



**REPUBLIC OF KENYA**

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

**LAND CASE NO. 103 OF 2013**

**MICHAEL KIPCHUMBA.....PLAINTIFF**

**VERSUS**

**FESTO ASANGO.....DEFENDANT**

**RULING**

1. This ruling is in respect of the Notice of Motion dated 21/2/2019 by the defendant/applicant seeking for the following orders:-

- a) **The Honourable Court be pleased to grant a stay of execution of the eviction order issued by this Honourable court on 1/2/2019, pending the hearing and determination of this application *inter partes*.**
- b) **The Honourable Court be pleased to grant a stay of execution of the eviction order issued by this Honourable court on 1/2/2019, pending the hearing and determination of the appeal.**
- c) **Costs of the application be awarded to the applicant.**

2. The application is supported by an affidavit sworn by Festo Asango, the applicant herein. He deposes that being dissatisfied by the judgement delivered on 31/1/2019, he has duly lodged a notice of appeal. He has contended that he is yet to file the substantive appeal and that the intended appeal raises pertinent issues as regards the judgement which ought to be ventilated. It is his deposition that the plaintiff/respondent has obtained an eviction order against him and eviction is eminent. According to the applicant, he has been in possession, control and use of the suit property for 7 uninterrupted years and that he has developed the said plots. It is further contended by the applicant that the plot, the subject matter is his only source of livelihood and if eviction is carried out prior to hearing of the appeal, he shall suffer irreparable loss.

3. The application is opposed. The Respondent filed his replying affidavit sworn on 1/3/2019. The plaintiff contends that the application under consideration lacks merit and therefore should not be entertained by this court; that he has suffered greatly as the applicant has invaded his plot and blocked him from utilizing the same; that he has been paying the requisite rates to the County Government of Trans Nzoia and has never benefited from the aforesaid plot due to the applicant's act; that he has perused the court file and as much as the applicant has filed a notice of appeal, no application for proceedings has been made and therefore the applicant is using delaying tactics for purposes of enjoying the use of the plaintiff's plot.

4. On 24/10/2018 the court gave directions that the application be canvassed by way of written submissions. Both parties filed their submissions which I have considered.

**Analysis and determination**

5. The application before me is for stay of execution pending appeal and applications of this nature are governed by the provisions of **Order 42 Rule 6 (2)** which 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.***

6. From the above, it is incumbent upon the applicant to prove that:-

*(a) The application was filed without unreasonable delay.*

*(b) That the applicant stands to suffer substantial loss unless the order of stay of execution is made.*

*(c) That the applicant is ready to offer such security as the court may order for the due performance of the decree or order that may ultimately become binding on him.*

7. On the first issue of delay I wish to state that the judgment was delivered on **31/1/2019** and the current application was filed on **21/2/2019** which indicates that the application was filed without unreasonable delay.

8. I am also satisfied that there is a notice of appeal in place, it having been on **6/2/2019** five days after the judgment was delivered.

9. On the issue of security for the performance of the decree, I have noted that none has been offered by the applicant but that the subject matter is land and the issue of security is not as significant in matters involving a pecuniary decree.

10. The second issue is that of substantial loss which is the foundation of applications for stay of execution pending appeal as was held in the case of *Kenya Shell Limited vs Benjamin Karuga Kigibu & Ruta Wairimu Karuga (1982-1988) 1 KAR 1018*.

*“It is usually a good rule to see if order 41 Rule 4 of the Civil Procedure Rules can be substantiated if there is no evidence of substantial loss for the applicant it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdiction for granting stay.”*

11. The applicant stated that he will be occasioned injustice if the orders sought are not granted as the suit land is his source of livelihood having put up semi permanent business premises let out to third parties.

12. The requirement of proof of substantial loss does not only mean monetary terms but also the inconvenience of having to be evicted and later having to evict the plaintiff in case the applicant is successful.

13. Nevertheless it must be noted that the fate of the appeal can not be known at this stage, and that as long as the decree has not been set aside the decree holder is entitled to execution of his judgment except where the court otherwise for sufficient reason orders.

14. In any case, there was no evidential documentation by the Applicant on the court record as regards the alleged extent of developments put up by the applicant on the suit land; and in any event, they are not permanent.

15. In this case I find that no substantial loss has been demonstrated. I do think that the implementation of the decree herein will not occasion the applicant substantial loss.

16. The upshot of this is that the application dated **21/2/2019** has no merit and it is hereby dismissed with costs to the respondent.

**Dated, signed and delivered at Kitale on this 8<sup>th</sup> day of April, 2019.**

**MWANGI NJOROGE**

**JUDGE**

**8/4/2019**

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Karani for defendant/applicant

Plaintiff/respondent in person present

**COURT**

Ruling read in open court.

**MWANGI NJOROGE**

**JUDGE**

8/04/2019