



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E & L CASE NO. 421 OF 2013

SAULO KANDIE.....PLAINTIFF

VERSUS

ROBERT KIPCHUMBA CHERUIYOT (*Sued as the Administrator and Legal Representative of the Estate of the late JAMES KWAMBAI CHERUIYOT*)DEFENDANT

RULING

The application before court is dated 14th November, 2018 wherein the applicant seeks orders that pending the hearing and the determination of intended appeal, there be an order staying and or suspending the execution of the decree in Eldoret CMCC No. 329 of 1998. In the alternative, an order for maintenance of status quo on land reference ***Sergoit/Elgeyo Border Block 1(Beliomo) 136*** be issued.

The application is supported by the affidavit of Saulo Kandie and grounds whose import is that the suit herein was challenging the enforceability of the decree in Eldoret CMCC No. 139 of 1998 and that the suit has been struck out by the honourable court. The plaintiff is desirous of pursuing an appeal against the decision of the court and therefore has filed a notice of appeal.

The plaintiff was ordered to file an application seeking stay of execution of the decree in Eldoret CMCC No. 139 of 1998 within 7 days. The plaintiff could not file the application within 7 days as the notice of appeal had not been signed and availed to him. The plaintiff has hitherto enjoyed stay of execution of the decree. There is need to preserve the prevailing status on possession of the land in order not to render the appeal nugatory. The defendant has already sought enforcement of the decree in the subordinate court.

The plaintiff's family resides on the suit land by dint of a decree he had obtained under the Co-operative's Act. The plaintiff stands to suffer irreparable harm if stay of execution and or an order of maintenance of status quo is not issued. The overriding objective of the court is to do justice to the parties. The plaintiff is ready to provide security as a condition of stay of execution. In the event, the decree in the subordinate is enforced the appeal will be rendered useless and or academic.

Robert Kipchumba Cheruiyot states in the replying affidavit that the application is devoid of merit, an abuse of the court process and the same ought to be dismissed with costs. That the plaintiff was indeed granted 7 days to move the court formally seeking such orders of stay. That the plaintiff's advocate indicated to court that the said 7 days he was granted were sufficient to file the said application seeking stay of execution.

That he is informed by his advocate that the stay orders as sought cannot be sustained as such orders can only be issued by the trial court in Eldoret CMCC No. 329 of 1998, or the appellate court either in Eldoret High Court in HCCA No. 3 of 2002 or the Court of Appeal where the appeal is pending and that the plaintiff has not met the criteria to warrant the grant of the orders of stay as sought:

No substantial loss has been demonstrated to be suffered by the plaintiff as by judgment of court in Eldoret High Court in HCCA No. 3 of 2002, the defendant herein retained his interest in the suit parcel thus he is currently the Proprietor of the same.

The application has been filed with unreasonable delay considering the plaintiff was granted leave to file the said application within 7 days. No sufficient reason has been advanced by the plaintiff to explain the delay and no security for costs has been deposited.

Furthermore, he is informed by his advocate that in order to prefer an application for stay such as this one, filing a notice of appeal is not a criterion to warrant stay of execution as sought.

That he is also informed by his advocate that to warrant orders of status quo as sought, the court's discretion is invoked. The plaintiff has failed to warrant the orders of status quo as sought as:

No prima facie case has been demonstrated to warrant the grant of such orders;

No irreparable harm has been demonstrated that shall be occasioned on the part of the plaintiff. If anything, he stands to suffer irreparable loss having won his case granting him Property rights in the suit Property. The same would amount to depriving him of his Property in violation of the Constitution and which loss cannot be compensated by way of damages;

That should the orders sought be granted, he stands to suffer great prejudice as he is entitled to the fruits of the judgment. As proprietor of the suit parcel, he is entitled to exclusive, peaceful enjoyment and ownership of the Suit Property and allowing the said application will be utter violation of his constitutional right.

That he is also advised by his advocate, which advise he verily believe to be true that the plaintiff's application is bad in law as it has been brought under the non-existent provisions of the law and thus the jurisdiction of this court hasn't been invoked. The plaintiff is hereby put on notice that the defendant has raised a preliminary objection.

That he is informed that he who seeks justice in the well of equity has to do so with clean hands. The lack of good faith on the part of the plaintiff doesn't warrant this court's unfettered discretion to grant the orders as sought. That he reiterates that this application is devoid of merit and not in the interest of justice and thus ought to be dismissed with costs to the defendant.

Mr. Momanyi, learned counsel for the applicant submits that the application is under section 13 of the Environment and Land Court Act and Order 42 of the Civil Procedure Rules. The decision was made on 24.10.2018. the notice of appeal was filed on 30.10.2018. This was 20 days after the decision. The application for stay was filed within reasonable time and that there was no unreasonable delay. The plaintiff is likely to suffer substantial loss as he resides on the land with family. The family will be evicted and the property demolished.

On security, the plaintiff argues that he is ready to give security of Kshs.30,000.

Mr. Tororei learned counsel for the respondent argues that the court found the suit without merit and dismissed it with costs. The order issued by court was a negative order and therefore cannot be stayed.

I have considered the application, replying affidavit and rival submissions and do find that this court having struck out the suit herein, there is nothing to stay as there is nothing to execute. There are no proceedings before this court to be stayed. There is no appeal from CMCC No. 329 of 1998 and therefore the court cannot order stay of execution of the said decision.

I do find the application without merit as there is nothing to stay. The application is dismissed with costs.

Dated and delivered at Eldoret this 31st day of May, 2019.

A. OMBWAYO

JUDGE