



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC CASE NO. 118 OF 2013

(AS CONSOLIDATED WITH KITALE ELC NO. 93 OF 2018)

VINCENT NARISA KROP.....1ST PLAINTIFF

COX PATRICK NARISA.....2ND PLAINTIFF

CHEMUTUKEN PALEE LOUKOUM.....3RD PLAINTIFF

JANE NASIRA CHEPOTUM EDHIO.....4TH PLAINTIFF

VERSUS

MARTIN SEMERO LIMAKOU.....1ST DEFENDANT

KAPCHONGE SHARTI.....2ND DEFENDANT

SAMUEL ALUKULEN.....3RD DEFENDANT

RIONGISIA SAMAKITUK.....4TH DEFENDANT

JACKSON KANAWAI.....5TH DEFENDANT

STEPHEN KAKUKO CHEPLOPEI.....6TH DEFENDANT

KARIOTOR PSIKEN LOSIANGOLE.....7TH DEFENDANT

CHEPARKONG R. ROMONYANG.....8TH DEFENDANT

CHEPTANGAT LEKERN.....9TH DEFENDANT

JOSEPH P. LOPOTIO.....10TH DEFENDANT

POWON LONYNG.....11TH DEFENDANT

CHEPOCHENDO LIMAN.....12TH DEFENDANT

JOACHIM ALEMUSIN.....13TH DEFENDANT

RULING

INTRODUCTION

1. Before this Court are two applications. The plaintiff filed an Application dated **28th August, 2020** seeking for the following orders;

(a) ...Spent

(b) **Eviction order do issue against the defendants herein, their children, servants and or agents allowing the plaintiffs to forcibly evict them to give vacant possession of land parcel registration No. West Pokot/ Chepareria/716.**

(c) **Lister Auctioneers being licensed auctioneers do evict the defendants, their families, agents and or any other person acting on their instruction and who are in trespass and have refused to give vacant possession of land parcel known as West Pokot/ Chepareria/716 to the plaintiffs.**

(d) **That the officer commanding Chepareria Police Station do enforce and provide security to Auctioneers while executing the order.**

(e) **Costs of this application be borne by the defendants.**

2. The Notice of Motion is founded on the grounds set out at the foot of the application and in the supporting affidavit of the 1st plaintiff. In brief the grounds are that this court on **29th May 2020** delivered judgment and restrained the defendants, their families and agents from trespassing and ordered them to give vacant possession of land parcel No. **West Pokot/Chepareria/716** within **90 days** from the date of judgment failure to which they would be forcibly evicted; that the defendants and their families, servants and agents are reluctant to give vacant possession and have continued to remain in the suit property parcel of land No. **West Pokot/ Chepareria/716**; that neither the Auctioneer who is an agent of this court nor the Officer Commanding Station is able to carry out the eviction without an express order of this court and that the ends of justice necessitate that the defendants obey the court order or have it enforced forcefully.

3. The sworn affidavit of **Vincent Krop Narisa** the 1st plaintiff is on the record, having been filed on **31/8/2020**, which reiterates the grounds upon which the application is based.

4. The Defendants' Notice of Motion dated **20th August 2020** seek the following orders:

(a) ...spent

(b) **THAT while pending the inter partes hearing and determination of this application, this court be pleased to stay the enforcement of the judgment and decree of this court issued on the 29/05/2020.**

(c) **THAT while pending the interpartes hearing and determination of this application, this court be pleased to stay the judgment and decree of this court, while pending the hearing and determination of an intended appeal to the court of appeal against the said judgment.**

(d) **That the costs of the application do abide in the results of the intended appeal.**

5. For clarity since there are two applications being dealt in this ruling, the parties shall be simply referred to as "*the plaintiffs*" or "*the defendants*."

6. The Defendants state in their grounds in support of the application that they on the **9/6/2020** applied for proceedings and judgment in order to facilitate the filing of the intended appeal and the plaintiffs were served with copies of the letter requesting for proceedings and judgment; that so far the defendants have not been furnished with the proceedings and the judgment by this court but typing of proceedings is on course; that the defendants have been in occupation and use of the suitland; that if the defendants are evicted from the suitland before the hearing and determination of the intended appeal, then their appeal shall be rendered nugatory and they shall be subjected to substantial loss; that the defendants and their family members and who are in excess of **1000** persons have their homes in the suit land with no alternative land and evicting them while their appeal is pending shall expose them to very serious suffering and make them vulnerable to the Covid-19 pandemic; that the application has been made without unreasonable delay and that the defendants are ready to give such security as the court would order for the due performance of the decree.

7. The application is supported by the sworn affidavit of the 10th Defendant on behalf of the other Defendants where he reiterated the grounds above.

8. The plaintiffs filed a replying affidavit sworn by the 1st plaintiff on **8/9/2020**, opposing the application dated **20th August 2020**.

9. The court directed that the two applications be heard together and that the parties to canvass them by way of written submissions.

10. For the defendants, submissions dated **5/10/2020** were filed by Ms. Kiarie & Co. Advocates. For the plaintiffs, submissions were filed by Ms. Kariuki Mwaniki & Co. Advocates on **15/10/2020**.

11. I have considered both the applications and the submissions on record.

The Defendants' Submissions

12. The defendants have submitted that under **Order 42 Rule 6** of the **Civil Procedure Rules, 2010** this Court has the discretion to consider and grant an application for stay of execution pending hearing and determination of an appeal.

13. The defendants have argued that under **Order 42 Rule 6 (4)** of the **Civil Procedure Rules**, an appeal to the Court of Appeal shall be deemed to have been filed when under the rules of that court a notice has been given. Accordingly, the defendants have argued that they lodged a Notice of Appeal on **9/6/2020** in terms of **Order 42 rule 6(4)** of the **Civil Procedure Rules** and applied for proceedings on even date.

14. The defendants have also argued in their submissions that the instant application was filed without unreasonable delay. They contend that judgment was delivered on **8/6/2020** and they lodged the notice of appeal and the letter requesting for proceedings on **9/6/2020**. They further maintain that the Notice of Appeal was signed by the Deputy Registrar on **18/6/2020** and that the present application was filed on **21/8/2020**.

15. The defendants have also argued that they have demonstrated that unless the stay sought is granted, they and their family members who are in excess of **1000** shall suffer profound loss.

16. The defendants have argued that they have exercised their statutory right of appeal. They have annexed draft grounds of appeal to the supporting affidavit which they claim raises arguable points of law and that it is important that the Court of Appeal delivers itself on the issues raised in the draft memorandum of appeal.

17. It is the defendants' case that enforcing their eviction from the suit land during the pendency of the appeal in the Court of Appeal, will render the success in the said appeal nugatory and that the Applicants would have been subjected to substantial loss. They cited the following cases in support of this claim;

(i) *MUKUMA V ABUOGA (1988) KLR 645;*

(ii) *BUNGOMA ELC LAND CASE NO. 101 OF*

2004 (JAMES KIKECHI V SEPSTIANO WAFULA & ANOTHER).

18. The defendants have also argued that they have indicated through the deponent in **paragraph 26** of the supporting affidavit that they are ready and willing to give reasonable security as the court would order for the due performance of the decree.

19. In summary, it is submitted that the application herein is meritorious and the Applicants have duly and satisfactorily complied with all the necessary conditions that must be met before the orders are granted.

The Plaintiffs' Submissions

20. The plaintiffs' main bone of contention is that the defendants are not entitled to the orders sought as none of the grounds put forth seeking for orders of stay by the defendants entitle them the said orders.

21. It is the plaintiffs' submission that, the defendants had been granted **90** days to seek for alternative land and vacate the Plaintiffs' parcel of land. It is also submitted that it is on record that the Plaintiffs and their families had been forcefully and unlawfully evicted from their parcel of land earlier by the Defendants.

22. It is further submitted that the defendants have not met the conditions that have to be satisfied before the orders sought are granted.

23. The plaintiffs have also taken exception with the issue that the Defendants failed to file and serve a replying affidavit and/or grounds of opposition to the application dated **28/8/2020** and therefore the same is unopposed. The Plaintiffs have also submitted that the application was meant to be heard *ex-parte* for it merely seeks to execute the decree of this court and no other issues have been raised.

24. In a nutshell, the plaintiffs contended that the Defendants have not satisfied the requirements envisaged under **Order 42 rule 6(2)** of the **Civil Procedure Rules 2010**. The following cases were cited by the plaintiffs in support of their submissions:

(i) *ALL PORT REITZ V JAMES KARUNGA KABIA CIVIL APPEAL NO. 63 OF 1997;*

(ii) *ISMAEL KAYUNGI THANDE V HOUSING FINANCE COMPANY LIMITED;*

(iii) *BUNGOMA HC MISC. APPLICATION NO. 42 OF 2011;*

(iii) *MACHIRA T/A MACHIRA & CO.*

ADVOCATES VS EAST AFRICAN STANDARD (NO. 2) (2002) KLR 63.

25. The court was urged to dismiss the application dated **20/8/2020** and allow the application dated **28/8/2020**

DETERMINATION

26. The first application dated **20/8/2020** which is in any event the first in order of filing, would automatically dispose of the second application dated **28/8/2020**. It is therefore appropriate that the application dated **20/8/2020** be examined on its merits first before delving into the second application.

27. The main issue for determination in application dated **20/8/2020** is whether the applicants have met the conditions for grant of the orders of stay sought.

28. The purpose of a stay of execution is to preserve the subject matter of a suit so that the right of appeal can be exercised without any prejudice to the applicant when that appeal would be otherwise rendered nugatory if stay were not ordered. Stay of execution is governed by **Order 42 Rule 6(1)** of the **Civil Procedure Rules, 2010**. The conditions to be met before stay is granted are provided by the **Rule 6(2)** as follows:

“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.”

29. **In the case of Butt v Rent Restriction Tribunal [1982] KLR 417, the Court of Appeal** outlines the principles that ought to guide the court in exercise of its discretion and held that:

“1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is: if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.

3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. The court in exercising its powers under Order XLI rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

30. **Juxtaposing the above principles to the instant application, the defendants are supposed to prove:**

(i) There is an appeal on the record.

(ii) That substantial loss may result unless the order is made.

(ii) That the application has been brought without unreasonable delay and;

(iii) Such security as maybe ordered by the court.

31. Regarding the first among the issues listed above, a notice of appeal is considered as sufficient evidence of an appeal and forms the basis of an application for stay. In this court’s view there is no dispute that a notice of appeal was filed in the record, and that there is therefore a valid appeal for the purposes of the instant application for stay.

32. On the second issue, the defendants have stated that they will suffer substantial loss as they have been living on the land together with their families who are in excess of **1000**. This claim has not been denied. The defendants are seeking not to be evicted. If they are evicted at this point, then the intended appeal would in my view be rendered nugatory. I therefore find that the condition of “substantial loss” has been satisfied.

33. Turning to the issue of possible inordinate delay in the filing of an application for stay of execution, this court notes that judgment was delivered on **8/6/2020** and the defendants lodged the Notice of Appeal and the letter requesting for proceedings on **9/6/2020** as evidenced by the annexures in the supporting affidavit marked “**JPL 1, 2 and 3**”. The defendants thereafter filed the Notice of Motion dated **20/8/2020** on **21/8/2020**. I do not therefore think that there was any inordinate delay in the filing of the present application. The defendants have thus satisfied the third condition for the granting of a stay of execution pending appeal.

34. On the issue of security of costs, the defendants have averred that they are ready to provide security for due performance of the decree. Though the plaintiffs have argued that the defendants have not stated what security would adequately compensate the plaintiffs who have

been denied the right to occupy and enjoy their land, the court finds that the argument is does not warrant an automatic denial of the orders sought since the court is able to impose security in these proceedings if it deems it proper to issue the orders of stay of execution sought.

What Orders should then issue?

35. Consequently I find that the application dated **20/8/2020** has merit. I therefore grant the application dated **20/8/2020** and I dismiss the application dated **28/8/2020**. The costs of both applications shall however be borne by the defendants. In addition I also order that:

(a) The defendants shall file and serve their appeal upon the plaintiffs within 45 days of this order;

(b) The defendants shall settle the costs of the instant suit within 45 days of the taxation of the bill of costs or entry into a consent thereof;

(c) In default of the conditions set out hereinabove in paragraph (a) and (b) either singly or cumulatively, the orders of stay granted herein shall stand automatically vacated.

It is so ordered.

Dated, signed and delivered at Kitale via electronic mail on this 19th day of November, 2020.

MWANGI NJOROGI

JUDGE, ELC, KITALE.