



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 487 OF 2013

DANIEL NDERI NJOGU.....PLAINTIFF

VERSUS

LYDIAH MUTHONI KIBAGE.....DEFENDANT

RULING

The application before me is the Notice of Motion dated 5th September 2019. It is brought under *Section 3A and 63 (c) and (e) CPA and Order 42 Rule 6 and 50 Rule 6 CPR*. The applicant is seeking the following orders:

1. Spent.

2. That the Honourable Court be pleased to stay the Court's order given on the 14th March 2019, requiring the plaintiff to vacate L.R. No. NGARIAMA/NYANGENI/49 within six months pending the hearing and inter-parties hearing of this application.

3. That the Honourable Court be pleased to stay the execution of the Court's order given in this case on the 14th March 2019 requiring the plaintiff to vacate L.R. No. NGARIAMA/NYANGENI/49 within six months, pending the hearing and determination of Nyeri Court of Appeal Civil Appeal No. 95 of 2019; Daniel Nderi Njogu Vs Lydia Muthoni Kibage.

4. That in the alternative to prayer 2 and 3 hereof, the Honourable Court be pleased to extend the period to the plaintiff/applicant to beyond the six months from September 2019 to enable the hearing and determination of the Nyeri Court of Appeal Civil Appeal No. 95 of 2019; Daniel Nderi Njogu Vs Lydia Muthoni Kibage.

5. That the costs of this application be provided for.

The application is supported by seven (7) grounds shown on the face of the application and an affidavit sworn by the applicant on 5th September 2019. In the supporting affidavit, the applicant stated that he was aggrieved by the judgment of this Honourable Court given on 14th March 2019 ordering him to move from the suit property registration No. NGARIAMA/NYANGENI/49 within six months.

- He stated that he has since lodged an appeal in the Court of Appeal in Nyeri being C.A. No. 95 of 2019 between Daniel Njogu Nderi Vs Lydia Muthoni Kibage. He annexed a copy of the Memorandum of Appeal and a payment receipt. The applicant further stated that he was hoping that the said Appeal would be heard and determined by the Court of Appeal before the expiry of the six months given by this Honourable Court.
- The appellant also submitted that unless the stay order is given, he is likely to suffer loss as the intended appeal will be rendered nugatory if his appeal succeeds.
- He stated that he has planted tea bushes on the portion of the suit land where he is required to vacate and which tea bushes he is unlikely to access.
- The application is opposed by a replying affidavit sworn by the respondent on 13th September 2019.
- In her response, the respondent deponed that the application is not merited as the same has not been brought without unreasonable delay. She stated that the application has been brought six (6) months after the impugned judgment was delivered and no explanation has been given for the delay.
- The respondent also deponed that the applicant has not demonstrated what irreparable loss he will suffer if stay is not granted since he does not even reside on the suit land.
- The respondent further deponed that the applicant has lied to the Court by stating that he has no other source of livelihood

- when it is on record that he has other parcels of land where he cultivates and resides being L.R. No. MWEA/MURINDUKO/126 measuring 8 acres.
- In conclusion, the respondent stated that the application does not meet the threshold for the grant of stay pending appeal as set out under *Order 42 Rule 6 (2) CPR*.

ANALYSIS AND DECISION

I have considered the affidavit evidence and the submissions by the parties. I have also considered the applicable law. ***Order 42 Rule 6 92) CPR*** provides as follows:

“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 decree or order as may ultimately be binding on him has been given by the applicant.

The ***Civil Procedure Rules*** has clearly stipulated the grounds under which a stay order may be granted to an applicant pending appeal. First an applicant must file an application without un-reasonable delay. The impugned judgment which is the subject of the intended appeal was read and delivered on 14th March 2019. The Memorandum of Appeal was lodged on 13th May 2019 while this application for stay was filed on 5th September 2019. A period of six months in my view is un-reasonable. I find that the applicant has taken long to file this application and no explanation has been given. I also find that the applicant has not given security for the due performance of the decree herein which is one of the conditions for stay pending Appeal. The applicant has not even given an undertaking to abide by any condition(s) that the Court may give.

It is imperative to note that whereas an unsuccessful litigant has a right of Appeal, such right must be balanced with the right of a successful litigant who must enjoy the fruits of a successful judgment. Whereas I am still persuaded now as before that the respondent is the rightful owner of the suit property, I take judicial notice that the Court of Appeal is not fully constituted as the bench which usually sit on circuit in Nyeri has been suspended temporarily. That may explain the delay in expediting the intended Appeal. In the issue of security, the appellants has in his own admission stated that he has tea bushes in the suit land which is his only source of livelihood. Since this Court has decreed that the land and everything contained therein belongs to the respondent, I now make the following orders:

- 1. The applicant is granted a stay of execution of the judgment/decreed of this Honourable Court issued on 14th March 2019 for six (6) months from today.**
- 2. The applicant to deposit a sum of Kenya Shillings two hundred thousand (Ksh. 200,000/=) in Court as security for the due performance of the decree herein within 10 days from today failing which the stay orders shall stand vacated.**
- 3. The costs of this application shall be borne by the applicant.**

READ, DELIVERED and SIGNED in open Court at Kerugoya this 11th day of October, 2019.

.....

E.C. CHERONO

ELC JUDGE

11TH OCTOBER, 2019

In the presence of:

1. Applicant – present

1. Respondent – present