



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

ELC NO.198 OF 2018

JAMES NJOROGE GITAU.....PLAINTIFF

VERSUS

LUCY CHEPKURUIDEFENDANT

RULING

(application for stay of execution pending appeal; principles to be applied; applicant having lost suit for title to land; applicant having been in possession of the land prior to the judgment; stay granted on conditions).

1. The application before me is that dated 5 March 2019 filed by the unsuccessful defendant. It seeks orders of stay of execution of the judgment pending appeal to the Court of Appeal. The application is opposed.

2. To put matters into perspective, the respondent filed this suit on 13 June 2008, claiming that he is the rightful owner of the land parcel Dundori/Muguathi Block 2/ 7 (Koelel) (hereinafter referred to as “the suit land”). The title to the said land was issued to one Micah Kipchumba Chumo whose estate is represented by the applicant. After hearing the case, it was my finding that the rightful proprietor of the suit land was the respondent and I made orders that the title held by the applicant be cancelled. I further ordered the applicant to vacate the suit land and gave her 6 months to so vacate. It is this judgment that the applicant now wants stayed pending appeal.

3. In her supporting affidavit, the applicant has inter alia deposed that there is a risk that the respondent may deal with the title which may render the appeal nugatory.

4. In the replying affidavit, the respondent has deposed inter alia that as a successful litigant, he is entitled to the fruits of his judgment. He has deposed that the applicant has been operating in bad faith by subdividing the land during the pendency of the suit, and if stay is granted, she may continue dealing with the suit land. He is further of the opinion that the applicant has not demonstrated any substantive loss that she may suffer if the decree is executed. He has mentioned that should the applicant be evicted from the suit land and she is found to be the rightful owner she can be restored back into possession.

5. In response, the applicant has deposed through a further affidavit that she does not intend to deal with the land pending the appeal. She has averred that this is the property she has called home for over 40 years and if evicted, this will cause her substantial loss.

6. I invited both counsel for the applicant and for the respondent to file written submissions, which they both did, and I have considered these before arriving at my decision.

7. What I have before me is an application for stay pending appeal and applications of this nature are covered under Order 42 Rule 6 (2) which provides as follows :-

No order for stay of execution shall be made under subrule (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 orders as may ultimately be binding on him has been given by the applicant.*

8. It will noted from the above that there are three elements that the court needs to look at when dealing with an application for stay pending appeal. First, the court needs to be persuaded that the application has been made without unreasonable delay, secondly, the applicant needs to demonstrate that she stands to suffer substantial loss if the application is not allowed, and finally, there needs to be provided security for the due performance of the decree.

9. I do not think that the applicant can be said to be guilty of unreasonable delay, and I will not dwell much on that point, although I do note that in his submissions, counsel for the respondent questioned why the application has been filed 4 months after delivery of the judgment. There is certainly some delay, but I do not think that it can be quantified to be unreasonable delay in the circumstances, given that this court gave the applicant 6 months to vacate the suit land.

10. On the issue of substantial loss, I do note that the applicant has been resident on the suit land and that clearly emerged during the proceedings of the case. She appears to have lived on this land for a considerable amount of time and that is indeed why I gave her 6 months to vacate. I am persuaded that if she has to leave, and find alternative accommodation, she stands to suffer substantial loss. This is not to mean that I do not appreciate the position of the respondent that a successful litigant needs to be allowed to enjoy the fruits of his judgment. There thus needs to be a balance between the right of the unsuccessful litigant to be allowed to have the property in issue preserved, so that she does not find it lost in the event that she succeeds on appeal, and also the right of the successful litigant to enjoy the property since the same has been decreed to him. Balancing the two interests, I am persuaded that the deposit of a sum of money, as security, will compensate the respondent for the duration of time that he will be unable to enjoy the property, while the appeal is ongoing. Doing the best that I can, taking into consideration the size of the land, the user of the land, the average duration of time of hearing appeals, and all other circumstances, my view of the matter is that a deposit of security in the sum of Kshs. 360,000/= would adequately compensate the respondent in the event that he ends up being successful on appeal. I direct that this money be deposited in a joint interest earning account within 30 days from today. I also direct that the taxed costs be deposited in the same joint interest earning account within 30 days of taxation. In the event that the applicant fails in her appeal, the money so deposited to be released to the respondent.

11. Since the applicant is the one in possession, I further make orders that she cannot sell, lease, charge, or in any other way, deal with the property in issue, or cede possession of it to another person. She should also not make any development of any structure, whether permanent or temporary, and she should not undertake any agricultural activities of a permanent nature, but is at liberty to plant seasonal crops and keep livestock.

12. The respondent is also barred from selling, charging, or in any other way dealing with the title to the suit land.

13. The costs of this application will abide the costs of the appeal.

14. Orders accordingly.

Dated, signed and delivered in open court at Nakuru this 24th day of July 2019.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of : -

Mr. Ooga holding brief for Mr. Githui for the applicant.

Ms. Kinuthia present for the respondent.

Court Assistants: Nelima Janepher/Patrick Kemboi.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU