



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 29 OF 2013

JANE NJERI IKIGU.....PLAINTIFF

VERSUS

TUWAN FARM LIMITED.....1ST DEFENDANT

FRANCIS KEBENEI KIMATUI.....2ND DEFENDANT

RULING

1. The application dated **31/7/2019** and filed in court on the same date has been brought by the 2nd defendant. It seeks the following orders:
 - (a) ...spent
 - (b) ...spent
 - (c) **That this court be pleased to order of stay of execution of judgment delivered on 18/7/2019 pending hearing and determination of the appeal.**
 - (d) **That costs of this application be provided for.**
2. The applicant has brought the application pursuant to **Order 42(1) Rule 6 of the Civil Procedure Rules 2010, Section 3A Civil Procedure Act.**
3. The grounds on which the said application is made are that the 2nd defendant is aggrieved and dissatisfied by the judgment delivered on 18/7/2019 and has filed a notice of appeal against the whole decision; that the 2nd defendant's appeal has high chances of success and he stands to suffer irreparable loss and damage if the orders sought are not granted as the plaintiff is likely to transfer the land to herself and third parties; that the appeal will be rendered nugatory and that the interest of justice will be served by granting the orders sought so as to allow the appeal to be heard and determined on merit.
4. The application is supported an affidavit of the 4th applicant dated **27/8/2019**. That affidavit is comprised of **8 paragraphs**. Of those the first and second introduce the deponent and the judgment sought to be appealed against. The third expresses his dissatisfaction and exhibits a notice of appeal. The seventh and eighth have merely formal contents declaring that the affidavit is in support of the application and the matters it contains are true to the best of the deponent's knowledge. In the supplementary affidavit he denies that the plaintiff has been in occupation of parcels No. **Kitale Municipality Block 2/Tuwan/633 - 636** since 1981; that he had been in possession of parcels Nos. **Kitale Municipality Block 2/Tuwan/635 and 636** for which he holds titles and plots Nos. **Kitale Municipality Block 2/Tuwan/633 - 634** which do not have titles and that he stands to suffer substantial loss if the titles in his name were cancelled and issued in the plaintiff's name as she may dispose of the same thus rendering the appeal nugatory. He maintains that it is necessary to have an order of stay of execution to preserve the subject matter pending the hearing and determination of the appeal.
5. The plaintiff/respondent filed replying affidavit on **27/9/2019** opposing the application. Her grounds are that she is entitled to the fruits of the judgment; that she has since 1981 been in possession of **Kitale Municipality Block 2/Tuwan/633 - 636**; that the court has already found that the applicant has never been in occupation of any of those parcels and he would therefore suffer no damage by remaining out of the land; that the applicant has no titles to **Kitale Municipality Block 2/Tuwan/633 and 634** and cannot suffer any damage if *status quo* is maintained; that the respondent has no intent to dispose of the land in any way and is ready to surrender the titles to court while awaiting the hearing and determination of the appeal; that the applicant has to demonstrate what loss he may suffer if the orders are not granted; that the applicant has not by way of annexing a draft of memorandum of appeal demonstrated an arguable appeal or shown that the appeal would be rendered nugatory and has not offered security for the performance of the court's decree.
6. The applicant filed his submissions on **11/10/2019**. I have perused through the record and found no submissions filed on behalf of the

respondent. I have considered the application and the response and the applicant's submissions.

7. The conditions for a grant of stay of execution are contained in **Order 42 rule 6** of the Civil Procedure Rules which provides as follows:-

“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 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.

(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

8. One of the condition is that an appeal must be in existence. I have examined the application and noted that a notice of appeal dated 23/7/2019 was filed on 25/7/2019, 7 days after the judgment was delivered. Under **Order 42 rule 6(4)** the applicant has established that an appeal is in place and this court may proceed to consider the merits of the other grounds.

9. This court must also be satisfied that substantial loss may result to the applicant unless the order sought is granted. The applicant cites the case of **Antoine Ndiaye -vs- African Virtual University [2015] eKLR** for the definition of substantial loss. He also relies on **Reliance Bank -vs- Norlake Investments Ltd [2002] E.A 227** for the proposition that the court should balance between the interests of the two parties while considering the issue of substantial loss. He maintains that the court has made substantive findings as to ownership and that if execution is levied the registered owner would be the plaintiff who would be at liberty to deal with the property as she wished; if a transfer to a third party occurred the appeal would be rendered nugatory.

10. In this application the applicant has averred in his supplementary affidavit that he had been in possession of parcels Nos. Kitale Municipality Block 2/Tuwan/635 and 636 and plots Nos. Kitale Municipality Block 2/Tuwan/633 - 634. He maintains that plots Nos. 635 and 636 do not have titles but 633 and 634 have titles, and that he stands to suffer substantial loss if the titles in his name were cancelled and issued in the plaintiff's name as she may dispose of the same thus rendering the appeal nugatory. This is contrary to the respondent's position that he has never been in possession. This court stated as follows in **paragraph 21** of its judgment dated 18/7/2019:

“However, the land was identifiable on the ground and it had some houses built on it. It was handed over to her directly by the former owner who also showed her the boundaries. According to the evidence on record she had been in possession ever since while the 2nd defendant has not been in possession thereof hence the 2nd defendant's two suits seeking her eviction”.

11. Having found as above, is it possible that the applicant would suffer substantial loss if the orders sought were not granted? In my view without any possession on the part of the applicant only the issue of disposal of the suit land arises with regard to loss. To address this issue the respondent has undertaken not to dispose of the land in any way and shown her readiness to surrender the titles to court while awaiting the hearing and determination of the appeal. In my view that is reasonable enough and may stave off any risk of loss that the applicant would otherwise suffer.

12. The third condition is whether the application has been made without unreasonable delay. The judgment in this matter was delivered on 18/7/2019 while the instant application was lodged on 31/7/2019, some 13 days later. I find that the application was timeously filed.

13. The last issue raised by the respondent is that of security. The applicant cites **Kerugoya HC No.11 of 2017 - Kinyunjuri Muguta -vs- Wotuku Muguta [2918] eKLR** and **Kenya Commercial Bank Ltd -vs- Sun City Properties Ltd & 5 Others [2012] eKLR** for the proposition that there are two competing interests that must be considered, that is, the right of a successful litigant not to be denied the fruits of his judgment and the right of unsuccessful litigant exercising his undoubted right of appeal who should be safeguarded from his appeal being rendered nugatory, and that in a bid to balance the two interests the courts usually order suitable security for the due performance of the decree.

14. I have noted that in the judgment sought to be appealed against save for payment of costs, no responsibility is placed upon the shoulders of the 2nd defendant to do anything in performance of the decree except to abide by a permanent injunction restraining him from interfering with the plaintiff's ownership and quiet possession of the suit land.

15. In **Kitale ELC No. 93 of 1997 Obed Readon Onyango -vs- Florence Juma Nabiswa & Sarah Chepkemobi Nabiswa** this court stated as follows:

“Looking at the provisions of Order 42 rule 6 (1) (b) this court’s interpretation is that it is not fatal for an applicant not to offer any security in an application since the court may itself impose such security on the applicants. I do note that none was offered by the applicants and the respondent demands security in the form of a cash sum sufficient to compensate him for loss of use of the premises. It would be expected that the appeal filed by the applicants would take some time to conclude and therefore the respondent would be kept out of land which this court has already proclaimed to be his for much longer, indeed an indefinite period dependent on the vagaries of litigation.”

16. I do not find any ground to deviate from the above reasoning in so far as the application is not rendered fatally defective for want of offer of security.

17. The issue that remains for this court is only on whether the appeal may be rendered nugatory if the orders sought do not issue. Since the 2nd defendant was not in possession of the suit land this court finds it necessary to grant a stay only in respect of the disposal of the suit land. I therefore order that a stay of execution is hereby issued restraining the respondent from in any way disposing of the interest in the suit property pending the hearing and determination of the intended appeal. The order of stay will be conditional on the applicant filing and serving the record of appeal within **45 days** hereof and payment of the taxed costs of the suit due to the plaintiff within the same period in default of which the stay order will lapse.

Dated, signed and delivered at Kitale on this 24th day of October, 2019.

MWANGI NJOROGE

JUDGE

24/10/2019

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Kiarie for plaintiff/respondent

Mr. Wafula holding brief for Nyolei for applicant

N/A for 1st defendant

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

24/10/2019