



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

CASE NO. 102 OF 2013

DR ALI LEKOLELA MONTET.....PLAINTIFF

VERSUS

RIGOGO CHONJO FARMERS CO. LTD....DEFENDANT

RULING

1. Judgment was delivered herein on 4th June 2020 as follows:

a. I order the defendant and its agents to vacate the parcel of land known as LR. No. 10984/2 as delineated on land survey plan number 114686 within 60 (sixty) days from the date of delivery of this judgment. In default, the defendant and its agents be evicted from the said property.

b. I award the plaintiff mesne profits of KShs 60,000 per year from 2nd March 2007 until vacant possession is delivered to the plaintiff.

c. A permanent injunction is issued restraining the defendant, its agents and or servants from trespassing, remaining on, interfering and or dealing with L.R. 10984/2 as delineated on land survey plan number 114686 in any manner whatsoever.

d. The plaintiff shall have costs of this suit.

2. Being dissatisfied with the judgment, the defendant filed Notice of Appeal on 9th June 2020 followed by Notice of Motion dated 24th June 2020, which is the subject of this ruling. The defendant seeks stay of execution of the judgment, decree and consequential orders pending hearing and determination of the appeal.

3. The application is supported by an affidavit sworn by Godfrey Magwi, the defendant's treasurer. He deposed that the defendant has already subdivided and settled its members on the disputed land and that they will be rendered homeless if evicted. Further, that the plaintiff may sell the disputed portion of the suit property, thus causing substantial loss to the defendant. Additionally, he cited risk of spread of Covid-19 due to forced eviction. He added that the defendant is ready to provide any security that may be ordered by the court.

4. The plaintiff opposed the application through a replying affidavit in which he deposed that the application is intended to deny him the fruits of the judgment. That upon delivery of the judgment, Godfrey Magwi organized a demonstration against him and his agents and threatened to harm him as a result of which his advocates wrote a protest letter dated 22nd June 2020 in addition to the matter being reported to the police. He added that if stay is granted, the defendant should be ordered to pay the mesne profits.

5. The application was canvassed through written submissions which both sides duly filed and exchanged. I have duly considered the application, the affidavits and the submissions.

6. This court's jurisdiction to grant stay of execution pending appeal is guided by **Order 42 rule 6 (1) and (2) of the Civil Procedure Rules, 2010** 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 sub rule (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.

7. A party seeking stay of execution pending hearing and determination of an appeal must demonstrate that substantial loss will result to him if stay is not granted and that the application has been made without unreasonable delay. As Platt Ag JA (as he then was) stated in **Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] eKLR**, substantial loss is the corner stone of the jurisdiction to grant stay of execution pending appeal. It is virtually impossible for such an application to succeed if an applicant fails to demonstrate that he will suffer substantial loss if stay is not granted.

8. I am persuaded that the applicant has demonstrated that substantial loss will result to it if execution proceeds. I say so because the judgment will, unless stayed, result in eviction of the applicant and its agents. Similarly, there would be nothing to stop the plaintiff from disposing of the suit property or the affected portions thereof. Eviction or loss of the suit property for instance through sale or transfer would constitute substantial loss.

9. The applicant has indicated willingness to provide whatever security the court imposes. While assessing the appropriate security, I take into account that the judgment herein ordered the applicant and its agents to vacate the suit property and also to pay mesne profits of KShs 60,000 per year from 2nd March 2007 until vacant possession is delivered. As at the date of this ruling, the mesne profits due would be at least KShs 780,000. While the plaintiff has urged that the mesne profits be paid to him, I do not think that is the appropriate course of action since the appeal could go either way. Taking into account both the vacant possession and mesne profits aspects of the decree, a sum of KShs 1,000,000 (one million) as security is appropriate. Further, so as to encourage the applicant to be proactive in the prosecution of the appeal, I will limit the life of the stay orders.

10. In the result, I make the following orders:

a. I grant stay of execution of the judgment and decree herein as well as consequential orders pending hearing and determination of the defendant's appeal.

b. Costs of Notice of Motion dated 24th June 2020 are awarded to the plaintiff.

c. The stay is conditional on the defendant depositing in court a sum of KShs 1,000,000 (One million) within 21 (twenty one) days from the date of delivery of this ruling. In default, the stay orders shall automatically lapse and Notice of Motion dated 24th June 2020 shall stand dismissed with costs to the plaintiff.

d. If the defendant complies with the conditions in (c) above, the stay orders will unless otherwise ordered remain in force for only (2) two years from the date of delivery of this ruling.

Dated, signed and delivered at Nakuru this 5th day of November 2020.

D. O. OHUNGO

JUDGE

In the presence of:

Mr Nanda holding brief for Mr Kipkoech for the defendant/applicant

Ms Wangari for the plaintiff/respondent

Court Assistants: B. Jelimo & J. Lotkomoi