



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 93 OF 1997

OBED READON ONYANGO.....PLAINTIFF

VERSUS

FLORENCE JUMA NABISWA.....1ST DEFENDANT

SARAH CHEPKEMOBI NABISWA.....2ND DEFENDANT

RULING

1. The application dated **25/7/2019** and filed in court on the same date has been brought by the defendants. It seeks an order of stay of execution of the judgment/decree herein pending hearing and determination of the intended appeal in the Court of Appeal. He also prays for costs to be in the cause.
2. The applicants have brought the application under **Section 3 and 3A Civil Procedure Act and Order 51 Rule 1 and Order 42(1) Rule 6 of the Civil Procedure Rules 2010**.
3. The grounds on which the said application is made are that the judgment in this matter was read and delivered by this court on **15/7/2019** and the applicants are dissatisfied with the judgment and the respondent intends to execute the decree/judgment; that the applicants have preferred an appeal to the Court of Appeal; that a Notice of Appeal has been filed; that if a stay of execution is not granted substantial loss may result to the applicants; that the appeal herein has reasonable chances of success and if the execution is carried out it will render the appeal nugatory as the applicants would have been evicted from the suit land; that there is no delay in bringing this application and that no one shall be prejudiced if the orders sought are granted.
4. The application is supported an affidavit of the 1st plaintiff dated **25/7/2019** which amplifies the above grounds.
5. In reply to the application the plaintiff/respondent filed a sworn replying affidavit on **13/8/2019**. In that affidavit he states that he is the proprietor of the suit land and the applicant's intended appeal has little chance of success; that the applicants stand to suffer no substantial or irreparable damage and are not entitled to the relief sought; that there is no fence or any structures erected on the suit property by the applicants; that the orders sought would deprive him of fruits of his judgment and thus prejudice him notwithstanding that he has been kept out of the use and occupation of the suit land for an extended period and that if the court allows the application the same should be on condition the applicants deposit security of Kshs. 2,000,000/= or any other sum to compensate him for his loss of user of the property.
6. The defendants filed submissions on **14/8/2019**. I have perused the record and found no submissions filed on behalf of the plaintiff. I have considered the application and the response including the submissions.
7. The condition 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. Therefore an appeal must be in place. The filing of a notice of appeal is according to **Order 42 rule 6(4)** sufficient. An applicant who has filed such a notice in this court is deemed to have filed an appeal to Court of Appeal. I have noted that a notice of appeal dated 18/7/2019 is in the record. Though the same does not have a court’s date stamp I note that the Deputy Registrar appears to have sign it on **22/7/2019**. I do therefore consider that the requirement of an appeal has been satisfy.

9. The second condition is that the court must be satisfied that substantial loss may result to the applicant unless the order is made. In this application the applicants have averred at **paragraph 7** of the supporting affidavit that there is risk of eviction and demolition of the buildings and structures on the suit land. They exhibit photographs of fairly old looking houses: two of them permanent and two of the semi-permanent. The respondent has not substantively rebutted this allegation. In my view the applicant would suffer substantial loss in the event they were evicted in execution of the decree.

10. The third condition is whether the application has been made without unreasonable delay. The judgment in this matter was delivered on **15/7/2019** and the instant application was filed **25/7/2019, 10 days** later. Without more I find that the application was timeously filed.

11. The last handle must be crossed by the applicants is whether the security has been given. 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 demand 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. The suit land was purchased for Kshs.150,000/= in 1987 and the plaintiff lost possession thereof to defendants in the year 1996. The whole portion measures 11.26 acres. In the suit the plaintiff claimed special damages and general damages and mesne profits. This court granted a declaration he is the lawful owner and an injunction against the defendants as well as general damages for trespass in the sum of Kshs.2,000,000/= and costs. I consider that security in the sum of Kshs.500,000/=to compensate the plaintiff for continued loss of user of the property is fit.

12. In the final analysis I find the applicant’s application has merit and I grant it in terms of prayer **No. (3)** and **(4)**. In addition and as a condition for the grant of prayer **No. (3)** I order that the applicants do deposit the sum of **Kshs.200,000/= (Two Hundred Thousands)** in a joint account held between counsel for both sides within **45 days** of this order, and that the record of the intended appeal shall be filed within **60 days** from the date of this order in default of which condition either singularly or cumulatively the stay orders granted shall lapse.

Dated, signed and delivered at Kitale on this 3rd day of October, 2019.

MWANGI NJOROGE

JUDGE

3/10/2019

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Ingosi for plaintiff/respondent

N/A for applicants

COURT

Ruling read in open court.

MWANGI NJORGE

JUDGE

3/10/2019