



**REPUBLIC OF KENYA**

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

**LAND CASE NO. 144 OF 2014**

**THERESA MUKAMI NJUGUNA.....PLAINTIFF**

**VERSUS**

**DORIS MUSAKALI MONARI.....1<sup>ST</sup> DEFENDANT**

**ZEDEKIAH EVANS**

**NYAMONGO ACHIRA.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The application dated **6/8/2019** which was filed in court on the same date was brought by the defendants/applicants. It seeks an order of stay of execution of the judgment/decree and taxation of costs made by this court on **31/1/2019** pending the hearing and final determination of the applicants' appeal. They also seek that the costs of the application be provided for.
2. The applicants have brought the application pursuant to **Order 1 Rule 10 (2) & 4 and Section 1A, 3 and 3A Civil Procedure Act 2010**.
3. The grounds upon which the said application is premised are that the applicants have filed notice of appeal and requested for proceedings; that they have an arguable appeal with overwhelming prospects of success; that the respondent has filed party and party bill of costs yet the award of the said costs is one of the grounds of appeal; that if the said stay of execution is not granted, the applicants' appeal will be rendered nugatory and the applicants will suffer irreparable loss and damage. It is alleged that the 2<sup>nd</sup> applicant will suffer irreparably if the suit land is transferred and costs executed against for he will really strain to pay the costs which are contested.
4. The application is supported by an affidavit of the 2<sup>nd</sup> applicant sworn on **6/8/2019**, and a supplementary affidavit sworn on **22/10/2019**.
5. The parties filed their written submissions on **25/10/2019**. I have considered those submissions.
6. 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.”

7. Is there an appeal in place? I note a copy of a notice of appeal is exhibited in the supporting affidavit. I have confirmed from the record a notice of appeal was filed on **14/2/2019** and that therefore for the purposes of this application there is an appeal in place as required by **Order 42 Rule 6(4)**.

8. The next question that the court must address is whether the plaintiff will suffer substantial loss if the orders sought do not issue. In the quest to obtain an answer to this question the evidence on the record must be examined within the context of the delivered judgment.

9. The first affidavit is sworn by the 2<sup>nd</sup> applicant. He only states that he is exposed to execution and that he would be directly affected as he is in possession of the disputed land. In his supplementary affidavit he emphasis that he would suffer irreparably since he would be compelled to pay costs unfairly and he would pay the same with a lot of difficulty which event would affect him psychologically. No affidavit is presented by the 1<sup>st</sup> applicant to show what loss she may suffer if execution issue and therefore it can be safely presumed that she would suffer none.

10. A perusal of the judgment in this case revealed that the court found that there was an agreement between the plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> defendants and that the plaintiff was not in breach of that agreement. Further the court found that the 1<sup>st</sup> and 2<sup>nd</sup> defendants created a constructive trust in favour of the plaintiff by receiving the purchase price and placing the plaintiff in possession of the suit land. The court ordered specific performance against the 1<sup>st</sup> defendant and that the excision of  $\frac{1}{2}$  an acre of land from **Kitale Municipality Block 18/Bidii/211** should abide as much as practicable to the extent of the portion the 1<sup>st</sup> and 2<sup>nd</sup> defendants had put the plaintiff into possession of before the 3<sup>rd</sup> defendant came along. The counterclaim of the defendants was dismissed. In this case therefore though the plaintiff had already bought  $\frac{1}{2}$  an acre of land the 1<sup>st</sup> and 2<sup>nd</sup> defendants made a detour around their transaction with her after she had financed their succession cause and entered into a transaction over the same land parcel with the 3<sup>rd</sup> defendant hence the orders of the court.

11. It is understood that each dissatisfied litigant has a right to appeal to a higher court if he so wishes. However loss and damage are not matters that should be left to the court’s assumption by an applicant for orders of stay of execution. Loss and damage must be demonstrated in clear and certain terms. Where this is not done the applicant risks dismissal of his application as demonstration of loss is crucial to an application for stay.

12. In the instant application I do not find the bare averments of the applicant to be helpful in the determination of whether or not he would suffer substantial loss. In this court’s view a refund from the silent 1<sup>st</sup> defendant would just as well compensate for loss if any would be suffered as it would be unconscionable to allow the 1<sup>st</sup> defendant to get away with both the consideration and the land which, having been sold to the plaintiff earlier, was not available for sale to the applicant.

13. As to whether the application has been made without unreasonable delay this court notes that the judgment in this matter was delivered on **31/1/2019** while the instant application was lodged on **6/8/2019**, after a duration of **6 months and 6 days**. I find that the application was filed after long delay which appears quite inordinate. However this court must inquire into whether that delay has been explained for the reason that even where the delay is inordinate there may be some plausible explanation therefor. The supporting affidavit of the applicant dated **6/8/2019** does not address the delay in any manner whatsoever. The supplementary affidavit of the applicant dated **22/10/2019** does not also address the issue of the delay. In the case of **Stephen Gathua Kimani -vs- Nancy Wanjira Waruingi T/A Providence Auctioneers [2016] eKLR** it was held that where it is necessary to explain delay and that delay is not explained then that delay is inexcusable and the court would not in such circumstances exercise its discretion in the favour of an applicant.

14. The inordinate delay, having not been explained in any manner, is fatal to the application before me.

15. On the issue of security, none has been offered by the applicant. However this court has held in other instances where stay of execution pending appeal has been sought that the proper interpretation of **Order 42 rule 6** is that an application for stay is not fatally defective for failure to offer security as the court may, subject to the success of the applicant in respect of the other grounds discussed hereinabove, impose such conditions as to security as it deems fit where none has been offered by the applicant.

16. In the application the applicant has not established that he would suffer substantial loss. He has also failed to explain the six months delay in lodging his application in this court. It is clear from the provisions of **Order 42 Rule 6** that all the conditions for the grant an order of stay of execution need to be in existence at once at any given time in order for the stay orders sought to issue. As substantial loss has not been proved and delay has not been explained the instant application must fail.

17. The upshot of foregoing the application dated **6/8/2019** has no merit and the same is dismissed with costs.

**Dated, signed and delivered at Kitale on this 27<sup>th</sup> day of November, 2019.**

**MWANGI NJOROGE**

**JUDGE**

**27/11/2019**

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Barongo for the Applicant

Mr. Nakitale holding brief for Waweru for Respondent

**COURT**

Ruling read in open court at 3.30 p.m.

**MWANGI NJOROGE**

**JUDGE**

**27/11/2019**