



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 275 OF 2012

KISEKEM LIMITED.....PLAINTIFF

VERSUS

MICHAEL KIPKERING CHERWON.....1ST DEFENDANT

THE COMMISSIONER OF LANDS.....2ND DEFENDANT

THE CHIEF LAND REGISTRAR.....3RD DEFENDANT

THE ATTORNEY GENERAL.....4TH DEFENDANT

RULING

1. The 1st Defendant vide Notice of Motion dated 6th August, 2019 seeks for stay of execution of the Judgment delivered on the 18th July, 2019 and the resultant decree, pending the hearing and determination of the appeal. The application is based on the eight (8) grounds on its face summarized as follows;

(i) That after the Judgment of 18th July 2019, the 1st Defendant filed a Notice of Appeal on the 19th July, 2019 and applied for certified copies of proceedings.

(ii) That the 1st Defendant will suffer substantial loss if stay is not granted and is willing to furnish security as ordered by the court.

(iii) That the application was filed without delay and the other parties will not suffer prejudice if the order is granted.

The application is supported by the affidavits sworn by **Michael Kipkering Cherwon** the 1st Defendant on the 6th August, 2019 and 23rd September, 2019.

2. The application is opposed by the Plaintiff through the replying and supplementary affidavits sworn by **Willy Kamuren**, the Managing Director, on 31st August, 2019 and 4th October, 2019.

3. The learned Counsel for the 1st Defendant filed the written submissions dated the 24th October, 2019 while that for the Plaintiff filed theirs dated 5th November, 2019.

4. The following are the issues for the court's determinations;

(a) Whether the 1st Defendant has certified the requirements of Order 42 Rule 6 of civil Procedure Rules for stay order pending appeal to issue.

(b) Who pays the costs?

5. The court has carefully considered the grounds on the Motion, the affidavit evidence by Counsel for both parties participating in the application, the written submissions by both Counsel, the record of the court and come to the following findings;

(a) That it is clear the Motion dated 6th August, 2019 was filed on the same day, 6th August, 2019 which was about nineteen (19) days from the 18th July, 2019 when the Judgment sought to be stayed was delivered. The application was therefore filed without unreasonable delay.

(b) That from the available affidavit evidence, the 1st Defendant has been in possession of the suit land, and the execution of the Judgment delivered on the 18th July, 2019 would result to his being locked out of the properties and the removal of structures thereon or their demolition. That as the 1st Defendant signaled his intention to file an appeal by filing the notice of appeal on the day following the Judgment, the court is satisfied that he would suffer substantial loss if an order of stay is not granted. That however, as the judgment of the court of 18th July, 2019 was in favour of the Plaintiff, and so as to protect their interest as the appeal is heard and determined, it is only fair that all the rent collected from the developments on the suit land be deposited in a bank in an interest earning account in the joint names of the Counsel for the Plaintiff and 1st Defendant as security for the performance of the decree. That arrangement will ensure that the 1st Defendant will not unreasonably delay in having the appeal processed, heard and determined.

(c) That the issues relating to the merit, or otherwise of the court's judgment delivered on the 18th July, 2019 are matters to be canvassed before the Court of Appeal for determination.

(d) That in view of the finding in (b) above, it is only fair that the costs of the application abide the outcome of the appeal.

6. That flowing from the foregoing, the court finds merit in the Motion dated the 6th August, 2019 and orders as follows;

(a) That stay is granted in terms of prayer (c) on condition that all the rent collected or earned by the 1st Defendant from the structures (developments) on the suit properties from the month of August, 2019 to October, 2019 is deposited in an interest earning account in the joint names of the learned Counsel for the Plaintiff and 1st Defendant with a bank in sixty (60) days from today. That further, all the rent collected or earned from the said structures (developments) from November, 2019 continue being deposited in the said account until the appeal is heard and determined.

(b) That the costs of the application abide the outcome of the appeal.

Orders accordingly.

Dated and delivered at Eldoret this 20th day of November, 2019.

S. M. KIBUNJA

JUDGE

Ruling read in open court in the presence of:

Mr. Songok and holding brief for Gachie for Plaintiff.

Mr. Aseso for 1st Defendant.

No appearance for 2nd to 4th Defendants.

Mr. Ngigi Mbugua for Rachuonyo for Interested Party.

Christine: Court Assistant