



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT ELDORET**

**E & L CASE NO. 588”A” OF 2012**

**[Formerly Eldoret Hccc No. 6 of 2010]**

**JOHN BARTINGEI SAMOEL.....PLAINTIFF**

**VERSUS**

**COSMAS MAKHANU WEKESA.....1<sup>ST</sup> DEFENDANT**

**JAMES BARGOKWET KASIKA.....2<sup>ND</sup> DEFENDANT**

**RULING**

**[NOTICE OF MOTION UNDER CERTIFICATE OF URGENCY DATED 2<sup>ND</sup> JUNE, 2020]**

1. The 2<sup>nd</sup> Defendant filed the above Motion, seeking for an order of stay of execution of the judgment dated the 21<sup>st</sup> April, 2020 and delivered on 6<sup>th</sup> May, 2020, pending the filing, hearing and determination of the intended appeal. The application is based on the nine (9) grounds on its face and supported by the affidavit of **James Bargokwet Kasika**, the 2<sup>nd</sup> Defendant, sworn on the 2<sup>nd</sup> June, 2020. It is the 2<sup>nd</sup> Defendant’s case that he was dissatisfied with the judgment delivered on 6<sup>th</sup> May, 2020 and had on 18<sup>th</sup> May, 2020 filed the Notice of Appeal. That unless the stay order sought is granted, he stands to suffer substantial loss and irreparable damage. That he is ready and willing to meet all the conditions the court may impose in granting the stay order. That the application was filed without delay.

2. The application is opposed by the Plaintiff through his replying affidavit sworn on the 22<sup>nd</sup> June, 2020. That it is the Plaintiff’s case that the application is fatally defective for it was filed through M/s Komen Kipchirchir & Company Advocates, who are new advocates without complying with **Order 9 Rule 9 of Civil Procedure Rules** after judgment had already been entered. That the 2<sup>nd</sup> Defendant has not demonstrated the substantial loss that he is likely to suffer, and therefore has not met the threshold in **Order 42 Rule 6 of the Civil Procedure Rules**. That the Plaintiff has been in possession of the suit land since 1980, and the decree has been forwarded to the Land Registry, Eldoret for registration. That the application has been overtaken by events. That should the application be granted, the 2<sup>nd</sup> Defendant should be required to deposit security for costs.

3. That the Court certified the application urgent on the 8<sup>th</sup> June, 2020 and on the 23<sup>rd</sup> July, 2020, gave directions on filing and exchanging written submissions. That by the mention of 8<sup>th</sup> October 2020, only Counsel for the Plaintiff had filed their written submissions dated the 17<sup>th</sup> August, 2020. The learned Counsel has submitted that as this suit had been decided through the judgment delivered on the 6<sup>th</sup> May, 2020, the firm of M/s Komen Kipchirchir & Company Advocates, through whom the 2<sup>nd</sup> Defendant’s Motion was filed, were required to comply with **Order 9 Rule 9 of Civil Procedure Rules** and did not. That the application therefore offends the said provision which the Court in the case of **Stephen Mwangi Kimote Vs Murata Sacco Society [2018] eKLR**, held was not a mere technicality. That the application should therefore be struck out. That further, the 2<sup>nd</sup> Defendant has not met the threshold in **Order 42 Rule 6 of Civil Procedure Rules** as he has not shown that he will suffer substantial loss, unless the order sought is granted and that the application was filed without unreasonable delay. The learned Counsel referred to the case of **Jane Jeptoo Sawe Vs Estate of Sylvester Kimagut Sang represented by Jennifer Chebet Sang Civil Application No. 49 of 2015**, where the Court of Appeal held that the order of stay of execution that the Applicant sought had been overtaken by events and could be granted as it would serve no useful purpose. That the learned Counsel asked the Court to find likewise as the decree had been forwarded to the Lands Office on the 11<sup>th</sup> June, 2020.

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

**(a) Whether the 2<sup>nd</sup> Defendant’s application is properly before the Court.**

**(b) Whether the 2<sup>nd</sup> Defendant has met the threshold set in Order 42 Rule 6 of Civil Procedure Rules.**

**(c) Who pays the costs of the application?**

5. The Court has carefully considered the grounds on the Motion, the affidavit evidence by the 2<sup>nd</sup> Defendant and the Plaintiff, the Plaintiff's Counsel's submissions, the superior court's decisions cited thereon, the record and come to the following findings;

(a) That the judgment dated 21<sup>st</sup> April, 2020 and delivered on the 6<sup>th</sup> May, 2020 shows that the Court found in favour of the Plaintiff in the two consolidated suits in respect of land parcel **Uasin Gishu/Kipkabus Settlement Scheme/378**. That the Court further granted the Plaintiff's costs.

(b) That the record further confirms that the Plaintiff filed their bill of costs dated the 26<sup>th</sup> May, 2020 on the 12<sup>th</sup> June, 2020. That by then, the 2<sup>nd</sup> Defendant had filed the instant Motion dated the 2<sup>nd</sup> June, 2020 on the 5<sup>th</sup> June, 2020. That obviously, the Motion was filed before the execution proceedings in the nature of bill of costs, contrary to the Plaintiff's position that the application was meant to delay the execution.

(c) That the 2<sup>nd</sup> Defendant's Motion dated 2<sup>nd</sup> June, 2020 and filed on 5<sup>th</sup> June, 2020 is clearly indicated to be drawn by and filed through M/s Komen Kipchirchir & Company Advocates. That the Notice of Appeal dated 18<sup>th</sup> May, 2020 and filed on the 19<sup>th</sup> May, 2020 is also drawn and filed through the said firm on behalf of the 2<sup>nd</sup> Defendant. That earlier, the same firm of advocates had drawn and filed the submissions for the 2<sup>nd</sup> Defendant dated the 29<sup>th</sup> January, 2020 and filed on 30<sup>th</sup> January, 2020. The record confirms that M/s Komen Kipchirchir & Company Advocates had indeed filed the Notice of Change of Advocate dated the 30<sup>th</sup> May, 2018 effectively coming on record for the 2<sup>nd</sup> Defendant in place of M/s A. K. Chepkonga & Company Advocates. That the contention by the Plaintiff that the said firm of Advocates have contravened **Order 9 Rule 9 of the Civil Procedure Rules** therefore has no basis. The Counsel was on record for the 2<sup>nd</sup> Defendant and participated in the hearing that culminated in the judgment delivered on the 6<sup>th</sup> May, 2020.

(d) That though the 2<sup>nd</sup> Defendant had indicated at ground (c) on the Motion that he filed the Notice of Appeal on the 8<sup>th</sup> May, 2020, the attached copy of the notice, and the one on record are dated the 18<sup>th</sup> May, 2020 and filed on the 19<sup>th</sup> May, 2020. That as the application subject matter of this ruling is dated 2<sup>nd</sup> June, and filed on the 5<sup>th</sup> June, 2020, it is the finding of the Court that there was no unreasonable delay in filing the Motion.

(e) That the Court's judgment delivered on the 6<sup>th</sup> May, 2020 leaves no doubt that the person in occupation of the suit land was the Plaintiff in whose favour the judgment is. That the Court among others held as follows;

**“In this matter, the Plaintiff has proved on a balance of probabilities that he has been in possession of the suit property for more than 12 years after the 1<sup>st</sup> Defendant was registered as the proprietor of the suit land and that at the time the 1<sup>st</sup> Defendant was selling and transferring the property to the 2<sup>nd</sup> Defendant, his rights had already been extinguished.**

**The upshot of the above is that it is hereby declared that the Defendants' interest in L. R. No. Uasin Gishu/Kipkabus Settlement Scheme/378, measuring 4.3 hectares has been extinguished and that the Plaintiff, John Baringei Samoei be registered as the absolute proprietor of the said parcel...”**

That though the Plaintiff claimed that the 2<sup>nd</sup> Defendant's Motion has been overtaken by events, as he had forwarded the decree to the Land Registry on the 11<sup>th</sup> June 2020, there is no evidence in the form of a certified copy of title deed, register or certificate of official search issued by the Land Registrar confirming that the suit land had since been registered in the name of the Plaintiff. That even if such evidence had been availed and the 2<sup>nd</sup> Defendant presents sufficient evidence to show that he stands to suffer substantial loss, the court would still have jurisdiction to order stay of further execution, or issue an order to maintain the legal status obtaining in respect of the suit land pending, the hearing and determination of the pending appeal.

(f) That the 2<sup>nd</sup> Defendant at ground (e) of the Motion and paragraph 11 of the supporting affidavit alluded to the substantial loss and irreparable damages he stands to suffer if stay order is not granted. That the nature or details of the said **“substantial loss”** and **“irreparable damage”** has not been set out or disclosed and according to the Plaintiff, the 2<sup>nd</sup> Defendant has failed to prove it. That **Order 42 Rule 6 of the Civil Procedure Rules** among others requires an applicant to satisfy the Court that substantial loss would result if the order is not issued. That the order sought being discretionary, the 2<sup>nd</sup> Defendant had the duty to tender prove that indeed, he would suffer substantial loss if the prayer is not granted. The Court finds no such evidence has been tendered, as he is not in possession. That if successful on appeal, the Court would issue the appropriate orders to grant the 2<sup>nd</sup> Defendant possession and title to the suit land.

(g) That as the 2<sup>nd</sup> Defendant has failed in his application the costs of the Motion should abide the outcome of the appeal.

6. That flowing from above, the Court finds the 2<sup>nd</sup> Defendant's Motion dated the 2<sup>nd</sup> June, 2020 to be without merit and is dismissed with costs to abide the outcome of the appeal.

Orders accordingly.

**Delivered virtually and dated at Eldoret this 2<sup>nd</sup> day of December, 2020.**

**S. M. KIBUNJA**

**JUDGE**

**In the presence of:**

Plaintiff: Absent.

Defendants: Absent.

Counsel: Mr. Kandie for the Plaintiff only.

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.