



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

CASE No. 174 OF 2015

STEPHEN KIBOWEN.....PLAINTIFF

VERSUS

RAYMOND RUTO.....1ST DEFENDANT

KIPKORIR RUTO.....2ND DEFENDANT

KIPROP RUTO.....3RD DEFENDANT

KIPCHUMBA RUTO.....4TH DEFENDANT

CHEPCHIRCHIR RUTO.....5TH DEFENDANT

CHEPKOECH RUTO.....6TH DEFENDANT

RULING

1. The defendants herein had through Notice of Motion dated 21st March 2017 sought an order that this matter be transferred to Eldoret Environment and Land Court for hearing and final determination and be consolidated with **Eldoret Environment and Land Case No. 119 of 2017, Jeruto Tapkili Tengekyon and Samwel Kipruto Chepkeitany v Agricultural Finance Corporation, Kolato Auctioneers and Stephen Kibowen**. The application was heard on the merits and dismissed with costs to the plaintiff through a ruling delivered on 15th February 2018.

2. Aggrieved by the said ruling, the defendants filed Notice of Appeal on 22nd February 2018 followed by Notice of Motion dated 5th March 2018 in which they seek an order that proceedings herein be stayed pending hearing and determination of the appeal. The application is supported by an affidavit sworn by the 1st defendant. He deposed that the defendants will suffer irreparably and the appeal will be rendered nugatory if stay is not granted.

3. The plaintiff responded to the application through a replying affidavit sworn on 19th March 2018. He deposed that the application is aimed at scuttling the hearing of the suit and delaying the determination of the suit and that it has not been established that substantial loss will result if stay is not granted.

4. The application was canvassed by way of written submissions. Both sides filed and exchanged written submissions. I have anxiously considered the application, the affidavits filed and the submissions.

5. The application is brought under **Order 42 rule 6 (1)** of the **Civil Procedure Rules, 2010**. **Order 42 rule 6 (1) and (2)** provide:

6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(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. Although the defendants state that they seek stay of proceedings, what is before the court is akin in all respects to an application for stay of execution pending appeal. The defendants must therefore satisfy the court that substantial loss will result to them if stay is not granted and that the application has been made without unreasonable delay. In **Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] eKLR**, Platt Ag JA (as he then was) stated:

It is usually a good rule to see if order XLI rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to 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 corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money.

7. I am satisfied that the defendants have filed Notice of Appeal and that the application was brought timeously. The only hurdle that they now need to surmount is that of substantial loss. Unless they demonstrate substantial loss, I do not see how their proposed appeal would be rendered nugatory. In that regard, they have argued that they cannot offer a defence in this suit in the absence of their father who is one of the plaintiffs in **Eldoret Environment and Land Case No. 119 of 2017** and that an eviction during pendency of **Eldoret Environment and Land Case No. 119 of 2017** would render the said case an academic exercise. They also cite possibility of conflicting decisions as another reason for seeking stay.

8. It must be remembered that any judgment in this case will be the end product of a hearing in which the defendants will have a chance to challenge the plaintiff's case and to put forth their own case including calling witnesses of their choice. Any party who will not be satisfied with the outcome will have a right of appeal. In those circumstances, I do not see how the defendants will suffer any substantial loss by the mere fact that this suit proceeds.

9. I observed as follows in the ruling that is the subject of the proposed appeal:

I also note that the Eldoret suit was filed in the year 2017 while this suit has been pending in Nakuru since the year 2015. It therefore takes precedence. As regards the fears about conflicting decisions, the parties are at liberty to keep the courts abreast of orders and decisions that may be made in the two different stations.

10. In view of the foregoing discussion, I am not persuaded that the defendants will suffer substantial loss if stay is not granted. If anything, staying proceedings herein indefinitely will likely cause injustice to the plaintiff who has been waiting to be heard since the year 2015. I find no merit in Notice of Motion dated 5th March 2018. It is dismissed with costs to the plaintiff.

11. Ruling herein was to be delivered on 3rd April 2019 but was delayed since I proceeded on medical leave. The delay is regretted.

Dated, signed and delivered in open court at Nakuru this 29th day of July 2019.

D. O. OHUNGO

JUDGE

In the presence of:

Mr Mwalo holding brief for Mr Kibii for the defendants/applicants

Mr Konosi for the plaintiff/respondent

Court Assistants: Beatrice & Lotkomo