



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E & L CASE NO. 73 OF 2014

DAVID K. BETT.....PLAINTIFF

VERSUS

SAMSON KIPKEMBOI.....DEFENDANT

RULING

1. **David K. Kibet**, the Plaintiff, moved the court through the Motion dated the 16th January, 2019 seeking for among others leave to file an appeal against the **“Judgment and Decree of this honourable court”**, stay of execution out of time pending appeal and costs. The application is based on the three grounds marked (a) to (c) on its face that the Defendant obtained judgment in his favour on the 9th November, 2018 and is likely to commence execution of the Decree which would amount to substantial loss and damage to the Applicant. That the Plaintiff is ready and willing to abide by any reasonable terms pending the hearing and determination of the appeal. The application is supported by the affidavits sworn by the Plaintiff on the 16th January, 2019 and 22nd July, 2019.

2. The application is opposed by **Samson Kipkemboi**, the Defendant, through the replying affidavit sworn on 28th June, 2019 deponing to among others that right to appeal over the judgment is automatic and no leave is required. That as no costs have been taxed, there is no execution that is imminent.

3. The learned Counsel for the Plaintiff filed their written submissions dated the 18th October, 2019 which counsel adopted during the hearing on the 22nd October, 2019. The learned Counsel for the Defendant made her oral submissions on the same day.

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

(a) Whether leave to appeal over the court’s judgment of 8th December, 2018 is required.

(b) Whether the Applicant has made a reasonable case for stay of execution order to issue pending the filing and determination of the intended appeal.

(c) Who pays the costs of the application?

5. The court has after considering the grounds on the application, the affidavit evidence by both parties, written and oral submissions by Counsel for both parties and the record come to the following conclusions;

(a) That the record confirms that this suit was heard and judgment on merit delivered on the 9th December, 2018 dismissing the suit filed by Plaintiff with costs and allowing the counterclaim of the Defendant for permanent injunction, re-establishing the boundary and fencing plot No. 55 Chepkumia Exchange Area. That in terms of the provision of **Part VIII of the Civil Procedure Act Chapter 21 of Laws of Kenya** and **Section 16 of the Environment and Land Court Act No. 19 of 2011**, the party or parties not satisfied with the court’s judgment have automatic right to file an appeal to the Court of Appeal within the time required. That there was therefore no need to seek leave to file an appeal from this court over the judgment delivered on the 9th December, 2018. The application is not about leave to file a notice of appeal or appeal out of time.

(b) That the Plaintiff’s suit having been dismissed with costs and judgment entered for the Defendant in the counterclaim, and noting that the costs payable has not been taxed and decree issued, the apprehension of execution is therefore misplaced. That there is therefore no basis of seeking for an order of stay of execution out of time as the Plaintiff seems to do. That accordingly, the court finds the Plaintiff has failed to establish a reasonable case for stay of execution order to issue at this stage.

(c) That the court has perused the record and there is no evidence of notice of appeal having been filed or attached to the application.

(d) That the application has among others invoked **Order 42 Rule 6(2) and (3) of the Civil Procedure Rules**, which requires a party seeking for stay of execution orders pending appeal to satisfy the court that substantial loss would be occasioned unless the order was granted, and that the application was filed without unreasonable delay. That further, such a party may be required to provide security for the due performance of the decree. That in this case, the Plaintiff has not shown that he has filed a notice of appeal, or appeal. The plaintiff has also not addressed the court on the nature of substantial loss he is likely to suffer if the stay order was not granted. That further, even though the application dated the 16th January 2019 was filed on the 17th January 2019, it was not until 21st June, 2019 that it was served upon Counsel for the Defendant. That the delay of over five (5) months in serving the application shows laxity on the part of the Plaintiff and amounts to unreasonable delay.

(e) That the court finds no merit in the Plaintiff's application and in terms of **Section 27 of the Civil Procedure Act Chapter 21 of the Laws of Kenya**, he should pay the Defendant's costs.

6. That from the foregoing, the Plaintiff's Motion dated the 16th January, 2019 is without merit and is dismissed with costs.

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. Mitei for Omusundi for Plaintiff.

Mr. Otieno for Defendant.

Christine: Court Assistant