



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 96 OF 2018

BENJAMIN KIMAIYO ITOK.....PLAINTIFF

VERSUS

THE NATIONAL LAND COMMISSION.....1ST DEFENDANT

THE DIRECTOR OF LAND ADMINISTRATION.....2ND DEFENDANT

REBECCA CHELIMO YATOR AND

GILBERT KIPTANUI YATOR

[Being sued as the Estate Administrators/Personal Representatives of the Estate of

JOSEPH KANDA CHEPKWONY (DECEASED) and

on behalf of the other two trustees

T/A MARAKWET MATATU GROUP.....3RD DEFENDANT

RULING

[NOTICE OF MOTION DATED 26TH MAY, 2020]

1. The Plaintiff vide the above Notice of Motion seeks for stay of execution of the order, decree or decision of 19th February, 2020, pending the hearing and determination of the Plaintiff's appeal to the Court of Appeal and costs. The application is based on the twelve (12) grounds on its face and the affidavit sworn by **Benjamin Kimaiyo Itok**, the Plaintiff, on the 26th May, 2020. That it is the Plaintiff's case that upon the ruling being delivered on the 19th February, 2020 in respect of the 3rd Defendant's preliminary objection dated 26th April, 2019 that the suit was statute time barred, he filed a notice of appeal on 2nd March, 2020. That the 3rd Defendant then filed their bill of costs dated the 25th February, 2020 and unless stay of execution order is issued, the 3rd Defendant may proceed to have it taxed, thereby making the Plaintiff suffer substantial and irreparable loss. That the application has been filed without delay and unless granted, the appeal will be rendered nugatory.

2. The application is opposed by the 3rd Defendant through the replying affidavit sworn by **Rebeca Chelimo Yator** on the 24th July, 2020. It is the case of the 3rd Defendant that the application has no merit, is frivolous, an abuse of the court process and does not meet the threshold required for granting of stay order. That her bill of costs has not been taxed, and cannot cause any substantial loss to the Plaintiff. That the application dated 26th May, 2020 was filed on the 24th June, 2020 which clearly shows the Plaintiff "**has no precipitous emergency**". That the suit land belongs to the Government of Kenya and its title was cancelled by the National Land Commission, and therefore the Plaintiff will not suffer any substantial loss.

3. The learned Counsel for the Plaintiff and the 3rd Defendant filed their written submissions dated the 28th August, 2020 and 16th September, 2020 respectively.

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

(a) Whether the Plaintiff has established the threshold set for grant of stay order under Order 42 Rule 6 of the Civil Procedure Rules.

(b) Who pays the costs?

5. The Court has carefully considered the grounds on the application, the affidavit evidence, the written submissions, cited superior courts' decisions thereon, and come to the following conclusions;

(a) That in the court ruling delivered on the 19th February, 2020 on the 3rd Defendant's preliminary objection dated the 26th April 2019, the Court upheld the objection on the ground that the Plaintiff's suit was statute time barred. The suit was therefore struck out with costs. That the record confirms that the Plaintiff was represented by his Counsel, **Mr. Cheptarus** on the date of the delivery of the ruling. That the suit having been struck out, the only thing the Defendants are likely to ask the Plaintiff in this suit are costs after they are agreed or taxed.

(b) That **Order 42 Rule 6 of the Civil Procedure Rules** that provides for stay of execution pending appeals, the applicant is required to show to the satisfaction of the Court that substantial loss would be suffered if the order is not granted. The applicant is also required to show that the application was filed without unreasonable delay and to provide security for the due performance of the decree. That superior courts' decisions including the of **Deposit Protection Fund Vs Rosaline Njeri [2006] eKLR**, have held that the taxation of bill of costs or demand for payment of taxed costs do not amount to substantial loss envisaged in **Order 42 Rule 6 of the Civil Procedure Rules**.

(c) That the application herein though dated the 26th May, 2020 was not filed until the 24th June, 2020. That from the 19th February, 2020 when the ruling subject matter of the appeal was delivered, to 24th June, 2020 when the application was filed a period of over four (4) months had lapsed. That the 3rd Defendant has submitted that there was unreasonable delay on the part of the Plaintiff in filing the application. That in the case of **Mohsen Ali Vs Priscillah Boit & Another [2014] eKLR**, the Court observed that **"Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter."** That indeed, what constitutes unreasonable delay will depend on the circumstances of each case. In the current case, the Plaintiff was represented by Counsel when the ruling of 19th February, 2020 was delivered. That the record confirms that the Plaintiff filed the Notice of Appeal dated 2nd March, 2020 on the same dated but waited until 24th June, 2020 to file the application for stay of execution pending appeal. That delay of over four (4) months has not been explained. The Court can only conclude that the application was activated by the Plaintiff's desire to delay the taxation of the 3rd Defendant's bill of costs filed on 28th February, 2020. The Court finds that the Plaintiff had unreasonably delayed in filing the application.

(d) That in view of the finding in (b) and (c) above, the Court finds that the Plaintiff has failed to establish the threshold set in **Order 42 Rule 6 of Civil Procedure Rules** as he has failed to prove that he would suffer substantial loss if stay of execution order is not granted. That even if the 3rd Defendant's bill of costs is taxed and executed, and thereafter the Plaintiff's succeeds on appeal, an order to reimburse the amount paid would be made against the 3rd Defendant. That there is no evidence presented to suggest that the 3rd Defendant is a person of straw, who is without sufficient resources to reimburse the Plaintiff if need be.

6. That flowing from the foregoing, the Court finds the Plaintiff's Notice of Motion dated the 26th May, 2020 and filed on 24th June, 2020 to be without merit and is dismissed with costs. It is so ordered.

Delivered virtually and dated at Eldoret this 16th day of December, 2020.

S. M. KIBUNJA

JUDGE

In the presence of:

Plaintiff: Absent.

Defendants: Absent.

Counsel: Mr. Kuria for 2nd Defendant.

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.