



**REPUBLIC OF KENYA**

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

**LAND CASE NO. 42 OF 2013**

**DAVID WAWERU MBUGUA.....PLAINTIFF**

**VERSUS**

**WILLIAM ADERO GOGA.....1<sup>ST</sup> DEFENDANT**

**SIMON TOO.....2<sup>ND</sup> DEFENDANT**

**GILBERT SAMOEL.....3<sup>RD</sup> DEFENDANT**

**MACREY WACHILONGA.....4<sup>TH</sup> DEFENDANT**

**BENJAMIN TARUS.....5<sup>TH</sup> DEFENDANT**

**THE BOARD OF TRUSTEES**

**A.I.C KENYA REGISTERED.....6<sup>TH</sup> DEFENDANT**

**RULING**

1. The application dated **13/12/2018** and filed in court on the same date has been brought by the plaintiff. He seeks an order that pending the hearing and determination of the intended appeal there be stay of implementation and execution of the judgment of this court delivered on **26<sup>th</sup> November, 2018**. He also prays for costs of this application be provided for.

2. The application is supported by the sworn affidavit of the plaintiff dated **13<sup>th</sup> December, 2018**.

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 the applicant is aggrieved by the judgment of this court delivered on **26<sup>th</sup> November, 2018**; that the applicant has filed a notice of appeal and applied for proceedings thereto; that the applicant shall be able to compile the record of appeal and lodge the appeal as soon as the proceedings are ready at the court registry; that the intended appeal will be rendered nugatory if stay is not granted for reasons inter-alia that the respondents shall execute the impugned judgment and defeat any outcome of the intended appeal and/or the outcome of the appeal in the superior court; that the applicant stands to suffer irreparable if the respondents are allowed to execute the judgment of this court; that it is in the best interest of justice that the substratum of this suit is preserved so that the eventual determination of the superior court is not rendered nugatory. His further ground is that this application has been brought without undue delay, in good faith and in the best interests of justice.

4. The application is opposed by the respondents who filed their replying affidavit on **7/2/2019**. The respondents' reply are that the AIC Church has been in occupation of the suit property since **1991** and has done substantial development thereon and the applicant's application is a ruse to further frustrate, delay and prevent the church from carrying out its purposes; that the applicant has not demonstrated to this honourable court how it will suffer any prejudice or harm once the judgment is executed; that the applicant has interfered with the churches use of the property for many years and the application is only meant to keep the church from enjoying the fruits of the judgment; that the applicant has not demonstrated evidence whether pecuniary or tangible the substantial loss it would suffer; that the suit property is registered in the name of the applicant and the AIC Church Kitale is apprehensive that the applicant may sell, transfer or alienate the suit property which may cause substantial loss and suffering to the decree holders and members who worship at the church and that the right to appeal ought to be balanced with the right of the decree holder to enjoy the fruits of judgment.

5. The plaintiff filed his submissions on **13/2/2019** and the defendants on **22/2/2019**.

6. **Order 42 rule 6(2) of Civil Procedure Rules** provides as follows:-

*“(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”.*

7. The questions that arise from the application are whether there is an appeal, whether the application has been made without delay and whether substantial loss would result if the order of stay sought was not granted.

8. This court is also to examine if there is any security offered, or that may be ordered, for the due performance of the decree obtained against the applicant.

9. I am satisfied that there is a notice of appeal in place, it having been filed on **29<sup>th</sup> November 2018**, three days after the judgment on **26<sup>th</sup> November, 2018**. Under **Order 42 Rule 4** of the **Civil Procedure Rules** the requirement that an appeal must be in place before any stay order is made is hence satisfied.

10. The application was filed on **13/12/2018**, that is, about 18 days from the date of delivery of the judgment in this suit and I find that to be sufficiently expeditious action on the part of the applicant.

11. The applicant alleges in his sworn supporting affidavit that the respondents shall execute the impugned judgment and defeat the outcome of the intended appeal and that he stands to suffer irreparable if execution issues as the appeal will be rendered nugatory.

12. The respondents aver that there is no evidence of probable loss exhibited by the applicant. They maintain that the suit land has been in use as a church for a long time, since 1991. They aver that the application is only meant to keep the church from enjoying the fruits of its judgment. Further, they express their apprehension that the applicant may dispose of the land since the title is in his name.

13. On this issue I find that the applicant is not resident on the land. The land is merely near his property. He has the title to the land. He may be compelled to subdivide his land in order to avail the respondent’s title to their portion if no order of stay is granted.

14. However, there was no sale of land to the respondent by the applicant and I am of the view that the dispute herein revolves around deeper issues, more than just land. I find that the conflict that has dogged the suit land emanates from the conduct of spiritual matters in a church setting. Each party, having their own beliefs, is unable to accept the other’s point of view.

15. To the court the conflict over the suit land is the merely the epicenter of the conflict between the respondents and the applicant. That was evinced by the intransigence of the parties who never reached a compromise even after this matter was adjourned thrice to accord them space to seek an amicable settlement which in this court’s view would have resulted in an ultimate reconciliation on a spiritual level. The measure of value attached to their respective beliefs is known only deep in their hearts and this court is of the view that it does not need to interpret that measure in order to arrive at any conclusion as to whether there will be loss to the applicant or not. What the respondents may lose on the other hand is the opportunity to have the land, whose title they have not had for many a year anyway, registered in their name with promptitude.

16. For that very reason I find that the loss to the applicant may not necessarily be measured in property or monetary terms but he may suffer loss nevertheless. For this reason I find that a stay may be granted subject to the court’s finding on the remaining issue of security.

17. It is true that the issue of security has not been addressed by the applicant in his application in that none has been offered. However in my view **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.

18. Lack of undertaking as to security should not be a barrier to the grant of an order of stay where the court can issue orders as to security. This is a matter in which, the land not having been sold for valuable consideration but donated for spiritual purposes, this court can order appropriate security on non-pecuniary nature.

19. I therefore grant a stay of execution as prayed in **prayer No. 3** of the application dated **13<sup>th</sup> December 2018**.

20. As a condition for the grant of stay above, I therefore order that the applicant must file within **fourteen (14)** days an undertaking, with a clause stipulating that he would be liable to damages to the respondents in default, that he shall not dispose of the suit land to any other party other than the respondents, pending the hearing and determination of the appeal. In addition the applicant shall file his appeal within **fourty five (45) days** hereof failure to which the order of stay shall automatically lapse.

21. The costs of this application shall abide by the outcome of the intended appeal.

**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. Kipruto holding brief for Kibii for plaintiff/applicant

N/A for the respondents

Mr. Bisonga holding brief for Khaminwa for respondents

**COURT**

Ruling read in open court.

**MWANGI NJOROGE**

**JUDGE**

**11/03/2019**