



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC NO. 662 OF 2012

SOLOMON ODIRA OKELLO.....1ST PLAINTIFF/RESPONDENT

FRIDAH BILHA MULWALE SHIROYA.....2ND DEFENDANT/RESPONDENT

VERSUS

ESTHER LABOSO.....DEFENDANT/APPLICANT

RULING

1. This ruling is in respect of an application brought by way of notice of Motion dated 27th March 2019 by the defendant/applicant seeking for the following orders:

a) Spent.

b) That there be interim orders of stay of execution of the judgment and decree of this Honourable court issued on 24th January 2019 and all consequential orders pending the hearing and determination of this application inter partes.

c) That there be interim orders of stay of execution of the judgment and decree of this Honourable court issued on 24th January 2019 and all consequential orders pending the hearing and determination of the intended appeal to the Court of Appeal.

d) That the costs of this application be in the cause.

2. Mr. Magut Counsel for the applicant relied on the grounds on the face of the application and the supporting affidavit of the applicant filed therein. It was Counsel's submission that the applicant has filed a notice of appeal and paid a deposit for the typing of the proceedings.

3. Counsel for further submitted that under Order 42 Rule 6 of the Civil Procedure Rules an applicant must prove that he or she has an arguable appeal and as such the applicant has annexed a memorandum of Appeal with 11 grounds.

4. That the applicant has been in occupation of the suit land and if she is evicted will suffer irreparable loss and further that the appeal will be rendered nugatory.

5. Mr. Kanyangi Counsel for the plaintiff/respondents opposed the application and relied on the grounds of objection dated 9th April 2019 together with the respondent's affidavit. That the court gave an order dated 23rd March 2019 directing that the status quo be maintained but the applicant took advantage of the order to plough the suit land which amounts to contempt and impunity.

6. That the applicant does not deserve the orders sought as he who comes to equity must come with clean hands. It was Counsel's further submission that the applicant cannot have an arguable appeal against the 2nd plaintiff as the 1st plaintiff/respondent paid off the SFT loan and took occupation of the suit land but later sold it to the 2nd plaintiff who paid for the land in full and took occupation. Therefore the intended appeal cannot have an overwhelming chances of success against the 2nd plaintiff.

7. Further that the applicant cannot suffer any irreparable harm if she vacates the suit land as she came to the land after 2008 post-election violence whereby she was assisted by a local Chief to take possession of the land.

8. Counsel submitted that the applicant should go back to where she was residing before 2008 and the fact that she has planted after the order of the status quo means that she is not willing to abide by the conditions set by the court as she depones.

9. Mr. Kanyangi for the respondent urged the court to disallow the application as the respondent will suffer prejudice if the same is allowed

and that the applicant has not met the threshold for grant of orders of stay pending appeal as per order 42 Rule 6.

Analysis and determination

10. The threshold for grant of orders in an application for stay of execution pending appeal are as provided for under Order 42 Rule 6 of the Civil Procedure Rules which states as follows:

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.

11. The applicant needs to satisfy the court on the following conditions before they can be granted the stay orders:

a) Substantial loss may result to the applicant unless the order is made,

b) The application has been made without unreasonable delay, and

c) Such security as the court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.

12. In the case of Antoine Ndiaye vs. African Virtual University [2015] eKLR, High Court at Nairobi, Civil Suit No. 422 of 2006, Gikonyo J. opined as follows;

13. “The relief of stay of execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules. The relief is discretionary although, as it has been said often, the discretion must be exercised judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown by the Applicant.”

14. The application for stay of execution must be filed without delay. In this case Judgment was delivered on 24th January 2019 whereby the defendant was given 60 days to vacate the suit property failure of which eviction order to issue.

The application was filed on 28th March 2019 two days to the expiry of the 60 days. Does this qualify as being filed in a timely fashion? My answer would be in the negative. If the applicant was dissatisfied with the judgment then they should have filed the application immediately.

15. The most important ingredient that the applicant must establish is that he or she will suffer substantial loss if the order of stay is not granted and that the essence of filing the appeal will be defeated and rendered nugatory. The question in the current application is whether the applicant has demonstrated the substantial loss that she would suffer. The court had granted temporary orders of status quo which were not obeyed by the applicant. A party who comes to equity must come with clean hands in order to benefit from equity.

16. In the case **CHARLES WAHOME GETHI VS. ANGELA WAIRIMU GETHI (Court of Appeal Civil Application No. NAI 302 of 2007 UR 205/2007), the Court of Appeal held that –**

17 “... it is not enough for the applicants to say that they live or reside on the suit land and that they will suffer substantial loss. The Applicants must go further and show the substantial loss that the applicants stand to suffer if the Respondent execute the decree in this suit against them.”

18. The applicant herein claims to be residing on the suit land but that is the reason the plaintiff sued her to vacate the land that she is occupying illegally. As was held in the above case of Charles Gethi it is not enough for the applicant to claim that she will suffer substantial loss without on account of being in occupation without satisfying the court of the loss. Ordinarily the court would not exercise its discretion in favour of such an applicant. Having said that I do not find this case as fit for grant of stay of execution

19. Further on the limb of substantial loss it was held in the case of **Machira t/a Machira & Co. Advocates vs. East African Standard (No 2) (2002) KLR 63**, as follows:

“In this kind of applications for stay, it is not enough for the applicant to merely state that substantial loss will result. He must prove specific details and particulars... where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay.”.

20. On the issue of security for the due performance of the decree or order as may ultimately be binding on the applicant is a requirement which the court can consider and grant if satisfied. In this particular case the applicant had been granted temporary orders of status quo but did not obey the court order therefore the court is not sure whether the applicant will abide with the conditions set by the court which are discretionary.

21. I would therefore order that in the interest of justice the substratum of the case be preserved by barring the plaintiff from disposing of the

suit land pending the hearing and determination of the case by depositing the title deed to the suit land in court but the plaintiff can go ahead with the execution of the decree. This is because the applicant has not satisfied the court for the grant of orders of stay.

22. Costs of the application in the cause.

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

M.A. ODENY

JUDGE

RULING READ IN OPEN COURT in the present of Mr.Kiboi holding brief for Mr.Kangani for Respondent and in the absence of Mr.Magut for Applicant. Applicant present in court.

Mr.Mwelem – Court Assistant