REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 438 OF 2013

ABDI ADAM HUSSEIN.....1ST PLAINTIFF

SHIRE MAALIM OSMAN.....2ND PLAINTIFF

IBRAHIM ABDULLAH KHALIF.....3RD PLAINTIFF

VERSUS

THE ATTORNEY GENERAL.....1ST DEFENDANT

THE COMMANDANT, NATIONAL YOUTH SERVICE.....2ND DEFENDANT

THE KENYA COMMERCIAL BANK LIMITED.....3RD DEFENDANT

RULING

The 1st and 2nd defendant have come to court praying for stay of execution of judgment dated 1.3.2017 and/or the decree extracted therefrom pending hearing and determination of the appeal in the Court of Appeal. The application is based on grounds that the 1st and 2nd defendants were aggrieved by the judgment rendered on and or dated 1.3.2017. Being aggrieved as aforesaid, the 1st and 2nd defendants lodged and served the Notice of Appeal dated 6.3.2017 and wishes to appeal to Court of Appeal against the judgment and decree. The 1st and 2nd defendants are apprehensive that the plaintiffs who have already extracted a decree may commence execution process to evict the 2nd defendant from the suit land and destroy the developments thereon, pendency of the appeal notwithstanding. The 1st and 2nd defendants are further apprehensive that unless stay is granted herein, the state stands to suffer substantial loss and damage and intended appeal rendered nugatory. This application has been brought expeditiously and without unreasonable delay and it is in the interest of justice that the prayer for stay of execution be granted.

The application is based on the affidavit of Dr. Richard E. Ndubai, the Director General of National Youth Service, the 2nd defendant herein who states that to the best of his knowledge neither the plaintiffs herein nor any other person including Leberio Farm Limited have any registrable interest in a public utility and the state stands to suffer substantial loss by losing its prime land and investments to the plaintiffs. He is aware that judgment was delivered on 1.3.2017 in favour of the plaintiffs to the extent that the 2nd defendant was ordered to vacate from the suit land within 30 days from 1.3.2017, in default eviction to issue. He is also aware that the plaintiffs have already extracted a decree and are preparing to execute the same through eviction upon lapse of 30 days as ordered by the court. That he is aware that the 2nd and 3rd defendants being dissatisfied with whole of the judgment and decree herein, filed a Notice of Appeal against the entire decision. He knows that the 3rd defendant has already requested and or applied for certified copy of the proceedings and judgment for appeal purposes and that he knows that the intended appeal is arguable and has overwhelming chances of success. This application is brought expeditiously and without unreasonable delay and is instituted in good faith to preserve the subject of the intended appeal. That if stay is not granted, execution would proceed and state stands to suffer substantial loss arising from forceful eviction, destruction of structures thereon and loss of use of the prime public utility yet the plaintiffs who have never been in possession would not be prejudiced. The fact that a Notice of Appeal has been filed is sufficient reason in law for this Honourable Court to order stay pending appeal.

In the replying affidavit, the Plaintiff/Decree holder states that the application has no merits and is frivolous and should be dismissed in limine. That the applicant has not met the threshold required of stay of execution. That the respondent should be allowed to enjoy the fruits of judgment.

I have considered the application dated 27.3.2017 and 19.4.2017. The application dated 27.3.2017 is for stay of execution pending appeal. Mr. Odongo, learned counsel for applicant, argues that the application is timeously filed and that the 1st defendant will suffer substantial loss if stay is not granted. The applicant has annexed a bundle of photographs showing the status of the land. The applicant argues that execution of the orders means removal of the applicant.

Mr. Mathai learned counsel for the respondent argues that there is no evidence of substantial loss and that the structures annexed in the application are on 3.5 ha owned by the defendants, Judgment debtors and that the land owned by the plaintiff/Judgment debtor is vacant. On delay, the respondent argues that the applicant is guilty of inordinate delay as he filed the application 3 days to the lapse of the 30 days stay granted by the court.

On whether the appellant will suffer substantial loss, this court in **JAMES WANGALWA & ANOTHER V AGNES NALIAKA CHESETO** ***MISC APPLICATION No 42 of 2011 [2012] eKLR (Gikonyo J*** **stated that:**

> ***"No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.***
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> ***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 substantial loss would entail,*** **a question that was aptly** ***discussed in the case of Silverstein Vs .Chesoni [2002] 1KLR 867,*** *and* ***also in the case of MukumaVs.Abuoga quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus*****:**
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> ***"…the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."***
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> **On the second condition of whether the application has been brought after an unreasonable delay,** ***this court observes that unreasonable delay depends on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter. In the case of*** **Christopher Kendagor v Christopher Kipkorir, Eldoret E&LC 919 of 2012** ***the applicant had been given 14 days to vacate the suit land. He filed an application one day after the 14 days. The application was denied, the court holding that, the application ought to have come before expiry of the period given to vacate the land."***

In **Winfred Nyawira Maina v Peterson Onyiego Gichana [2015] eKLR, the Court held that:**

> ***The foundation of the stay pending appeal is that the party is intending to file or has filed an appeal in the exercise of his constitutional right of appeal. He must, however, show sufficient cause and preponderantly, that, if his appeal succeeds, he will suffer substantial loss unless stay is ordered. Moreover, he must bring his application without unreasonable delay and give security sufficient to cover performance of the decree which may ultimately be payable by him. The Applicant filed the appeal in a supersonic speed but did act likewise to cover his back by applying for stay of execution pending appeal. Indeed, going by his arguments, a prudent and diligent suitor should have been awakened by the applications by the Respondent to levy execution on his immovable property and apply without delay to have the execution stayed. But the Applicant waited for the Respondent to go through all the motions of execution until a prohibitory order on the immovable property was issued in execution. It should be noted that filing of an appeal alone will never operate as a stay of execution and order 42 Rule 6 of the Civil Procedure Rules is as clear. And therefore, with all due respect, the explanations offered by the Applicant for not applying in a timeous manner do not hold firm or at all. From the conduct of the Applicant in allowing the Respondent to go through time-consuming and costly rigours of the process of applying for execution renders credence to the Respondent's assertion that the Applicant deliberately allowed too much time to pass-by as a gimmick by the Applicant to obstruct and delay the course of justice in this matter. Surely, the Applicant did not bring this application timeously and is the indolent litigant whose conduct compromises his equity and may not excite any love from a court of equity. Except, I realize that notwithstanding, the fact that his equity is tinctured with laches, will need to be coupled with other grounds for the Court to state with absolute sanctification that the Applicant has not shown any sufficient cause for a stay to be ordered. This course ensures that the Applicant is not disentitled of a remedy in limine. That is why the court must go ahead and examine the other grounds under order 42 Rule 6 of the Civil Procedure Rules and take the overall impression of the entire circumstances of the case to see whether any sufficient cause has been shown as to order a stay of execution."***

I have considered the application and do find that it is not in dispute that judgment was delivered on the 1.3.2017 in favour of the plaintiffs. The 2nd defendant was ordered to vacate from the suit land within 30 days. The plaintiffs have already extracted the decree for eviction. The 1st and 2nd defendants have filed a notice of appeal in time. The application for stay of execution was filed 3 days before the lapse of 30 days stay granted by the court. I do find that the applicants have come to court without inordinate delay.

On substantial loss, I do find that the applicant has established that he has substantial developed 3.5 ha of the disputed parcel of land. However, the developed part is not claimed by the respondent and therefore, the court does find that even if the decree was executed, it would not affect the developed part of the suit land.

However, in public interest and the interest of justice, this court grants stay of execution pending appeal and further orders that both parties should not interfere and/or deal with Eldoret/Municipality Block 15/2089 by disposing, alienating or constructing on the same pending hearing and determination of appeal. Costs of the application be in the appeal. Orders accordingly.

Dated and delivered at Eldoret this 17th day of April, 2018.

A. OMBWAYO

JUDGE