



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**ELC NO. 104 OF 2008**

**SAMMY POGHISIO LIMANG'ORE.....PLAINTIFF**

**VERSUS**

**KALEMUNYANG MUNYONGOLE ROTWEI**

*(Sued through guardian ad litem*

**JACOB PKIACH KALEMUNYANG).....DEFENDANT**

**R U L I N G**

1. By a Notice of Motion dated **14/1/2019** and filed in court on **16/1/2019** brought under **Section 3A** of the **Civil Procure Act, Order 42 Rule 6 and Order 51 Rule 1** of the **Civil Procedure Rules** the defendant/applicant is seeking the following orders:

(1) .....spent

(2) .....spent

(3) **That the execution of the decree and all consequential orders arising from the judgment delivered by this honourable court in this suit on 5<sup>th</sup> July, 2018 be stayed pending the hearing and determination of the defendant's appeal to the Court of Appeal against the said judgment and the decree arising therefrom.**

(4) **That costs of this application be costs in the appeal.**

2. The application is supported by the sworn affidavit of the defendant dated **14/1/2019**.

3. The grounds upon which the application is made are contained in that affidavit and at the foot of the application. In brief they are that in the judgment delivered in this suit on **5/7/2018**, this court ordered, inter alia, that the defendant be evicted from land parcel No. **West Pokot/Chepkono/1376**(hereinafter referred to as the "suit land"); that the defendant has lodged in this court a notice of appeal as required by rules of the Court of Appeal; that the defendant has also applied to the Deputy Registrar of this court for certified copies of the proceedings, the judgment and the decree for purposes of appeal and is awaiting the same to enable him prepare and file a record of appeal in the Court of Appeal; that the defendant has been called upon to appear before this court on **17/1/2019** to show cause why execution should not be issued; that the defendant has no other home except the suit land where he has been living for more than four (4) decades; that substantial loss shall thus result to the defendant if stay of execution is denied and he is evicted from the suit land and his appeal succeeds and that this application has been made timeously and in good faith.

4. The application is opposed by the plaintiff who filed their replying affidavit on **29/1/2019**. The plaintiff's reply is that the defendant's application lacks merit and the applicant is only out to buy time and deny the plaintiff from enjoying the fruits of his judgment; that the defendant is not being sincere when he states in **paragraph 10** of his supporting affidavit that his application has been made timeously and in good faith; that the judgment in this matter was delivered way back on the **5<sup>th</sup> July, 2018**; that about **7 month** down the line, no application for stay of execution has ever been made until the **14<sup>th</sup> January, 2019** and only after the defendant herein has been served with a notice to show cause why execution should not issue; that application for stay of execution should have been made without any reasonable delay and that an appeal is not an automatic stay of execution; that the defendant herein has not given any reason at all in his supporting affidavit what has occasioned the delay; that the defendant's averments in his supporting affidavit are merely meant to confuse and mislead this honourable court and that the defendant's application is an abuse of the court process meant to delay this matter and should therefore be dismissed with cost.

5. I have examined the judgement dated **5/7/2018**. In that judgement it was observed that in **Appeal No. 152 of 1997** the Minister's decision

was in favour of the plaintiff herein and he was given **15 acres** while the defendant was to have the balance out of the disputed land. This court also observed that the defendant's evidence that his title still reads **14.72 hectares** does not aid his case and also found that though the calling up and cancellation of the old title may not have been done, this does not change the fact that a decision was made by the Minister.

6. Indeed the applicant's evidence only confirms that the applicant still has a huge chunk of land that he is entitled to. This court concluded that the defendant has no right or interest in the land comprised in **parcel no. West Pokot/Chepkono/1376** and that his occupation thereof is illegal and violation of the rights of the plaintiff and ordered his eviction.

7. **Order 42 rule 6** of the **Civil Procedure Rules** provides 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.”*

8. The first stop in an application of this nature is to establish if an appeal has been filed for the purposes of the determination of an application such as the current one, the filing of a notice of appeal suffices to convince this court that there is an appeal in place. I have perused the record and found that while the judgment was read on **5/7/2018** a notice of appeal was filed on **16/7/2018**. I conclude that there is an appeal in place.

9. Secondly this court must establish whether substantial loss may result to the applicant unless the order is made. I have observed that the land was merely subdivided into two portions following the Minister's decision and the applicant took one portion while the respondent took the other.

10. Though it had been averred the applicant has no other home except the suit land and that he has been living there more than **4** decades it is worthy of notice that the Minister's decision on **Appeal Case No. 152 Of 1997** was made long ago and at least not later than the year **2006**.

11. The Minister's decision was implemented thereafter but the applicant continued residing on the land. Nevertheless it is the opinion of this court the application dated **14/1/2019** has not demonstrate to this court there are any permanent development that he has erected on the land that would occasion him substantial material loss if they were removed.

12. Besides it has not been shown that the decision of the minister has ever been challenged under the provisions of **Section 29 of the Land Adjudication Act** it still stands. I find that the applicant has a place to go and that he will not be rendered destitute by eviction from the suit land. For those reasons I find that he will not suffer any substantial loss.

13. Regarding whether the application has been made without unreasonable delay I find that the applicant took **7 months** to file the application considering that he was represented at the reading of the judgment it is not explained why he took this long whereas he must be taken to have known that a judgment creditor is entitled to commence execution proceedings upon delivery of the judgment. The **7 months** delay has not been explained. In my view the same is unreasonable. This application must fail on that ground.

14. For these reasons the application dated **14/1/2019** has no merit and the same is dismissed with costs.

**Dated, signed and delivered at Kitale on this 28<sup>th</sup> day of March, 2019.**

**MWANGI NJOROGE**

**JUDGE**

**28/03/2019**

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Bororio for plaintiff/respondent

Mr. Bisonga for defendant/applicant

**COURT**

Ruling read in open court.

**MWANGI NJOROGE**

**JUDGE**

**28/03/2019**