



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KITALE**

**ELC NO. 7 OF 2014**

**TIMOTHY KADAGI UMBASU.....PLAINTIFF**

**VERSUS**

**JOHN ANDAYI OMENDA.....DEFENDANT**

**RULING**

**The Application**

1. By a notice of motion dated 5/10/2020 and filed on the same date brought under provisions of Sections 1A, 1B, 3A of the Civil Procedure Act, Order 42 Rule 6 of the Civil Procedure Rules, the plaintiff/applicant seeks the following orders:

**(1) ...spent**

**(2) That this court be pleased to issue orders for stay of execution of the court's judgment pending hearing and determination of Eldoret Court of Appeal Civil Application No. of 2020.**

**(3) ...spent**

**(4) Costs be provided for.**

2. The application is premised on the grounds that the plaintiff has filed a civil application before the Eldoret Court of Appeal; that the application and the intended appeal shall be rendered nugatory and that the defendant is likely to execute the court's judgment any time. Although the prayer in the application has a blank where the number of the Court of Appeal application is supposed to be, the attached copy of the court of appeal application and the submissions filed by the applicant leave this court in no doubt that the application is **Eldoret Court of Appeal Civil Application No 37 of 2020**.

**The Response**

3. The defendant through his advocate filed grounds of opposition dated 9/10/2020 on 13/10/2020 and pray that the application be dismissed with costs on the following grounds:

**(1) The application is frivolous and an abuse of the due process of the law only intended to delay the finalization of this matter.**

**(2) This Hon. Court can only stay the execution of decree and not a judgment under the law where there is an appeal pending.**

**(3) The applicant is guilty of laches which is not explained since 19/11/2019.**

**(4) The respondent who is old and sickly is entitled to his fruits of judgment and shall be greatly prejudiced if the applicant's application is allowed.**

**Submissions**

4. The plaintiff filed his written submissions on 19/10/2020. I have perused through the file record and found no submissions filed on behalf

of the defendant.

### **Determination**

5. The issue that arises in the instant application is whether an order for stay of execution should issue pending the hearing and determination of the proceedings lodged in the Court Of Appeal that is **Eldoret Court of Appeal Civil Application No 37 of 2020**.

6. The conditions for the grant of an order of stay of execution are set out in **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 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 sub rule (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 the instant application this court must therefore consider whether:

**(i) there is an appeal in place;**

**(ii) the application was made without unreasonable delay.**

**(iii) substantial loss may result unless the order is made; and**

**(iii) the Applicant is prepared to offer security.**

8. There is no notice of appeal filed in the record. From the application it is the case that the applicant is attempting to obtain an extension of time from the Court of Appeal to file the notice of appeal. A filed notice of appeal is considered as sufficient evidence of an appeal and forms a strong ground for an application for stay. In this court’s view there being no notice of appeal filed in the record, there is no appeal for the purposes of an application for stay.

9. As to whether the application has been brought without unreasonable delay it is noteworthy that the judgment intended to be appealed against was delivered on the **19<sup>th</sup> November 2019** and that the instant application was filed on the **5<sup>th</sup> October 2020**, that is, after a period of about eleven and half months. I consider that to be inordinate delay for the purposes of a stay application.

10. The conditions for the grant of an order of stay must be established cumulatively and not disjunctively and the applicant having failed to establish at least two of them, this court is not inclined to examine the rest of the issues listed above as it would be a mere academic exercise.

11. Consequently this court finds that the application dated **5/10 /2020** has no merit and the same is hereby dismissed with costs to the defendant/respondent.

**Dated, signed and delivered at Kitale via electronic mail on this 19<sup>th</sup> day of November, 2020.**

**MWANGI NJOROGE**

JUDGE, ELC, KITALE.