



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT ELDORET**

**ELC NO. 447 OF 2013**

**JACOB KIPRONO KIPLAGAT.....APPLICANT**

**VERSUS**

**MARY KOBILO BARKWANG.....1<sup>ST</sup> DEFENDANT**

**GIDEON BARKWANG.....2<sup>ND</sup> DEFENDANT**

**RULING**

This is the ruling in respect of an application dated 23<sup>rd</sup> October 2017 brought by way of notice of motion by the defendant/applicants for orders:

- a) That there be stay of execution of the judgment/ decree in this suit pending the hearing and determination of this application inter partes.
- b) There be stay of execution of the judgment / decree in this suit pending the hearing and determination of the intended appeal to the court of appeal.

Counsel agreed to canvass the application by way of written submissions. The plaintiff/respondent's Counsel filed his submissions but the defendant applicant did not file any. I will therefore make a ruling based on the supporting affidavit and the submissions by the plaintiff/respondent's Counsel.

The applicant filed the current application on 24/10/17 under certificate of urgency. The matter was certified urgent by the court and directed that the applicant serves the application within 7 days for inter parte hearing. On the date of the inter parte hearing Counsel agreed by consent to canvass the application vide written submissions. The respondent's counsel filed his submissions but the applicant failed to do so.

Counsel for the respondent submitted that no Appeal was filed on or before 12/10/17 as required by law. He further submitted that the Plaintiff / Respondent executed the judgment and obtained title on 6/11/17 and that they are waiting to tax the costs of the suit. It is therefore Counsel's submissions that since no notice of appeal has been filed to prove intention to appeal, no appeal has been preferred and there is no ground for stay of execution. Counsel cited the case of Nairobi Court of Appeal Civil Application NO. 78 of 2011 Equity Bank Limited=vs= West Link MBO Limited where it was held that:-

"..... An application for stay that has been filed and where no actual appeal has been lodged there must be an intention of appeal which is manifested by lodging a notice of appeal In my view, the notice of motion is predicated on an appeal. It is not a standalone matter".

Further Counsel submitted that the decree has crystallized and the application herein has been overtaken by events as the decree has been executed and a title issued. It was also his submission that the order cannot be stayed as the decree was lodged at the land's registry on 6/11/17 and transfer has already been done.

Counsel further relied on the case of Nairobi Civil Appeal No. 48 of 2015 - Selestica Limited =vs= Gold Rock Development Limited where it was held as follows:-

"...In my view there is unreasonable delay in this case which the appellant has not satisfactorily explained... it would only have been expected that the appellant acts with extreme vigilance in this matter. In my view, the appellant acted at the eleventh hour which was an extremely risky affair... "

Counsel submitted that the application does not meet the threshold for grant of stay of execution as the applicant has not explained the unreasonable delay in filing the application. Further, the intended appeal will not be rendered nugatory if stay of the order is not granted as the decree has already been executed and there is nothing to be stayed hence this instant application is of no use to the Defendant. Counsel prayed that the application be dismissed with costs.

### **Analysis and determination**

This is an application for stay of execution pending appeal. The principles for grant of such orders are well settled and are anchored on Order 42 rule 6 of the Civil Procedure Rules. Under this Order, the court must be satisfied that substantial loss may be occasioned if the order of stay is not granted, the application must be made without undue delay and the court may order for security for the performance of such decree or order as may ultimately be binding on the applicant.

I will not belabor much as the applicant was given an opportunity to argue the application to satisfy the court that he deserves the orders for stay but he did not grab the chance. I have taken the liberty to look at the supporting affidavit as filed and noticed that the same does not explain the reason for the delay in filing the current application.

I have also looked at the supporting documentation and is of the view that the applicant has not met the threshold as provided for under order 42 Rule 6 of the Civil Procedure Rules. The purported Notice of Appeal and the Memorandum of Appeal are neither signed nor have an Appeal Number. This alone shows the lack of seriousness on the part of the applicant's counsel to pursue this matter. Counsel was given an opportunity to present his client's application but failed to do so.

The applicant has not demonstrated that they will suffer substantial loss if the stay of execution order is not granted. These ingredients are necessary when seeking such orders.

The applicant also went to sleep after the judgement, no explanation has been given for the inordinate delay in filing this application. The decree has been extracted and executed so there would be nothing to stay. The applicant was not serious when he brought this application to court. The issue of security of costs which is a limb of the requirement to be met under Order 42 Rule 6 has also not been addressed.

Having considered the application together with the supporting documentation and the submissions of Counsel, I find that the application lacks merit and is therefore dismissed with costs.

**Dated and delivered at Eldoret on this 7<sup>th</sup> day of February, 2018.**

**M.A ODENY**

**JUDGE**

Ruling read in open court in the presence of Plaintiff/Respondent and in the absence of the Respondents.

Mr. Koech – Court Assistant.