



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KITALE**

**ELC NO. 78 OF 2008**

**LILIAN JELIMO.....PLAINTIFF**

**VERSUS**

**ENOCK KIPKOECH KEMBOI.....1<sup>ST</sup> DEFENDANT**

**JOYCE CHEPCHIRCHIR TANGUI.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The Notice of Motion dated **7<sup>th</sup> March, 2019** and filed in court on the same date has been brought by the plaintiff/applicant. It seeks an order that there be a stay of execution of judgment and decree pending hearing and determination of the intended appeal. It also prays for costs of this application do abide the outcome of the appeal.
2. The Notice of Motion is founded on the grounds set out at the foot of the application and in the supporting affidavit of the applicant. These grounds are that the applicant is aggrieved and dissatisfied with the judgment and decree herein and has appealed against and that the appeal has high chances of success; that the applicant shall suffer irreparable loss and damage unless prayers sought herein are granted; that the defendant/respondent shall not in any way suffer prejudice if the orders sought are granted; that the application has been made without undue delay and that it is just and fair that the application be allowed and the applicant accorded an opportunity of being heard on her appeal.
3. In her further dated 28/3/2019 the applicant has indicated that has offered security for due performance of decree herein in the form of title No. **West Pokot/Chepkemo/885** in the opinion of a valuer estimated as **Kshs.12,500,000/=**.
4. She also avers that the judgment can be execution without her participation and she would suffer loss if it is not stayed because upon cancellation of titles steps may be taken to alter the registration status of the land to her detriment.
5. The replying affidavit to the application was filed on **20/3/2019** by one **Joyce Chepchirchir Tangut** who avers that filing of an appeal does not entitle an applicant to an automatic stay of execution; that conditions set out in **Order 41 Rule 6** have not been demonstrated to exist; that no potential loss or damage has been demonstrated as being likely to be occasioned to the applicant and that there is no threat of execution by the respondents since there is no decree in the court file.
6. The plaintiff filed written submissions on 5/4/2019 and the defendants on 9/4/2019.
7. In her submissions the application relies on **Halan & Another -vs- Thornton and Turpin [1963] Ltd [1990] KLR** for the proposition that in an application of execution an applicant must apply without delay, establish sufficient cause substantial loss and furnish security. She also relies on **James Thomas Andafu -vs- Joseph Makhokha Akhulunya [2018] eKLR** and **Muga -vs- Kunga [1998] KLR**.

**8. 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”.***

9. 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.

10. As to whether there is an appeal I note that a notice of appeal has been filed in the record and a copy thereof dated 31/1/2019 has been attached to the supporting affidavit for the purposes of **Order 6 rule 6(4)** an appeal exist.

11. As to whether the application has been filed without unreasonable delay the judgment was delivered on 29/1/2019 while the application was filed on 7/3/2019; that is a period of two month and seven days. I do not consider this to amount to unreasonable delay.

12. The final condition to consider is whether the execution will occasion the applicant substantial loss. The land is currently in the name of the applicant. She regards it as her property. The respondents had been in occupation of the land until the suit was filed in the year 2008. The suit took ten years to conclude and all this time the respondents were still in occupation. There is a genuine risk that the execution of the judgment may lead to cancellation of titles and the ultimate registration of portion of the land in the names of the respondents.

13. The plaintiff has not demonstrated that there is likelihood that the respondents would dispose of such portions so registered in their names before the appeal has been concluded. On their part the respondents have averred that the process of execution has not even began. However I find that it is necessary in the circumstances of this case to have the subject matter land preserved pending the appeal. The applicant has offered title No. **West Pokot/Chepkemo/885** as security. It is clear that she is a woman of means. In my view that security is sufficient.

14. Consequently I find that the application dated 7/3/2019 has merit and I grant prayer No. (3) and (4) thereof. In addition I hereby order that a restriction shall be registered by the Land Registrar, prohibiting any dealing with title No. **West Pokot/Chepkemo/885** pending the hearing and determination of the intended appeal. The appeal shall be filed and served within **21 days** hereof in default of which the orders of stay herein shall stand automatically vacated.

**Dated, signed and delivered at Kitale on this 13<sup>th</sup> day of May, 2019.**

**MWANGI NJOROGE**

**JUDGE**

**13/5/2019**

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Ms. Munialo for Respondent

Ms. Awinja for the Plaintiff

**COURT**

Ruling read in open court.

**MWANGI NJOROGE**

**JUDGE**

**13/5/2019**