



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC JUDICIAL REVIEW NO. 1 OF 2017

REPUBLIC.....APPLICANT

VERSUS

NATIONAL LAND COMMISSION.....RESPONDENT

THE BOARD OF MANAGEMENT

SITATUNGA SECONDARY SCHOOL.....1ST INTERESTED PARTY

CHRISTOPHER MUKHWANA.....2ND INTERESTED PARTY

R U L I N G

1. The *Ex Parte* Applicant filed an application dated 3/4/2018 under **Order 42 Rule 6, Order 51 Rule 1 of The Civil Procedure Rules** and **Sections 1A, 3A, and 63(e)** of the *Civil Procedure Act* seeking an order that pending the lodging, hearing and determination of the preferred appeal there be an order of stay of enforcement or execution of the Notice of Eviction issued by the National Land Commission date 27th July 2017 directed at the applicant.

2. The sworn affidavit of the Ex Parte Applicant was filed in support of the application. It is also dated 3/4/2017. The applicant has exhibited a copy of a notice of appeal and a draft memorandum of appeal in his supporting affidavit. The grounds on the basis of which the application is made are that the 14 day stay granted by the court was set to lapse on 3rd April 2018 and that the ex parte applicant is desirous of filing and appeal and if no stay is granted, the *ex parte* applicant will be exposed to the impending eviction to his detriment. It is also averred that no prejudice would be visited upon the respondent and the interested parties if a stay is granted. The applicant depones that he has established his home on the land subject matter of the respondent's eviction notice and the eviction would render him homeless and his appeal would be rendered moot.

3. The application is opposed by the interested parties who filed grounds of opposition dated 11th April 2014 stating that the application does not meet the criteria for the grant of a stay; that the intent of the applicant is to protract these proceedings unnecessarily by preventing the respondent from carrying out its statutory mandate of recovering public property; that the successful party would be denied the fruits of its judgment; that a grant of stay militates against public interest; that the suit land is not registered in the applicant's name; that the applicant has not demonstrated any developments on the suit land and hence demonstrated any risk of loss, and that the applicant has come to a court of equity with soiled hands.

4. **Order 42** of the **Civil Procedure Rules** states as follows:

(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(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.

5. Therefore the conditions for the grant of orders under those provisions are that the court must be *satisfied that substantial loss may result to the applicant unless the order is made and that the application has been filed timeously.*

6. In the case of *Daniel Wambua Ndabi V 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.”

7. The respondent and the interested parties relied on the case of *John Mwangi Nderitu Vs Joseph Ndiritu Wamathai Nyeri CA 22 of 2016. (2016 eKLR)* whose facts he submits are *in pari materia* to the facts in the present case.

8. In the *John Mwangi Nderitu case* (supra) the court observed as follows:

“In Elena D.Korir vs Kenyatta University [9] Justice Nzioki Wamakau had this to say:-

“the application must meet a criteria set out in precedents and the criteria is best captured in the case of Halal & another vs Thornton & Turpin Ltd[10] where the Court of Appeal (Gicheru JA, Chesoni & Cockar Ag JA) held that “The High Court’s discretion to order stay of execution of its order or decree is fettered by three conditions, namely:- Sufficient cause, Substantial loss would ensue from a refusal to grant stay, The applicant must furnish security, the application must be made without unreasonable delay.(Emphasis added)

In addition, the applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in Hassan Guyo Wakalo vs Straman EA Ltd[11](2013) as follows:-

“In addition the applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall have been rendered nugatory. These twin principles go hand in hand and failure to prove one dislodges the other”.

9. I have examined the record herein.

10. Regarding the issue of substantial loss I have perused the application and the supporting affidavit and I find no evidence given of structures on the land. This court had also found in the judgment that the suit land is not registered in the name of the applicant.

11. However, I have noted the zest that the respondent and the interested parties have demonstrated in their response, and they have adequately showed that they have intentions to take over the suit land and develop the same and possibly put it out of the reach of the applicant. Does this amount to risk of substantial loss? In my view it would if the land had been registered in the name of the applicant. However lack of that registration implies that the land does not belong to him so it is difficult to appreciate in what manner he would suffer substantial loss. Besides, the land will be there at the end of the appeal process. The applicant has not demonstrated the respondent and the interested parties are intent on disposing of the land to other persons or part with its possession.

12. On the issue of timeous filing, I find the applicant blameless in that he filed the application soon after the judgment was issued and before the lapse of the orders of stay made upon the oral application.

13. Regarding the issue of security, I find that though the applicant has not offered definite details about security, he has nevertheless offered security and this court would have, if it were inclined to grant the orders, defined the security to be so deposited.

14. However, as the conditions for the grant of a stay must be must all be proved without exception, and he has failed to prove the risk of substantial loss, I find that the application dated 3rd April 2018 must fail and I hereby dismiss it with costs to the respondents and the interested parties.

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. Bett holding brief for Ombati for Applicant

A.G. (absent) for Interested Party

National Land Commission absent

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

29/5/2018