



**REPUBLIC OF KENYA**

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

**ENVIRONMENT AND LAND CASE NO. 150 OF 2012**

**PATRICK LOKWANGA.....1<sup>ST</sup> PLAINTIFF**  
**PAUL ROP KOMEN.....2<sup>ND</sup> PLAINTIFF**  
**JACOB CHEBOI.....3<sup>RD</sup> PLAINTIFF**  
**CHRISTOPHER KANDA.....4<sup>TH</sup> PLAINTIFF**  
**DAVID BARNGETUNY.....5<sup>TH</sup> PLAINTIFF**

**Sued in their personal capacity and on behalf of KAREL CLAN)**

**VERSUS**

**JOSEPH CHEBOI.....1<sup>ST</sup> DEFENDANT**  
**SIMION TOO.....2<sup>ND</sup> DEFENDANT**  
**JOHNSTONE KISANG.....3<sup>RD</sup> DEFENDANT**  
**MICHEAL CHEBET.....4<sup>TH</sup> DEFENDANT**  
**MARTIN KIPROP.....5<sup>TH</sup> DEFENDANT**  
**CHEPKAMABA KIPKICH.....6<sup>TH</sup> DEFENDANT**

**Sued in their personal capacity and on behalf of KAMOI CLAN**

**RULING**

This ruling is in respect of an application brought by way of a Notice of Motion dated 8<sup>th</sup> February 2018 by the defendant/applicants seeking for the following orders:

- a) Spent
- b) Spent
- c) THAT there be a temporary stay of execution of the court's judgment and/or orders and/or decree of 30<sup>th</sup> January 2018 and all consequential orders emanating therefrom pending hearing and final determination of the intended appeal.
- d) THAT costs of this application be provided for.

A brief background to this case is worth mentioning. This matter came up for directions on 25<sup>th</sup> July 2017 and parties agreed to proceed by way of affidavit evidence. Counsel also agreed to file written submissions within 14 days which were duly filed and the court gave a judgement date which was delivered on 30<sup>th</sup> January 2018.

On 8<sup>th</sup> February 2018 the applicants filed an application under certificate of urgency seeking for stay of execution of the decree and all consequential orders emanating from the judgment.

Counsel appeared before Justice Ombwayo on 29<sup>th</sup> March 2018 who directed that the application be served before close of business the same day and appear before the trial court on 3<sup>rd</sup> April 2018. The same date was during the April recess and therefore the matter proceeded ex parte without the respondent. The respondent filed an application for setting aside the orders of stay that were granted in their absence which the court heard and rendered a ruling setting aside the ex parte orders of stay on 9<sup>th</sup> May 2019. The court directed that the application for stay be heard afresh by filing written submissions.

This is the ruling that the court is asked to deliberate on.

### **Applicants' Submissions.**

Counsel for the applicants informed the court that they would rely on the filed affidavits in support of the application, the grounds on the face of the application together with the arguments for stay of execution already on record. It was Counsel's submission that the intended appeal will be rendered nugatory if the stay orders are not granted as the respondents are in the process of evicting the applicants.

Mr. Kiboi submitted that the applicants are ready to comply with an order of security of costs if the same is imposed by the court. Counsel therefore urged the court to allow the application as prayed as the applicants are apprehensive that the plaintiff respondents will execute the decree as granted by the court.

Counsel took issue with the authorities relied on by the respondent and stated that they are distinguishable hence the court should not rely on them.

### **Plaintiffs/Respondents' Submissions**

Counsel for the respondent filed submissions and gave a brief synopsis of the case leading to this current application. Counsel submitted that Judgment was delivered by the court on 30<sup>th</sup> January 2018 whereby the court made the following orders:

- a) That the proceedings conducted on 25<sup>th</sup> April, 2002 were a nullity.
- b) That the award adopted by the Iten Resident Magistrate's Court in land Disputes Tribunal Case No. I of 2003 on 6<sup>th</sup> August, 2003 is also a nullity.
- c) That an order of injunction restraining the Defendants from trespassing on the plaintiff's parcel of land is hereby granted.
- d) That adjudication process be commenced to finalize the issue of legal ownership of the suit land.
- e) That costs of this suit to the Plaintiffs

Counsel submitted that the defendant/applicants being dissatisfied with the said judgment moved this court vide the current application for stay of execution orders. Further that the respondents filed a replying affidavit in opposition to the application and that the defendant/applicants were granted leave to file a supplementary affidavit but they did not serve the respondent with the same.

Miss Odwa Counsel for the respondents submitted on the requirements to be met in an application for stay of execution as per Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010 which prescribes the conditions as follows; that an application for stay of execution must be brought without unreasonable delay; the Applicant must show that he will suffer substantial loss if the order of stay is not granted; and the Applicant has offered adequate security for the due performance of the decree which will be ultimately binding on the applicant.

Counsel submitted that for one to invoke the provisions of Order 42 of the Civil Procedure Rules, 2010 they ought as a matter of course have filed a Memorandum of Appeal or in the case of an appeal to the Court of appeal where a Notice of Appeal has been lodged under the Rules governing the Court of Appeal as per Order 42 rule 6 (4) of the Civil Procedure Rules, 2010).

It was Counsel's submission that no Notice of Appeal has been lodged to warrant this court to entertain and grant the Orders sought as the same was not annexed to the application. Further Counsel stated that on a without prejudice basis she noticed that the court record reveals that a Notice of Appeal dated 8<sup>th</sup> February 2019 was purportedly stamped 9<sup>th</sup> February 2019, a day after this application was filed .

Miss Odwa submitted that the said Notice of Appeal is irregularly in the court file given that as at 13<sup>th</sup> February 2018, well after the 14 days prescribed by the Court of Appeal Rules, 2010 to file an appeal, when the Plaintiffs' Advocates visited the court registry to collect the decree, no Notice of Appeal had been filed by the Defendants/Applicants. That the only document that was on the Court file was the present application dated 8<sup>th</sup> February 2018 without any annexures.

Counsel also submitted that the current position of the absence of a filed notice of appeal was fortified by the fact that despite the Plaintiffs/ Applicants Ms. Nyairo and Company, Advocates writing to court to establish the genuineness of the purported Notice of Appeal and to the Defendants/Applicants advocates to confirm whether the Notice of Appeal was indeed paid for, and that no response has been received either from the court or the Defendant/ Applicants' advocates on the suspect Notice of Appeal as per annexure IBI of the Plaintiffs/Respondents' replying affidavit. Further that to date more than one year after the alleged filing of the Notice of Appeal, the same has not been served

either upon the Plaintiffs/ Applicants or their advocates on record, M/S Nyairo and Company, Advocate . Counsel therefore urged the court to find that existence of the Notice of Appeal on the court record well after this application was filed is therefore improper and suspect and this Court cannot be asked to exercise its discretion based on a false and/or suspect document.

Counsel cited the **Barack Otieno Ombima versus Farouk and 2 Others[2019] eKLR** where the Court held as follows on an appeal that was improperly lodged

*The Respondents aver that they filed a Notice of Appeal. I note that the alleged Notice of Appeal is purportedly signed by the DR — ELRC Nyeri which is an unlikely situation as this case was handled in Nairobi. The Notice does not also bear this Court's stamp or any Court stamp from ELRC Nyeri though addressed to ELRC Nairobi.*

*The Respondents did not even exhibit a payment receipt to show the Notice was filed and paid for.*

*It is therefore apparent that no proper Notice of Appeal has ever been filed before this Court and no appeal is pending before the Court of Appeal. An Appeal should have been filed within 15 days.*

*The Respondents have not demonstrated that they have actually filed any such appeal. The orders sought are therefore valid and I allow the Application before me and direct that execution should proceed*

Counsel also relied on the case of **Susan Atieno Ngoko versus Ram Hospital Limited [2018] eKLR** where the court held as follows:

*In totality, I find that the applicant has not satisfied me that it will suffer substantial loss to justify denying the claimant the fruits of her judgment. I further find that the applicant has not explained the delay in service of the notice of appeal and further that the applicant has not explained the delay in filing this application for stay 48 days after judgment and only 2 days before the date of taxation of the claimant's bill of costs.*

Counsel therefore urged the court to find that the notice of appeal is irregular and as such the application should be dismissed with costs to the respondents. It was Counsel's further submission that the nature of the orders granted by the court in the decree made on 30<sup>th</sup> January 2018 other than the order for costs are not capable of being stayed and that granting the orders of stay of execution would amount to overturning the court's own judgment without the appeal being heard and determined.

Miss Odwa also relied on the case of **Consolidated Bank of Kenya and 2 Others versus Usafi Limited [2006] eKLR** where the Court of Appeal held as follows:

*"We consider that under the rule in its present form there are only three types of orders permitted to be made under rule 5(2) (b) namely;*

*i. a stay of execution.*

*ii. an injunction.*

*iii. a stay of any further proceedings*

*"A stay of an injunction" is not included in that provision. The omission may well have been intended by the Rules Committee since to grant a stay of an injunction would have the effect of nullifying the injunction before the appeal against its grant had been heard. We do not consider the submission of Mr. Majanja that what he is seeking falls within "a stay of execution". We are unable to appreciate how one can stay an order for an injunction and yet at the same time sustain it on record. The word "injunction" is defined in the Glossary to the White Book 2003 as:-*

*"A court order prohibiting a person from doing something or requiring a person to do something. "We are of the view that once an injunction has been ordered it is in force and no further proceedings are required to give effect to it."*

Further in the case of **Republic versus The Municipal Council of Mombasa and another Exparte Adopt-A-Light Limited Nairobi Civil Application Number 15 of 2007** where the Court of Appeal held as follows:

*"The Court of appeal has no jurisdiction at the stage of the application for stay to undo what the superior Court has done. It can only reverse the certiorari upon the hearing of the appeal."*

Counsel therefore submitted that from the above it is clear that the Court has no jurisdiction to stay the orders it granted in its judgment and as such the application ought to fail. Further that the Applicant has not demonstrated what substantial loss they will suffer if the orders of stay of execution are granted. That an applicant must prove substantial loss that they will suffer if the order of stay is not granted. Miss Odwa urged the court to dismiss the application with costs to the respondents.

### **Analysis and Determination**

This is an application for stay of execution of the judgment and all consequential orders emanating from the judgment delivered on 30<sup>th</sup> January 2018. The rules governing applications for stay of execution are as per Order 42 Rule 6 of the Civil Procedure Rules. An applicant must establish that the application has been filed timeously without undue delay, that he or she will suffer substantial loss if the order is not

granted and finally that the applicant is ready to offer such security for the due performance of the decree that will ultimately be binding on him.

On the first issue as to whether the application was filed timeously without unreasonable delay, it is on record that the judgment was delivered on 30<sup>th</sup> January 2018 and the application for stay was filed on 8<sup>th</sup> February 2018. I find that the applicant has met this requirement.

The next issue is as to whether the applicants have proved that they will suffer substantial loss if the order for stay is not granted. It should be noted that this is the cornerstone of stay of execution applications and a party must go a step further to convince the court that he or she is likely to suffer such loss. The applicants merely deponed that they will suffer loss if the order is not granted but did not substantiate the loss to be suffered.

In the case of **Robert Nguruiya Chutha versus Joseph Chege Ndungu [2014] eKLR** Justice P. Nyamweya while citing the Court of Appeal decision of **Charles Wahome Gethi versus Angela Wairimu Gethi [20081 eKLR** held as follows:

*"The first question is whether the Defendant has shown that he stands to suffer substantial loss if the order of stay is not granted. From the pleadings and affidavit in support of the application, the Defendant reiterates that he stands to suffer irreparable loss. However, the Defendant does not state how he shall suffer the loss. Suffice to say, whereas the order made on 16/11/2012 barred the Defendant from trespassing or continuing with construction on the suit property, the Court in the same order barred the Plaintiff from demolishing or interfering with any structures constructed thereon by the Defendant pending the determination of the suit. Other than the Plaintiff taking over possession of the suit property and erected a chain-link fence around it, there is no averment made by the Defendant as to demolition or disposal of the property. The Court of Appeal in the case of **Charles Wahome Gethi v Angela Wairimu Gethi . Civil Appl. No. 302 of 2007 [2008/ eKLR** held that:*

*"... it is not enough for the applicants to say that they live or reside on the suit land and that they will suffer substantial loss. The Applicants must go further and show the substantial loss that the applicants stand to suffer if the Respondent executes the decree in this suit against them"*

It is clear from the above that the applicants have not satisfied the court that they will suffer substantial loss as required under Order 42 Rule 6.

Further I notice that the applicants in their supplementary affidavit attached documents which had already been considered in the judgment and as such it was like reopening the case for retrial. The said supplementary affidavit which Counsel for the respondent submitted that was not served on them.

Similarly the supporting affidavit by the applicants to the application admits that they are not in occupation as they had already been chased away hence they are afraid to go back to the suit land for the adjudication process to take place. If that is their worry, then the court having given the orders which must be complied with can be able to midwife the implementation of the orders as per the judgment. It is also on record that there is no valid Notice of Appeal attached to the application. Why would the court stay the execution of a judgment pending no action in the next court? That would be tantamount to putting implementation of a decree in abeyance indefinitely which would be an abuse of court process. I find that the application lacks merit and will suffer the fate of being dismissed.

On the issue of security of due performance of the decree that will be ultimately binding on the applicants, the applicants stated that they had deposited some amount in court which had earlier been ordered ex parte which was subsequently set aside. The applicants' can ask for a refund of the money if they had deposited it in court as the order was set aside.

Having considered the application, the submissions and the relevant judicial authorities I find that the application lacks merit and is therefore dismissed with costs to the respondents. The earlier orders of maintenance of status are hereby vacated.

**DATED and DELIVERED at ELDORET this 3<sup>RD</sup> DAY OF OCTOBER, 2019.**

**M. A. ODENY**

**JUDGE**

**RULING read** in open court in the presence of Miss.Wahome for Plaintiff/Respondent and Miss.Chepkemboi for Defendant/Applicant.

MR. Mwelem – Court Assistant