed vide a Replying Affidavit sworn by Elina J. Saina, the 1st Plaintiff/Respondent herein. She deposes that the application is merely meant to deny the Plaintiffs the fruits of their Judgment. That the Applicant's father owns a 100 acre piece of land at Moi's Bridge Block 3 (Mogoon) 3 on which the Applicant has blatantly refused to settle. That the Applicant has not demonstrated how and what he will lose if he moved into his father's land. That further the Applicant is the Respondent's grandchild and has no inheritance rights over the land in dispute.

By a Further Affidavit sworn on 24th January, 2013 by the Applicant, he deposes that he had lived with his grandfather (now deceased) on the suit land since his childhood and that that is the land on which he married. That the Respondents have always treated him as their son and that he does not know any other home save the suit land. That therefore his eviction would be detrimental to his family.

In a Supplementary Affidavit sworn on 15th February, 2013 the 1st Respondent reiterates the contents of the Replying Affidavit and urges the court not to sit on appeal of its Judgment.

The application was canvassed by way of filing written submissions. Those of the Applicant were filed on 25th June, 2013 on his behalf by M/s. Rioba Omboto & Company Advocates and on behalf of the Respondents by M/s. Kiboi Tuwai & Co. Advocates.

On the part of the Applicant, it is submitted that he has satisfied all the provisions of Order 42 Rule 6 of the Civil Procedure Rules and further demonstrated that he has filed an appeal against this court's decree.

On behalf of the Respondents, Mr. Kiboi has submitted that, to the contrary, the Applicant has not satisfied any of the conditions set out vide Order 42 Rule 6.

I have accordingly considered the respective submissions and the cited case law and I take the following view.

The application is majorly brought under Order 42 Rule 6 of the Civil Procedure Rules which 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 order for the due performance of such decree or order as may ultimately be binding on his 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 subordinate court or tribunal has been complied with."

Under sub-Rule (1) an application of stay lies with the court appealed from. In this case therefore, the High Court may entertain an application seeking an order of stay of execution pending the hearing and determination of an appeal filed in the Court of Appeal. Sub-Rule (2) gives the conditions which the party seeking a stay must satisfy before the order of stay of execution is granted.

Sub-Rule (4) defines what an appeal before the Court of Appeal is in the following words:-

"For 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."

Therefore, a party seeking a stay of execution before the High Court wherein the appeal lies with the Court of Appeal must demonstrate that indeed there exists an appeal before that court. The sub-rule (4) is framed in mandatory terms and no amount of decorative words can twist its interpretation to suit the circumstances of a case.

Under Rule 75 of the Court of Appeal Rules, 2010, a Notice of Appeal shall be lodged within fourteen (14) days of the date of the decision which it is desired to appeal. It provides as follows:-

"75. (1) Any person who desires to appeal to the Court shall give notice in writing, which shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.

(2) Every such notice shall, subject to rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal.

(3) Every notice of appeal shall state whether it is intended to appeal against the whole or part only of the decision and where it is intended to appeal against a part only of the decision, shall specify the part complained of, shall state the address for service of the appellant and shall state the names and addresses of all persons intended to be served with copies of the notice.

(4) When an appeal lies only with leave or on a certificate that a point of law of general public importance is involved, it shall not be necessary to obtain such leave or certificate before lodging the notice of appeal.

(5) Where it is intended to appeal against a decree or order, it shall not be necessary that the decree or order be extracted before lodging notice of appeal.

(6) A notice of appeal shall be substantially in the Form D in the First Schedule and shall be signed by or on behalf of the appellant."

In the instant case, Judgment of this court was delivered on 10th October, 2012. Notice of Appeal was lodged on 23rd of the same month which was within the fourteen days stipulated by the law.

This being the case, the onerous duty of this court is to determine whether the Applicant has satisfied the provisions of Order 42, Rule 6 under which this application is brought.

First, as to whether the Applicant would suffer substantial loss if the order sought is granted, my candid view is that no substantial loss is likely to be occasioned in this respect. It is factual that the Applicants' father owns another parcel of land being, **Moi's Bridge/Moi's Bridge Block 3 (Mogoon)/3** where himself and his immediate family can move.

The Applicant claims entitlement to the suit land merely because he was brought up on the said land. Whereas I would be hesitant to determine issues that will be canvassed in the pending appeal, the fact that the Applicant has lived on the suit land may not entitle him to a claim of it. His inheritance interest is best pursued in his father's estate as opposed to his grandfather whose hospitality the Applicant does not honour.

In the premises, it is not true to say that the Applicant, if he moves to his father's land will suffer any substantial loss. To the contrary, he becomes the ultimate beneficiary.

Second, as to whether this application has been made without unreasonable delay, I note that the Judgment was delivered on 10th October, 2012. The application was filed on 17th December, 2012 which is approximately two months thereafter. Whereas the Applicant has not given any explanation as to why it took up to two months to file the application, it is my view that a delay of two months cannot be deemed as unreasonable or inordinate.

Third, is, whether the Applicant has furnished any security in due performance of the decree. Although the genesis of this matter is a land dispute, it is important that the Applicant demonstrates that he is willing to deposit security of some kind in the event Judgment on appeal is not given in his favour.

The Applicant, unfortunately seems not to appreciate this fact as he has not offered any security in due performance of the decree or explained why any should not be deposited.

Under sub-rule (2), an Applicant who seeks to benefit from an order of stay must satisfy the three conditions outlined therein. It is clear that the Applicant in the instant application has not met this threshold as set out by the rule and as held in the case of **HALAI & ANOTHER -VS- THORNTON & TURPIN (1963) LTD - CIVIL APPEAL NO. 15 OF 1990 - COURT OF APPEAL AT NAIROBI** (cited by the Applicant's counsel) that;

"The High Court's discretion to order a stay of execution of its order or decree is fettered by three conditions. Firstly, the Applicant must establish a sufficient cause. Secondly, the court must be satisfied that substantial loss would ensue from refusal to grant a stay and thirdly the applicant must furnish security. The application must of course be made without unreasonable delay."

Of course the first condition cited in the above decision is not provided for under sub-rule (2) of Rule 6, but the other conditions thereof must be satisfied in mandatory terms.

From the foregoing, I hold that the Applicant has failed to demonstrate that he deserves the stay orders sought; specifically, he has not met the conditions set out in Order 42, Rule 6 (2) of the Civil Procedure Rules. In the result, his application dated 13th December, 2012 is hereby dismissed with costs to the Respondents.

DATED and DELIVERED at ELDORET this 3rd day of October, 2013.

G. W. NGENYE – MACHARIA

JUDGE

In the presence of:

Mr. Namiti holding brief for Omboto for Applicant

Mr. Kathili holding brief for Kiboi for Respondents