



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

E.L.C. CASE NO. 219 OF 2014

BENSON NGUNGI KIRONJO

(SUING ON BEHALF OF MUGWE CLAN.....PLAINTIFF

VERSUS

JOEL KITHAKA MARINGA

(SUED ON BEHALF OF NGUI CLAN.....DEFENDANT

RULING

1. By a notice of motion dated 20th February 2019 brought under **Order 42 Rule 6 of the Civil Procedure Rules** (hereinafter *the Rules*), the Defendant sought an order for stay of execution of the judgement and decree of the court dated 7th February 2019 pending the hearing and determination of an intended appeal against it.

2. The said application was based upon the several grounds set out in the notice of motion. It was contended that the Defendant had lodged a notice of appeal against the said decree; that the intended appeal was arguable and might be rendered nugatory; and that members of the Defendant's Ngui clan might otherwise suffer substantial loss if the decree is executed since some of them might be evicted from the portions of land they currently occupy.

3. The said application was supported by an affidavit sworn by the Defendant on 20th February 2019 in which he reiterated and expounded upon the grounds set out in the motion. It was contended that members of the Plaintiff's Mugwe clan had threatened to invade the property in dispute and that if the boundaries are altered at this time it might be difficult to restore them in the event of the intended appeal succeeding.

4. The Plaintiff filed a replying affidavit sworn on 13th May 2019 in opposition to the said application. It was contended that it had not been shown that the intended appeal had overwhelming chances of success; that the application was merely intended to delay the course of justice; and that in any event it was the members of the Plaintiff's Mugwe clan who were in occupation of the disputed land.

5. When the said application was listed for hearing on 14th May 2019 the Defendant's advocate sought and obtained leave to file a supplementary affidavit within 14 days. He also requested the court to fix a ruling date for the application for stay. The Plaintiff's advocate, on the other hand, sought to file written submissions on the application. The record shows that the Plaintiff filed his submissions on 10th July 2019 but there is no indication of the Defendant having filed a supplementary affidavit by the time of preparation of this ruling.

6. The court has considered the Defendant's said application, the Plaintiff's replying affidavit in opposition thereto as well as the Plaintiff's written submissions on record. The grounds to be considered in granting or declining an application for stay of execution are set out in **Order 42 Rule 6(2)** as follows:

“(2) 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 order as may ultimately be binding on him has been given by the applicant.”

7. In the case of **Butt Vs Rent Restriction Tribunal (1979)eKLR** the court made the following observations with respect to an application for stay pending appeal:

“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett LJ in Wilson Vs Church (No 2) 12 Ch. D ([1879] 454 at P 459. In the same case, Cotton LJ said at P 458:

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.”

8. The court is of the view that there is a risk of substantial loss in the sense that should the Defendant succeed on appeal, the suit properties may be out of his reach, if say, the Plaintiff were to alienate them upon execution of the decree. Such loss may render the appeal, if successful, nugatory or barren. The court has a duty to prevent such a barren result.

9. On the other hand, should a stay of execution be granted without any other protective order to preserve the suit properties, there might be a barren result should the Defendant dispose of the suit property before or after losing the appeal. The court has to strike a balance between the interests of both the Plaintiff and the Defendant. The suit property should be available to the successful litigant upon conclusion of the intended appeal.

10. There is no doubt that the instant application for stay was filed without unreasonable delay. The application was filed on 6th March 2019 which was about one month after delivery of the judgement. The Defendant has consequently met the requirement of expeditious filing.

11. On the issue of security for due performance of the decree, the court is of the view that no security may be required in the circumstances of this case because of the orders the court shall make in the matter. The court shall make an order for preservation of the suit properties pending the hearing and determination of the intended appeal.

12. The upshot of the foregoing is that the court is inclined to grant the application for stay on terms pending the hearing and determination of the intended appeal.

13. The court, therefore, makes the following orders for disposal of the application:

a) There shall be a stay of execution of the decree for a period of **two (2) years** from the date hereof or until the conclusion of the intended appeal, whichever come first.

b) The Deputy Registrar shall furnish the Defendant with copies of proceedings and other documents for purposes of appeal within **45 days** from the date hereof.

c) The Plaintiff and the Defendant either by themselves, their agents, and respective clan members are hereby restrained from alienating, charging or disposing of any interest in the suit properties in dispute during the subsistence of the stay order.

d) Costs of the application are hereby awarded to the Plaintiff.

14. It is so ordered.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 26TH DAY of SEPTEMBER 2019.

In the presence of Mr. Andande for the Plaintiff and Mr. Njagi for the Defendant.

Court Assistant Mr. Muinde

Y.M. ANGIMA

JUDGE

26.09.19