



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**CIVIL SUIT NO. 71 OF 2013**

**KENYA INDUSTRIAL..... ESTATES PLAINTIFF/APPLICANT**

**VERSUS**

**ANNE CHEPSIROR.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**SAMACK GENERAL**

**SUPPLIED LIMITED.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**ULTRA EUREKA FARM LIMITED.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**CUSTOM CREDIT**

**MANAGEMENT LIMITED.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**TAJAKOS ENTERPRISES LIMITED....5<sup>TH</sup> DEFENDANT/RESPONDENT**

**ATTORNEY GENERAL.....6<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

Before me is the application dated 6.2.2015 brought under Certificate of Urgency by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. The applicants seek orders that there be stay of execution of the judgment of the court, thus there be stay of eviction pending the hearing and determination of appeal and that the status quo before judgment to be maintained. The application is based on grounds that the court delivered judgment on 30.1.2015 in favour of the plaintiff/respondent as against the 2<sup>nd</sup>, 3<sup>rd</sup> defendants amongst others. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants' application are aggrieved by the said judgment and have filed a notice of appeal, the intended appeal has merit and has high chances of success. That if the judgment is executed, the appeal shall be rendered nugatory and that the defendant/respondent shall suffer irreparable loss. The applicant is ready and willing to abide by any reasonable conditions of stay of execution that may be ordered by the court. That the application is filed timeously in the sole interest of justice and fairness.

The application is supported by the affidavit of Jackson K. Chebet, the Director of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants/Applicants' companies herein who claims to be fully clothed with the requisite competence and authority to swear this affidavit on their behalf. He states that he is informed by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Applicants Advocates on record which information he verily believes to be true that on 30/1/2015 the court delivered its judgment in favour of the plaintiff as against the defendants amongst them 2<sup>nd</sup> and 3<sup>rd</sup> defendants/applicants. That he is aware that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants are aggrieved by the said judgment and as such advised and instructed their advocate M/s Nyaundi Tuiyott & Company Advocates to lodge an appeal to the court of appeal which has been duly filed. The plaintiff is poised to execute the said decree against the defendants at any time henceforth. That he is further aware that execution of the said judgment which includes change of particulars at the lands registry can be done immediately without notice and which would be of great prejudice to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Applicants herein.

He is aware that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Applicants shall suffer substantial damage and loss in case the application is not allowed in view of the depositions in paragraph (5) above and further taking into account the issue of eviction which will encompass demolition and destruction of property. That he is advised by their advocates on record M/s Nyaundi Tuiyott & Co. Advocates that the appeal is meritorious and has high chances of success and shall be ideally rendered nugatory in case this application' s interim prayers and orders are not granted by this honorable court.

The deponent is informed by their advocates on record which information he verily believes to be true that this application is timeously made

without undue delay and that he is aware that if the prayers sought are granted which are in the interim pending, the decision of the Court of Appeal, the plaintiff will not be prejudiced in any manner whatsoever as they have not been in occupation. That he is informed by their advocates on record that this application and the respective appeal raises substantive issues of law and fact to be determined by the appellate court. The Plaintiff/ Respondent shall not be prejudiced in any way if this application is allowed as any inconveniences can be remedied by an award of costs for this application. The Respondent will not suffer prejudice if orders sought are granted. That it is fair and just that this application be allowed so as to enable the court to comprehensively determine the issues between the parties and ensure there is satisfaction to the party who feels aggrieved by the order of the previous court.

The 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants have also brought an application dated 9.2.2015 seeking for orders of stay of execution. The 1<sup>st</sup> defendant applicant states that she resides on the suit property with the family and therefore, the whole family will be rendered homeless. She has made substantial developments on the land and has produced the valuation report. The intended appeal is likely to be rendered nugatory unless the order of stay of execution is granted as the Commissioner of Lands is likely to cancel the title document and that she stands to be evicted. The application was filed without undue delay. On security, he states that he is agreeable to keeping the title document in court as security of judgment/decree of court given on 30.1.2015 pending appeal.

The application is based on grounds that the applicant stands to suffer substantial loss and damage due to eviction and that the applicant's documents are likely to be cancelled. They are likely to be deprived of their properties. According to the applicant, the application has been filed without unreasonable delay. The application is supported by the affidavit of Anna Cherop Chepsisor who states that she was personally aggrieved and dissatisfied with the judgment and has filed a notice of appeal. She stands to suffer substantial loss unless the execution of the decree dated 30.1.2015.

The plaintiff/respondent filed grounds of opposition against both applicants stating that no security for performance of decree has been offered and that there are no arguable grounds of appeal. Moreover, that no prejudice will be suffered by the applicants if stay is denied. The Attorney General filed grounds of opposition stating that no appeal has been filed and no draft of draft memo of appeal has been filed. Moreover, that the applicants have not established that they are likely to suffer substantial loss of stay if not granted. The plaintiff/decree holder further filed a reply affidavit sworn by Reginald Kimanthi stating that he is the Estates and Property Manager for the plaintiff, a State Corporation holding property in trust for the Treasury and other stake holders including the Ministry of Industrialization herein and have the Corporation's authority to depone, thus competent to swear this affidavit on behalf of the Corporation. That he has perused and had explained to him the contents of the 1<sup>st</sup> and 2<sup>nd</sup> appellants' Notice of Motion dated 6<sup>th</sup> February, 2015 seeking stay of execution of judgment and stay of eviction pending the hearing and determination of the application is frivolous and should be dismissed *in-limine*.

He is aware that the judgment was delivered by the Honourable court on 30<sup>th</sup> January, 2015 after the plaintiff instituted the matter in 2008 and has since waited for 7 years for the litigation to come to an end. That further, now that the plaintiff has been rewarded with fruits of justice, the applications made by the 1<sup>st</sup> and 2<sup>nd</sup> appellants are devoid of merit and are only intended to protract the matter longer than is necessary. Litigation ought to come to an end. That he is advised by his advocates on record, Messrs Lumumba & Lumumba Advocates, that the defendants have not demonstrated any substantial loss they are likely to suffer and further the alleged demolition and destruction of the suit property is the prerogative of the plaintiff who from the onset already built on the said property that the 1<sup>st</sup> and 2<sup>nd</sup> appellants unwittingly and illegally occupied.

That he is advised by his Advocates on record that the orders of stay are conditional upon the applicants vacating the subject Government land and that the 1<sup>st</sup> and 2<sup>nd</sup> appellants have not submitted any security of performance of the Honourable Court judgment and decree issued on 30<sup>th</sup> January, 2015. The plaintiff will be highly prejudiced since the said property was for purposes of providing housing for its staff workers before the property was subjected to litigation in the courts because of the 1<sup>st</sup> and 2<sup>nd</sup> appellants illegal actions on the suit property.

The Honourable Judge in his judgment observed that the suit property was already developed by the plaintiff and thus the plaintiff had a legitimate expectation that it would be given priority on the expired lease for renewal. That he is advised by his advocates on record that through a reading of the judgment delivered on 30<sup>th</sup> January, 2015 and the proceedings it was clearly demonstrated that the defendants failed to follow the proper procedure for allocation of the town plots and to provide the Honourable Court with evidence of the purported allocation of the suit property and that the subsequent acquisition was fraudulent. The Honourable court's judgment was fair, just and equitable against all parties to the suit.

That he is advised by his advocates on record that this Honourable Court should build jurisprudence in a manner that is likely not to affect the scales of justice and precedents the court should also exercise its discretion judiciously in the interests of justice. This matter was instituted in 2008 and judgment was delivered on 30.1.2015 and that litigation has to come to an end and that the plaintiff ought to be allowed to enjoy fruits of judgment. Moreover, that there is no evidence of substantial loss by the applicants. Moreover, that no security has been offered. The plaintiff states that he will be highly prejudiced since he has put up houses for his servants and therefore, had a legitimate expectation that the property would be allocated to him during renewal of the lease.

In their submissions, the applicants state that they have demonstrated that if stay is not granted, they will suffer substantial loss and that they will be evicted from the land and that they live on the land with their families. The applicants are ready to abide by any conditions of stay that the court may order. The application was filed timeously. The plaintiff/respondent filed submissions whose gist is that the defendants have no arguable appeal in the Court of Appeal and that the respondents should be allowed to enjoy the fruits of the judgment. The respondent submits further that the application is intended to deny the plaintiff the fruits of judgment and that justice demands that litigation must come to an end. Moreover, that the applicants have not demonstrated substantial loss as they have not proved specified details and particulars.

I have considered the application and do find that Order 42(6) of the Civil Procedure Rules gives this court a discretion to grant a stay of execution of decree pending appeal. The conditions for granting a stay of execution pending Appeal are now settled. An order of stay of execution is a discretionary one but that discretion is fettered by the conditions set out in Order 42 Rule 6 (2) of the Civil Procedure Rules which are that: -

***i. The application must be made without undue delay.***

***ii. That the Applicants must demonstrate that they will suffer substantial loss unless the order sought is granted.***

***iii. 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.***

It is not in dispute that the applicants have come to court within reasonable time as judgment was ordered on 30.1.2015 whilst the application was filed on 6<sup>th</sup> and 9<sup>th</sup> February, 2017 and therefore the court finds that the application was filed timeously. On substantial loss, I do find that the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants have improved the property in dispute as per the valuation report, thus 8/595 an improvement of **Kshs.3,000,000** and Eldoret Municipality Block 8/592 an improvement of **Kshs.7,000,000** and therefore are likely to suffer substantial loss if evicted from the suit properties. From the foregoing, I do find that the applicants are entitled to the orders sought however, they are required to deposit security of the value of the properties. Thus, Anna Chepsiror to deposit security of **Kshs.15,000,000** not being the title deed in respect of the suit land. Custom Credit Management Ltd to deposit security of **Kshs.35,000,000** not being the title to the suit land. Hosea Kibet Ruto to deposit security of **Kshs.15,000,000** not being the title to the suit land.

The application by 2<sup>nd</sup> and 3<sup>rd</sup> defendants/applicants does not succeed as they have failed to demonstrate any substantial loss likely to be suffered as there is no valuation report in respect to their title properties and therefore the court cannot ascertain what they are likely to suffer and therefore the application lacks merit and is dismissed with costs. The upshot of the above is that the application by the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents is allowed with the aforementioned conditions. Save that the stay shall lapse after a period of one hundred (100) days with liberty to apply.

**Dated and delivered at Eldoret this 9<sup>th</sup> day of February, 2018.**

**A. OMBWAYO**

**JUDGE**