



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 169 OF 2013

FLORA CHERONO.....PLAINTIFF/RESPONDENT

VERSUS

MARY NJIHIA.....1ST DEFENDANT

GRACE ABENI.....2ND DEFENDANT

HAMISI SUMBA.....3RD DEFENDANT

WAWERU NYAGA.....4TH DEFENDANT

JOSEPH BARASA NYONGESA.....5TH DEFENDANT

THE LAND REGISTRAR

TRANS-NZOIA.....6TH DEFENDANT

ABUBAKAR TEMBULA CHANGE.....7TH DEFENDANT

KESOGON MOSQUE COMMITTEE...8TH DEFENDANT

RULING

1. By a ruling dated **24/10/2019**, the application dated **27/8/2019** was struck out with costs on the basis that the applicant violated order of the court issued on **3/10/2019** by failing to file submissions. On **28/10/2019** the 4th applicant filed an application to review, set aside and reinstate the application dated **27/8/2019**. The application was heard on **4/11/2019**. Ms. Bett for the plaintiff/respondent did not oppose the application dated **28/10/2019**. The court granted prayers No. 2 and 3, that is, the review, setting aside and reinstating the application dated **27/8/2019** when it was shown that the defendant/applicant had a filed copy of submissions in his possession.
2. The application dated **27/8/2019** and filed in court on **28/8/2019** has been brought by the 3rd defendant. It seeks an order of stay of execution of the judgment and 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.
3. The applicant has 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**.
4. The grounds on which the said application is made are that the judgment in this matter was read and delivered by this court on **31/7/2019** and the applicant was dissatisfied with the said judgment; that the respondent intends to execute the said judgment; that the 3rd applicant has preferred an appeal to the Court of Appeal and has already filed a notice of appeal; that if a stay of execution is not granted substantial loss may result and render the appeal nugatory to the applicant; that the appeal has reasonable chances of success; that there has been no delay in bringing this application and no one shall be prejudiced if the orders sought are granted.
5. The application is supported an affidavit of the 4th applicant dated **27/8/2019** which amplifies the above grounds.
6. The plaintiff/respondent filed grounds of opposition on **30/9/2019** opposing the application. The grounds the plaintiff relied on are that the application does not satisfy the requirements of granting of stay pending appeal in that no security has been provided and no substantial loss has been demonstrated; that the application is a ruse to protract this matter further by denying the responding from recovering his property

and enjoying the fruits of her judgment; that the suit land is registered in respondent's name and that the applicant has not demonstrated that he has an arguable appeal. It is further stated by the respondent that the notice of appeal indicates that the applicant intends to appeal from the judgment of Hon. Justice Yano which is not the judgment delivered herein.

7. The plaintiff/respondent filed his written submissions on **14/10/2019**. The 4th applicant/defendant's submissions were filed together with the review application on **28/10/2019**. I have considered those submissions.

8. 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.”

9. In view of the above provisions therefore, in an application for stay of execution pending appeal the applicant must establish that an appeal has been filed, that the application has been made without undue delay and that substantial loss would result unless the orders were issued. The court is entitled to impose any condition as to security if it deems it proper to grant the orders of stay.

10. Regarding whether there is appeal this court notes that a notice of appeal was filed on **1/8/2019** by the applicant herein. Although that notice of appeal appears to contain an error in that it states that the judgment sought to be appealed from was delivered by Hon. Justice C.K. Yano, I do not think that that error affects the merits of this application, reason being that that notice has been filed in the file record for this case and the date of judgment cited therein and all other details are, in my view, correct. For the purpose of the instant application there is therefore an appeal on the record.

11. As to whether the application has been filed without undue delay I do note that judgment was delivered on **31/7/2019** and the application was filed on **28/8/2019**. That is a period of **28 days**. In my view that cannot be termed as unreasonable delay.

12. This court must also address the issue of substantial loss. I have examined the application and found that annexure **“HS3”** in the supporting affidavit comprises of photographs of permanent developments erected on the suit premises. It has not been denied that such structures exist on the suit premises. Though this court has found the land in question rightfully belongs to the plaintiff, the applicant has demonstrated that he is in possession thereof and has developed the same. Without more, it is my view that if eviction of the applicant issued before the hearing and determination of the appeal he may suffer substantial loss and the appeal may be rendered nugatory.

13. For the above reasons this court finds that the application **27/8/2019** has merit. The same is granted in terms of prayer **No. (3)** thereof. The applicant shall file and serve his record of appeal in the matter within **45 days**. In addition the applicant shall within the same period deposit **Kshs.300,000/=(Three Hundred Thousand Shillings Only)** being security for costs in an account held jointly by counsel for the parties. In default of compliance with the two conditions set herein, the stay order granted herein shall automatically lapse. The costs of the application shall abide the decision in the appeal.

Dated, signed and delivered at Kitale on this 13th day of November, 2019.

MWANGI NJOROGE

JUDGE

13/11/2019

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Onyancha for applicant

N/A for the respondent

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

13/11/2019