



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

E & L CASE NO.125 OF 2017

GEORGE KAMAU GITHAU.....PLAINTIFF

VERSUS

MOSES CHEBOI.....DEFENDANT

RULING

This Ruling is in respect of an application dated 6th August, 2019 brought by the defendant/applicant seeking for orders of stay of execution of the decree of the honourable court pending the hearing and determination of the intended appeal.

Before I deal with the application for stay of execution it is important to give a brief background to this case. The court notes that this is an unfortunate case where the defendant has filed several applications of a similar nature to try and undo the failures occasioned by not taking the matter seriously to attend court. It should also be noted that Counsel for the applicant had filed an application to cease acting whereby he had informed the court that the defendant had failed to give adequate instructions which was allowed and the same necessitated the adjournment of the case.

The defendant appointed Arap Mitei & Co. Advocates who filed a notice of appointment and when the matter came up for hearing on 9th April 2018 Counsel for defendant stated that he had just been instructed and needed more time to peruse the file of which the court allowed and fixed a date for hearing on 24th July 2018.

On 24th July 2018 when the matter came up for hearing, both Counsel for the plaintiff were present and were given time allocation for the hearing of the suit at 11.30 a.m. When the matter was called out at the scheduled time Counsel for the plaintiff and his client were present in court and Counsel for the defendant and his client were absent. The court therefore proceeded with the plaintiff's case. The court gave a judgement date for 25th September 2018.

On 17th September 2018 Counsel who had cease acting entered into a consent with Arap Mitei & Co. Advocates to come on record for the defendant and filed an application for the court to for the defendant for lack of instructions, Anassi Momanyi & Co. Advocates filed another application to suspend the delivery of judgment slated for 25th September 2018 and set aside the proceedings. The court heard the application and dismissed it as it had been overtaken by events as the judgment was ready for delivery and no good reason was advanced to warrant the arresting of the delivery of judgment.

On 22nd October 2018 the defendant made another application for stay of execution and setting aside the judgment and all consequential orders which application was heard and dismissed with costs to the plaintiff/respondent.

On 6th August 2019 the defendant/applicant made a similar application of stay of execution which had been dismissed by the court.

Going to the current application for stay of execution, for such application to succeed the applicant must satisfy the Provision of Order 42 of the Civil Procedure Rules. The applicant must demonstrate that the application was filed in a timeous manner without undue delay, that the applicant will suffer substantial loss if the orders of stay are not granted and finally offer security for due performance of the decree.

Order 42 Rule 6(1) of the Civil Procedure Rules, 2010 which empowers this court to stay execution, either of its judgement or that of a court whose decision is being appealed from, pending appeal. The conditions to be met before stay is granted are provided by the Rule 6(2) as follows:

“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.”

An application for stay of execution is also at the discretion of the court but the same must be exercised judiciously. The exercise of judicial discretion was enunciated in the Court of Appeal case of **Butt v Rent Restriction Tribunal [1982] KLR 417** and gave guidance on how a court should exercise discretion and held that:

“1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.

3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

Having given a background to this suit, I find that this is not a suitable case where the court would exercise its discretion in favour of the applicant. The applicant must also conform to the provisions of Order 42 Rule 6 of the Civil Procedure Rules. It is not enough to state that the Applicant is in occupation of the suit land. The court cannot deodorize any occupation which might be illegal or otherwise. No loss has been demonstrated or established by the Applicant. Mere mention that substantial loss will be occasioned to the applicant is not enough without being established.

On the issue of security are performance of the decree, the Applicant has just stated that the land will still be there and offered no security. It is not automatic to grant stay of execution orders as it is trite law that no appeal or second appeal shall operate as a stay of execution or proceedings under a decree.

I find that the Applicant has not met the threshold for stay of execution and therefore the same is dismissed with no orders as to costs.

DATED and DELIVERED at ELDORET this 11TH DAY OF DECEMBER, 2019.

M. A. ODENY

JUDGE

RULING read in open court in the presence of Mr.Okara for Plaintiff/Respondent and in the absence of Defendant/Applicant.

M/s Christine - Court Assistant