



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAKURU**

**ELC (PETITION) No. 360 OF 2017**

**COVE INVESTMENTS LIMITED.....PETITIONER**

**VERSUS**

**JOHANA KIPROTICH RONO &**

**JOSEPH RONO LANGAT AS THE LEGAL**

**REPRESENTATIVES OF THE ESTATE OF**

**MATHIAS KIMNYOLE LANGAT.....1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. This ruling is in respect of two applications: 1<sup>st</sup> respondent's Notice of Motion dated 31<sup>st</sup> July 2018 and petitioner's Notice of Motion dated 15<sup>th</sup> October 2018. The former application seeks stay of execution of this court's ruling delivered on 27<sup>th</sup> July 2018 and the resultant orders arising therefrom pending hearing and determination of an appeal to the Court of Appeal while the latter application seeks leave to amend the petition herein to incorporate a prayer for declaration of trust and compensation for loss and damage suffered by the petitioner.

2. Notice of Motion dated 31<sup>st</sup> July 2018 is supported by an affidavit sworn by Johana Kiprotich Rono and is opposed by an affidavit sworn by Kenneth Kiplagat, the Company secretary of the petitioner. The 1<sup>st</sup> respondent contend that they will suffer substantial loss in that structures and grass on the suit land will be destroyed if stay is not granted. The petitioner on the other hand maintains that the application is overtaken by events since the orders of 27<sup>th</sup> July 2018 have since been enforced and further that the orders were made to stop the 1<sup>st</sup> respondent from stealing a match on the petitioner.

3. Notice of Motion dated 15<sup>th</sup> October 2018 is supported by an affidavit sworn by Kenneth Kiplagat, the Company secretary of the petitioner and is opposed by an affidavit sworn by Johana Kiprotich Rono. The petitioner contends that the amendments sought are necessary for determination of the real dispute between the parties while the 1<sup>st</sup> respondent argues that the amendment will convert the petition to a private suit and further that the prayer sought to be introduced is similar to prayers in another suit being Nakuru HCC No. 158 'A' of 2005.

4. I have considered both applications. Parties chose to rely entirely on the material on record and urged the court to make a ruling on that basis.

5. I will start with Notice of Motion dated 31<sup>st</sup> July 2018 which seeks stay of execution pending appeal.

6. **Order 42 rule 6 (1) and (2) of the Civil Procedure Rules, 2010** which provides:

***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.***

7. A litigant who seeks stay pending appeal is under a duty to satisfy the court that substantial loss will result to him 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.***

8. I am satisfied from the material on record that the 1<sup>st</sup> respondent filed Notice of Appeal and that the application has been brought without unreasonable delay. Regarding the test of substantial loss, I note that this court stated as follows in its ruling dated 27<sup>th</sup> July 2018 which is now sought to be stayed:

***In view of the 1<sup>st</sup> respondents admission that they now have possession and further in view of the 1<sup>st</sup> respondents admission that the petitioner had possession as at 20<sup>th</sup> April 2018 when there was an order of this court in force protecting the said possession, it is immaterial whether the dispossession took place on a Saturday, a Sunday, 3<sup>rd</sup> June 2018 or on any other date after 20<sup>th</sup> April 2018. It is sufficient that it has been demonstrated that the 1<sup>st</sup> respondents regained possession contrary to an order of this court protecting the petitioner's possession. In view of the letter from the 1<sup>st</sup> respondent's advocates dated 20<sup>th</sup> April 2018, the dispossession was premeditated and done in the full knowledge that there was an order in force whose effect was to maintain the petitioner's possession. That is a most unfortunate situation.***

9. The 1<sup>st</sup> respondents had acted contrary to an order of this court. The actions were premeditated and done in the full knowledge that there was an order in force. This court's order of 27<sup>th</sup> July 2018 was issued to restore the *status quo ante*. I am not persuaded that any substantial loss will be suffered by the 1<sup>st</sup> respondent if a court order is obeyed and the rule of law upheld. I see no merit in Notice of Motion dated 31<sup>st</sup> July 2018. It is for dismissal.

10. Notice of Motion dated 15<sup>th</sup> October 2018 seeks leave to amend the petition herein to incorporate a prayer for declaration of trust and compensation for loss and damage suffered by the petitioner. The general rule is that amendments sought before hearing should be allowed if the opposite party can be compensated by an award of costs. See **Eastern Bakery v. Castelino, (1958) E.A.461**. Needless to state, this matter has not yet reached hearing stage. I have looked at the draft amended petition and I do not see how any injustice will be occasioned to the 1<sup>st</sup> respondent by the proposed amendment. Needless to state, the respondents will be free to respond to the amended petition as they deem fit. I see no reason why Notice of Motion dated 15<sup>th</sup> October 2018 should not be allowed.

11. In the end, I make the following orders:

a) Notice of Motion dated 31<sup>st</sup> July 2018 is dismissed with costs to the petitioner.

b) The petitioner is granted leave to amend the petition herein to incorporate a prayer for declaration of trust and compensation for loss and damage suffered by the petitioner.

c) The amended petition and any further supporting affidavit to be filed and served within 14 days from the date of delivery of this ruling.

d) The respondents to file and serve replying affidavits if need be, within 14 days of service of the amended petition.

e) Costs of Notice of Motion dated 15<sup>th</sup> October 2018 are awarded to the 1<sup>st</sup> respondent. The 2<sup>nd</sup> respondent did not participate in the hearing of the applications and for that reason no costs are awarded to him.

12. Ruling herein was to be delivered on 13<sup>th</sup> February 2019 but was delayed since I proceeded on medical leave. The delay is regretted.

**Dated, signed and delivered in open court at Nakuru this 15<sup>th</sup> day of July 2019.**

**D. O. OHUNGO**

**JUDGE**

**In the presence of:**

**Mrs Oliech holding brief for Mr Kairaria for the petitioner**

**Mr Karanja Mbugua for the 1<sup>st</sup> respondent**

**No appearance for the 2<sup>nd</sup> respondent**

**Court Assistants: Beatrice & Lotkomoi**