



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**LAND CASE NO. 38 OF 2012**

**JOSEPH OUMA ONDITI.....PLAINTIFF**

**VERSUS**

**JANE KISAKA MUNG'AU.....DEFENDANT**

**R U L I N G**

1. By the application dated 22/1/2018 the defendant seeks a stay of execution of the judgment of this court delivered on 31/7/2017 and the decree thereof pending the hearing of an appeal against the said judgment and decree.

2. The applicant avers that the intended eviction arising from the judgment carried out would render the appeal nugatory. A Notice of Appeal is annexed as Exhibit "JKM1 (a)" in the supporting affidavit. It appears to have been filed within the prescribed period. A request for certified copies of the proceedings and judgment is annexed as Exhibit "JKM1 (b)" to the supporting affidavit. It is copied to Ms. Kidiavai & Co. Advocates. A Valuation Report is annexed as Exhibit "JKM2". It gives a text and photographic description of the suit property. The applicant asserts it is her only known home and that it is worth at least Kshs.2,000,000/=.

3. In response to the application the plaintiff filed grounds of apposition dated 20/2/2018. His grounds are that the intended appeal has no chance of success as the respondent is the registered owner of the suit land and no counterclaim was lodged by the defendant for a declaration that the land was hers; that the structures on the suit land were erected when this litigation was pending; and that no security has been provided for the due performance of the decree. It is also claimed that the application was made after an unreasonable delay and that it is merely meant to delay the enjoyment of the fruits of the judgment by the plaintiff.

4. The application is brought under **Order 42 Rule 6 of the Civil Procedure Rules**. Under that rule the applicant must establish that (a) substantial loss may result to the applicant unless an order of stay is granted, (b) the application has been made without undue delay and (c) security as to costs has been given by the applicant.

5. In the case of *Masisi Muita -vs- Damaris Wanjiku Njeri -Muranga Civil Appeal No. 107 of 2015 [2016] eKLR* the Court observed that:-

**“The cornerstone of the jurisdiction of the court under Order 42 of the Civil Procedure Rules is that substantial loss would result to the applicant unless a stay of execution is granted”.**

6. In the cited case above the court referred to the case of *James Wangalwa & Another -vs- Agnes Naliaka Cheseto* where the Court expressed itself concerning substantial loss as follows:-

**“The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. This is what substantive loss would entail, a question that was discussed in the case of *Silverstein -vs- Chesoni*. The issue of substantial loss is the cornerstone of both jurisdiction. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory”.**

7. This suit concerns land. The applicant has been living on that land. She has constructed a dwelling house thereon. She pleads that she has no other home and that she would be rendered destitute if execution is carried out. I do consider the fact that the applicant has dwelt on the suit land since 2004 to be uncontroverted. It is not also in dispute that she has considerably developed the suit land over the years.

8. In my view, though the successful party in a suit is entitled to the fruits of the judgment this court is also aware of the applicant's right to the suit property upon a successful appeal to a higher court, which right, if impeded by an execution process that alters the status quo on the ground may be so gravely prejudiced as to be unattainable again. The execution process may alter too much in the present case. The prayers in the plaint sought orders that would result in an eviction. On the other hand the defendant's counterclaim, for contrary to the plaintiff's submissions a counterclaim is in the record, sought a declaration that the land parcel was fraudulently registered in the names of the plaintiff

and also a cancellation of the registration.

9. I find that if the execution process took place, and perchance the defendant/applicant's property in the premises was interfered with in default of an order from this court, she would have nowhere to turn to as that process would be legal yet her appeal would still be pending. The applicant would therefore suffer substantial loss if the execution ensued.

10. However there remains the allegation of delay raised by the plaintiff.

11. Turning to the issue of whether there has been unreasonable delay in the lodging of the instant application, I note that the Notice of Appeal was promptly filed as required by the Rules. However the applicant took a period of five months and twenty two days before she filed the instant application. In the case of *Trattoria Ltd -vs- Joaminah Wanjiku Maina NBI Misc. Appl. No. 431/2013 eKLR*. It was stated that:-

**“It is now well settled that what amounts to unreasonable delay for purposes of order 42 Rule 6 Civil Procedure Rules is dependent on the peculiar circumstances of each case. The court denied stay in that case where the delay lasted 11 months”.**

12. In the case of *Utalii Transport Company Ltd & 3 Others -vs- NIC Bank Ltd & Another 2014 eKLR* the Court has this to say:-

**“Whereas there is no precise measure of what amounts to inordinate delay and whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case the subject matter of the case, the nature of the case, the explanation given for the delay and so on and so forth.**

**Nevertheless inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable, conclusion that it is inordinate and therefore inexcusable. On applying the courts mind on the delay caution is advised for courts not to take the word “inordinate” in its dictionary measuring but in the sense of excessive as compared to normality”.**

13. In the case of *Gahir Engineering Works Ltd -vs- Rapid Kate Services & Another 2015 eKLR* where the application was lodged after 8 months, the Court has this to say:-

**“It is worth considering that it is the norm and good practice for advocates to advise their clients and further (seek) their client's instructions on the way forward. Obviously this is not a one day business. There are some factors that may in some cases occasion delay which delay is excusable. Even if I am found to be wrong on that disposition it is in the interest of justice to determine whether even with an inordinate delay justice can still be done to the parties”.**

14. In that case the court found that part of the delay had been explained. It dealt with the remaining period of two months delay and granted the application. In this case no attempt has been made to explain the delay of more than 5 ½ months since judgment was delivered.

15. In the above cited case *Gahir Engineering Works Ltd -vs- Rapid Kate Services & Another 2015 eKLR* the Court quoted a passage. *Peter Tharau Ngure -vs- Margaret Wairimu Magugu HCCC No. 457 of 2003* as follows:-

**“Once a judgment has been passed there is always the possibility of execution at any time thereafter and the judgment debtor must seek the court's intervention without unreasonable delay if he wants stay of execution pending appeal”.**

16. The delay in bringing the instant application has not been explained in any manner. I find it inordinate. The application dated 22/1/2018 therefore fails and I dismiss the same with costs to the respondent.

**Dated, signed and delivered at Kitale on this 23<sup>rd</sup> day of April, 2018.**

**MWANGI NJOROGE**

**JUDGE**

**23/4/2018**

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Bisonga for Respondent

Mr. Ingosi for Applicant

**COURT**

Ruling read in open court.

**MWANGI NJORGE**

**JUDGE**

**23/4/2018**