



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E & L CASE NO. 392 OF 2015

[Formerly Eldoret Hccc No. 1 of 2006]

FANIKIWA LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

GEORGE KIPTABUT LELEI.....1ST DEFENDANT/APPLICANT

JOHN ARAP SAINA.....2ND DEFENDANT/APPLICANT

RULING

NOTICE OF MOTION UNDER CERTIFICATE OF URGENCY DATED 13TH JULY, 2020]

1. The Defendants filed the Motion under Certificate of Urgency dated the 13th July, 2020, seeking for “*stay of execution of the decree issued in Eldoret ELC No. 393 of 2015 and all consequential orders pending the hearing and determination of Eldoret Appeal No. 75 of 2019*” and costs. The application is based on the ten (10) grounds marked (1) to (10) on its face, and supported by the affidavit sworn by **John Arap Saina** on the 13th July, 2020. It is the Defendants’ case that they were dissatisfied with the Court’s judgment delivered on the 6th December, 2018 and have since filed **Eldoret Court of Appeal Civil Appeal No. 73 of 2019** that is pending. That the Plaintiff commenced execution through proclaiming their properties on the 10th July, 2020, and this application has been filed promptly. That so as to avoid the two counts embarrassing each other should they come at different decisions, and to safeguard the substratum of the pending appeal, the stay order should be granted. That they were inhumanly evicted from their homes and their properties demolished and or looted leaving them destitutes and paupers. That they filed the notices of appeal on the 7th December, 2018, and thereafter obtained leave from the Court of Appeal to file, and serve the record of appeal out of time. That on 10th July, 2020 they were served with a proclamation and warrants of attachments in execution by the auctioneers while they had not been served with the ruling on assessment of bill of costs of 29th November, 2019.

2. The application is opposed by the Plaintiff through the replying affidavit sworn by **Sophie Chemengen**, the Director to the Plaintiff, on the 20th July, 2020. It is the Plaintiff’s case that their party to party bill of costs filed on 18th January, 2018 and coming up for taxation was served upon the Defendants’ Counsel, and they acknowledged receipt by affixing the receiving stamp. That both sides were represented on 12th September, 2018 when directions to file written submissions were made. That the Plaintiffs filed their submissions and served upon Counsel for the defendants on the 25th September, 2018. That after several mentions to await the Defendants file their submissions, the taxation was fixed for ruling on the 15th November, 2019, and notice served upon Counsel for the Defendants on the 15th October, 2019. That the taxation ruling was delivered and certificate of costs issued on 6th February, 2020. That the court lacks jurisdiction to determine the application under **Order 42 Rule 6 of the Civil Procedure Rules** as the Defendants’ application to review and stay the judgment dated 3rd October, 2017 had been dismissed. That the eviction of the Defendants was executed on 31st August, 2017, and this Court is *functus officio* and the orders sought res-judicata. That no appeal has been filed in respect of the judgment delivered on 28th June, 2017. That the **Eldoret Civil Appeal No. 75 of 2019** is an appeal against the ruling, and orders of this court delivered on 6th December, 2018 dismissing the application for review and stay of the judgment delivered on the 28th June, 2017. That the Defendants have not shown any irreparable loss they are bound to suffer if their application is not granted, and should be dismissed or struck out with costs.

3. The learned Counsel for the Defendants and Plaintiff filed their written submissions dated the 16th July, 2020 and 6th October, 2020 respectively.

4. The following are the issues for the Court’s determinations;

(a) Whether the Court is with jurisdiction to hear and determine the application.

(b) Whether the Defendants have made out a reasonable cause for the orders sought to be granted.

(c) Who pays the costs in the application?

5. The Court has considered the grounds on the Motion, the affidavit evidence, the written submissions, the superior courts' decisions cited therein, the record and come to the following findings;

(a) That the record confirms that the Court's judgment was delivered in favour of the Plaintiff on the 28th June, 2017 after hearing all the parties. That judgment has not been reviewed, varied or appealed against to-date.

(b) That the ruling of 6th December, 2018 confirms that the Defendants had filed two applications dated 3rd October, 2017 and 13th July, 2017. That the application dated 3rd October, 2017 sought to stay the execution of the orders of 28th June, 2017 while the one dated 13th July, 2018 sought for leave to file a supplementary affidavit incorporating documentary proof that the suit land was public land. That the court pronounced itself on the two applications as follows;

“I have discerned the new evidence in the form of the map and various letters referred to by the applicant and do find no merit to review the judgment dated 28th June, 2017 as the applicants are not coming to Court as Sirikwa Squatters, and that the applicants are introducing a new claim that amounts to a departure from their pleadings. The application dated 13th July, 2018 is dismissed with costs.

It has not been demonstrated that Eldoret Civil Appeal No. 15 of 2017 is related to this suit, and that it is clear that the Appeal No. 15 of 2017 is not from this suit. The Applicants have no appeal pending in the Court of Appeal, hence not entitled to any stay pending appeal. Moreover, the order of the court was executed by the Decree Holder, hence there is nothing to stay. The upshot of the above is that the application dated 3rd October, 2017 is likewise dismissed with costs.”

(c) That the Motion dated 13th July, 2020 seeks at prayer (c) for **“stay of execution of the decree issued in Eldoret ELC No. 393 of 2015 and all its consequential orders pending the hearing and determination of Eldoret Appeal No. 75 of 2019.”** That ground (1) of the Motion and paragraph 4 of the supporting affidavit goes to confirm that the Defendants were aggrieved with the ruling of 6th December, 2018 and lodged **Eldoret Civil Appeal No. 73 of 2019** that is currently pending hearing and determination. That though the Defendants have referred to two different appeal case numbers being numbers **73 of 2019** and **75 of 2019**, it is clear whatever the correct reference may be, the appeal's subject matter is the court's ruling of 6th December, 2018 and not the judgment delivered on the 28th June, 2017.

(d) That further to (c) above, prayers (b) for interim order of stay and prayer (c) for stay pending determination of the appeal refer to the **“decree issued in Eldoret ELC No. 393 of 2015.”** That this suit or record as can be discerned on the heading of the Motion, the other court processes filed and the record is **Eldoret ELC No. 392 of 2015**, and not **Eldoret ELC No. 393 of 2015**. That the application cannot therefore be granted as phrased.

(e) That the ruling of 6th December, 2018 dismissed with costs the two applications by the Defendants dated 3rd October, 2017 and 13th July, 2018 whose details have been set out in (b) above. That as the learned Counsel for the Plaintiff has submitted, the order being a negative one did not direct anything capable of being stayed.

(f) That the application dated 13th July, 2020 seeks to stay the orders of 6th December, 2018 and not those of 28th June, 2017. That as the Court has not made a determination on a similar prayer before, then it is with jurisdiction to hear and determine the Motion.

(g) That the proclamation and notice of attachment reportedly served upon the Defendants on the 10th July, 2020 are a culmination of the execution proceedings following the taxation of the Plaintiff's bill of costs. That the Plaintiff has detailed in the replying affidavit how the bill of costs and related notices were served upon the learned Counsel for the Defendants as required. That the Defendants have not disputed the said depositions, and their allegation that they were not given a hearing during the taxation process appear to be far-fetched. That the proclamation and notice of attachment is about the taxed costs of the suit for the period from 2006, when the suit was filed to August, 2016. **[See the bill of costs dated 19th January, 2018]**. That the costs of the suit had been awarded to the Plaintiff in the judgment of 28th June, 2017 in respect of which there is no pending appeal as determined by the Court earlier on the 6th December, 2018. That accordingly, the stay order sought cannot issue as there is no pending appeal in respect of the said judgment.

(h) That it is clear the application was filed about one year seven months after the ruling of 6th December, 2018. The Defendants have not explained that delay which the Court finds to be unreasonable.

(i) That is the Defendants were evicted on the 31st August, 2017, the only thing remaining to be executed on the judgment of 28th June, 2017 is the costs. That the Defendants have not shown what substantial loss that would result if execution on the taxed costs is done. That the Court therefore finds that the Defendants have failed to show that they deserve the stay order sought.

(j) That the Defendants having failed in their application, then they should meet the Plaintiff's costs in the application.

6. That from the foregoing, the Defendants' Motion dated the 13th July, 2020 is without merit, and is dismissed with costs.

Orders accordingly.

Delivered virtually and dated at Eldoret this 25th day of November, 2020.

S. M. KIBUNJA

JUDGE

In the presence of:

Plaintiff/Respondent: Absent.

Defendants/Applicants: 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.