



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC CASE NO. 12 OF 2012

JOSEPH YANO.....PLAINTIFF

VERSUS

SIMON KIBET KIPTUM.....DEFENDANT

R U L I N G

1. The applicant brought an application dated 26/1/2018 seeking the following principal order:-

“That this honourable court be pleased to issue orders for stay of execution of the decree issued in Land Case No 12/2012 Kitale on 24th January 2017 and whose judgment was delivered on the 20th January 2017 pending the hearing and determination of the Eldoret Civil Appeal No 16 Of 2017”.

2. The grounds upon which the application is brought are that the appeal filed by the applicant has high chances of success, that the appeal will be rendered nugatory unless the orders sought are granted and that the applicant may suffer irreparable damage, and that the applicant is ready to furnish the court with security for the due performance of the decree.

3. The respondent filed a replying affidavit on **6th March 2018**. The gist of that affidavit is that costs have been assessed and partly paid by the applicant, that notice to show cause has issued in respect of the balance, that the applicant has gone underground thus making execution difficult and that the defendant should pay costs before stay is granted.

The Parties' Submissions

4. The application was ordered to be canvassed by way of written submissions with the plaintiff filing his submissions on the **16th March, 2018**. I went through the record and found no submissions on the part of the defendant/applicant at the time of preparation of this Ruling.

5. The plaintiff submits that the defendant has taken one year to bring the application hence unexplained delay. He also submits that no loss would be suffered by the applicant if he pays the costs as the same are capable of being recovered by the applicant if the appeal turns out to be successful. The plaintiff cites the case of **Kitale High Court Case No. 115 of 2013** where the court stated that the applicant would not suffer any loss if the stay of assessment and payment of costs is not granted.

Determination.

6. I have considered the application and the reply and the submissions of the plaintiff.

7. **Order 42 rule 6(2) of Civil Procedure Rules** provides as follows:-

“(2) No order for stay of execution shall be made under sub rule 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.”

8. In the case of **Daniel Wambua Ndabi -vs- Peter Luka Ndutu [2008] eKLR** the court stated as follows:-

“The issue for determination by this court is whether the defendant established a case to enable this court grant stay of execution pending the hearing of the appeal. The principles to be considered by this court in determining whether or not to grant stay of execution pending the hearing of an appeal are well settled. In Butt vs. Rent Restriction Tribunal [1982] KLR 417 at page 419 Madan JA held that:

“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in Wilson vs. Church (No.2) 12 Ch. D [1879] 454 at page 459. In the same case Cotton LJ said at page 458:

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory”.

9. The main issues that arise in an application of this nature are therefore whether the application has been brought timeously and if the applicant would suffer irreparable loss if the orders sought were not granted.

10. According to the plaintiff the application has been made after a long duration of one year. In the **Daniel Wambua Ndabi** case (supra) the application was made after three years and the defendant did not give any explanation why he delayed to file the application for stay of execution within a reasonable period and so the court found the delay to be inordinate.

11. I must pause here and observe that there is no attempt on the part of the applicant to explain the delay in the bringing of this application. Even if the applicant were able to establish that he would suffer irreparable damage, explanation of the delay is a necessary legal requirement if this court is to be able to assess whether the delay is inordinate.

12. In the absence of that explanation I find that the delay is inordinate and that the application dated must fail for that reason alone. Consequently I find that the application by the plaintiff cannot be granted.

The application dated **26/1/2015** is hereby dismissed with costs to the respondent.

Dated, signed and delivered at Kitale on this 29th day of May, 2018.

MWANGI NJOROGE

JUDGE

29/5/2018

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Ms. Arunga for applicant

Mr. Chebii holding brief for Kaosa for plaintiff

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

29/5/2018