



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 853 OF 2012

MICHAEL ONYANGO OTUKO.....PLAINTIFF

VERSUS

JOSEPH MUINAMI KINYANJUI.....1ST DEFENDANT

THE HON. ATTORNEY GENERAL.....2ND DEFENDANT

RULING

[NOTICE OF MOTION DATED 8TH NOVEMBER, 2019]

1. **Michael Onyango Otuko** filed the Motion dated 8th November, 2019, seeking to have a stay of execution of the order of eviction and injunction embodied in the judgment delivered on the 24th October, 2019 pending the hearing of an intended appeal to the Court of Appeal. The Plaintiff also seeks for 1st Defendant to be restrained by an order of injunction from harassing the Plaintiff or interfering with the user of the land parcel known as **Langas Phase II/Sheet 1/Plot No. 331**, pending the hearing and determination of an intended appeal to the Court of Appeal and costs. The application is based on the four grounds marked **(1) to (4)** on its face and supported by the affidavit sworn by Michael Onyango Otuko on the 8th November, 2019. The case of the Plaintiff is that he was aggrieved by the Court's judgment of 24th October, 2019 and that he filed a notice of appeal dated 30th October, 2019 and lodged with the Deputy Registrar on the 6th November, 2019. That the application was filed without delay and he stands to suffer substantial loss unless the prayers sought are granted, for he has been living on the suit land and has substantially had developed it. That the 1st Defendant started harassing him by slashing his plants on the land even before the period of 30 days had lapsed.

2. The application is opposed by the 1st Defendant, through the replying affidavit sworn on the 20th November, 2019 and filed on the 21st November, 2019. It is the 1st Defendant's case that if the application is granted, the Plaintiff will unfairly benefit from it. That if the court were to grant the prayers, the Plaintiff should pay the 1st Defendant Kshs.20,000. That the Plaintiff has not substantiated the loss he is likely to suffer. That the Plaintiff has not tendered proof of the harassment allegations. That the 1st Defendant should not be denied the fruits of the judgment delivered that was in his favour.

3. That pursuant to the directions issued on the 20th May, 2020, the learned Counsel for the Plaintiff and the 1st Defendant in person filed the written submissions dated the 17th August, 2020 and 31st August, 2020 respectively.

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

(a) Whether the Plaintiff has made out a reasonable case for stay of execution and injunction orders pending the hearing and determination of the pending appeal.

(b) Who pays the costs of the application?

5. The Court has carefully considered the grounds on the Motion, the affidavit evidence, written submissions filed, the decided superior Court's decisions cited therein, the record and come to the following conclusions;

(a) That during the hearing of the contempt proceedings vide the Motion dated the 28th November, 2019, the 1st Defendant disclosed that the Plaintiff had been evicted from the suit land pursuant to an eviction order issued in Eldoret CMCC No. 27 of 2011 which had preceded this case. That in view of that fact, the prayers of stay of execution of this Court's judgment if granted, would amount at countering the orders of the said lower court suit orders when this matter is not an appeal of the lower court suit.

(b) That as the Plaintiff herein was a party in Eldoret CMCC No. 27 of 2011 where the eviction order reportedly executed had been

issued in favour of the 1st Defendant herein, and this not being an appeal arising therefrom, the prayer for injunction restraining the 1st Defendant from what is otherwise mandated by the lower Court case order, has no merit.

(c) That while the Plaintiff may have filed the application without undue or inordinate delay, the Court finds he has not tendered particulars of the loss he is likely to suffer if the prayers of stay of the judgment are not granted, to enable the Court determine whether or not the loss would be substantial and likely to make the appeal, if successful, nugatory. That further, the Plaintiff has not tendered or expressed readiness to provide security for the due performance of the judgment.

(d) That as the Plaintiff has failed in his application, he should pay the 1st Defendant costs of the application vide **Section 27 of Civil Procedure Act Chapter 21 of the Laws of Kenya.**

6. That the foregoing shows the Plaintiff's Motion dated the 8th November, 2019 to be without merit and is dismissed with costs to 1st Defendant.

Orders accordingly.

Delivered virtually and dated at Eldoret this 4th day of November, 2020.

S. M. KIBUNJA

JUDGE

In the presence of:

Plaintiff: Absent.

Defendants: 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.