



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC NO. 118 OF 2015

(AS CONSOLIDATED WITH ELC NO. 87 OF 2015)

SHEILA KABOLE MABWA.....PLAINTIFF

VERSUS

JOSHUA ANG'ELEI.....1<sup>ST</sup> DEFENDANT

ROBERT LOBUR ANG'ELEI.....2<sup>ND</sup> DEFENDANT

GEDION LOITALIM ANG'ELEI.....3<sup>RD</sup> DEFENDANT

ALLAN EGILAE ANG'ELEI.....4<sup>TH</sup> DEFENDANT

FRANCIS KINGARA MBUGUA.....5<sup>TH</sup> DEFENDANT

RULING

1. The application dated **8/2/2019** and filed in court on **11/2/2019** has been filed by the plaintiff. It seeks orders that this court be pleased to grant a stay of execution of all orders arising from the judgment dated **3/12/2018** pending the hearing and determination of an intended appeal.
2. The grounds for the application are set out at the foot thereof namely; that a notice of appeal was filed on **10/12/2018**; certified copies of judgment and proceedings has been sought; that the applicant stands to suffer substantial harm if the respondent proceed to execute the judgement and that the appeal would be rendered nugatory if no stay was granted.
3. Grounds of opposition to the motion were filed by the respondents on **19/2/2019** stating that the plaintiff has not demonstrated that she would suffer substantial loss if the orders are declined; that the plaintiff has not indicated that she is able and willing to provide security for the due performance for such decree as maybe binding on her; that the plaintiff has not demonstrated that she has an arguable appeal and that the application is in bad faith and is calculated to delay the defendants' enjoyment the fruits of their judgment.
4. **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 subrule (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.”*

5. The first step is an examination as to whether the applicant has filed an appeal. For the purposes of **Order 42 Rule 2 and rule 4** I find that there is a notice of appeal filed on **10/12/2018**. This application therefore has surpassed the first hurdle.

6. Next, this court will examine whether the application was brought timeously. Judgment was delivered in this suit on the **3<sup>rd</sup> December 2018**. The application was filed on **11/2/2019**, a period of more than two months.

7. I find that this is unreasonable delay.

8. Thirdly, there is the issue of whether the applicant would suffer substantial loss. This court is not oblivious of its finding in the judgment that all along the applicant was not in possession of the suit premises until the year 2016 during the pendency of this litigation. Her taking of possession of the suit land violated the doctrine of *lis pendens* and though this court must examine the issue of whether she would sustain substantial loss it has already been found that the respondents suffered loss of possession while their case was pending.

9. The kind of loss that she stands to suffer is that by means of the expected execution of the decree of this court the title deed which is in her name stands to be cancelled and the respondents may be registered the proprietors of the land. Notably if the supporting affidavit is all we go by, the applicant does not, despite her taking up of possession of the suit land, reside on the land or conduct any vital business there, or even rely on the same for her livelihood. I therefore find that no evidence of substantial loss has been adduced by the applicant to warrant the orders of stay.

10. Regarding the issue of security I find that the applicant has not offered any security; I do note **Order 42 Rule 6** gives this court the mandate even where no security has been offered by an applicant, to order such security for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

11. The three essential conditions for grant of stay of execution that is: the presence of an appeal, the timeous filing of the application, the proof of substantial loss, must in this court's view exist as a full combination and failure to prove one ground is fatal to the application for stay.

12. I have already found that the applicant has not established before this court that she would suffer substantial loss, and though this court has mandate to impose conditions as to security, it finds it needless to do so in view of that very fact.

13. The application dated **8/2/2019** therefore lacks merit and the same is hereby dismissed with costs.

**Dated, signed and delivered at Kitale on this 11<sup>th</sup> day of March, 2019.**

**MWANGI NJOROGE**

**JUDGE**

**11/03/2019**

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Collins

Mr. Bisonga for defendants

Mr. Kipruto holding brief for Mukabi for the applicants

**COURT**

Ruling read in open court.

**MWANGI NJOROGE**

**JUDGE**

**11/03/2019**