



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC NO. 120 OF 2012

ALEX RIOBA ROBOSO.....PLAINTIFF

VERSUS

TUWAN FARM LIMITED.....1ST DEFENDANT

TOM ALEX RIOBA.....2ND DEFENDANT

RULING

1. The application dated **14/2/2019** and filed in court on **15/2/2019** and has been brought by the plaintiff. It seeks orders that the this court be pleased to grant a stay of execution of its judgment delivered on **29/1/2019** pending hearing of this Application inter-partes and thereafter pending hearing and determination of the intended appeal and that the costs be provided for.

2. An affidavit sworn by the plaintiff on **14/2/2019** is annexed to the notice of motion in support of the grounds.

3. The background of the application is that judgment was delivered in this matter on **29/1/2019** in favour of the defendants and, being dissatisfied with the same, the plaintiff filed a notice of appeal giving his intention of appealing against the said judgment.

4. The 2nd respondent filed grounds of opposition only. In those grounds filed on **27/2/2019** the respondent avers that the applicant has not satisfied the conditions or criteria for granting of an order for stay of execution; that there is no appeal or proper and valid appeal and the application is fatally defective and incompetent; that the applicant's appeal has scant chance of success as the 2nd respondent is the absolute registered proprietor of the suit parcels of land and that the applicant does not merit or deserve the exercise of the honourable court's discretion in his favour.

5. The applicant filed submissions on **13/3/2019**. He cited the cases of **National Bank of Kenya -vs- Alfred Owino Bala 2015 eKLR, Mursal Guleid and 2 Others -vs Daniel Kioko Musam 2016 eKLR, Kenya Akiba Micro Finance -vs- Ezekiel Chebii & 14 Others 2012 eKLR and Kennedy Otieno Odeyo & 12 Others -vs- Ken Gen Ltd 2010 EKLR**.

6. The 2nd defendant filed submissions on **11/3/2019**. He cites the case of **Nancy Kahoya Amadwa -vs- Expert Credit & Another Nairobi HCCC No. 1803/1999**.

7. It can not be ignored that the 2nd respondent has raised what may be deemed as a preliminary objection to the application by arguing that the firm of Walter Wanyonyi & Company Advocates did not comply with the provisions of **Order 9 Rule 9 of the Civil Procedure Rules** before filing the application. The firm representing the plaintiff at the time of the judgment was Millimo Muthomi & Co. Advocates. No consent of the said firm is filed authorizing the firm of Walter Wanyonyi to take up the representation of the plaintiff. The plaintiff though having filed a notice of appeal, did not file a prior notice to act in person. The firm that is to be deemed as still on record for the applicant in this case is the firm of Millimo Muthomi & Co. Advocates. The provisions of **Order 9 rule 9 of the Civil Procedure Rules** provides as follows:

“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court-

(a) upon an application with notice to all the parties; or

(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”

8. I therefore find that this objection is merited. However in the event I am wrong I will also examine the conditions for the grant of stay of

execution have been established in the instant application.

9. I will replicate herein the provisions of **Order 42 rule 6** of the **Civil Procedure Rules** states as follows:

(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.”

10. Is there an appeal on the record? **Order 42 rule 4** of the **Civil Procedure Rules** provides as follows:

“(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.”

11. Therefore, under **Order 42 Rule 4** of the Civil Procedure Rules a filed Notice of Appeal is sufficient. I have noted that there is a filed notice of appeal in place in this matter. It was filed on **4/2/2019**.

12. The 2nd respondent's argument is that the notice of appeal is defective in that it was filed by the applicant in person whereas now he is represented by a firm of advocates who are not properly on record and thus the application should be struck out.

13. I am not in agreement with the 2nd respondent that the lack of propriety of a notice of appeal would render this application a non-starter. All that this court requires to know is that a notice of appeal has been filed by or on behalf of the applicant notifying all and sundry that the applicant intends to appeal against the decision of this court. The rest should be left to the Court of Appeal to determine whether the notice of appeal is proper or not. In this case therefore the filed notice of appeal entitles the applicant to a further consideration of his application on its merits.

14. Next is the question of whether the instant application has been brought timeously. The judgment was delivered on **29/1/2019** the application was lodged on **15th February 2019**, about 15 days later. I find that the application was filed without any undue delay.

15. The third issue is whether the court is satisfied on the basis of the material on the record that substantial loss would result from the execution of the judgment if the orders sought do not issue. On this issue the applicant has averred that he has resided on the suit land for 19 years. He has developed the property. He avers that he has developed a permanent structure in which he resides with his family. He avers that it is only equitable that he be granted a chance to move to the Court of Appeal. The applicant has not yet filed an appeal in the Court of Appeal.

16. However the applicant's averments must be viewed in the light of the fact that the 2nd respondent is the registered proprietor of the suit land and that under the provisions of **Section 24** and **Section 25 of the Land Registration Act** he is entitled to all the rights that are incidental to and appurtenant to that land. Granting the application will only have the consequence of keeping the respondent out of possession of that land for a longer period yet this court has found that he is the rightful owner of the land.

17. I have examined the application by the applicant and found no evidence of extensive developments, leave any of a permanent nature, on the suit land. He has failed to convince this court therefore that he would suffer substantial loss.

18. The conditions for the grant of stay of execution have to all co-exist at the same time for the order of stay to be merited. The application before me has failed the test of proof of substantial loss and is fatally defective on the ground of propriety of legal representation of the applicant.

19. Consequently I find that the application has no merit and it is hereby dismissed with costs.

Dated, signed and delivered at Kitale on this 28th day of March, 2019.

MWANGI NJOROGE

JUDGE

28/03/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Wanyonyi for plaintiff/applicant

Mr. Ingosi for 2nd defendant

Mr. Ingosi holding brief for Kibe for 1st defendant

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

28/03/2019