



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC CASE NO. 103 OF 2006 (OS)

SHADRACK BUNGEI (*suing as administrator of the Estate of*

JOSEPH KIPKERING (deceased).....**PLAINTIFF**

VERSUS

SELINA JEROTICH (*sued as administrator of the Estate of*

MARY JEPKOSGE KISWAI (deceased).....**DEFENDANT**

R U L I N G

1. The applicant brought an application dated **23/5/2018** seeking the following orders:-

(a) That this Honourable Court be pleased to issue orders of stay of execution of the court's decree in this matter, pending hearing and determination of Eldoret Court of Appeal No. 4 of 2018.

2. The grounds upon which the application is brought are that an appeal has already been filed in the Court of Appeal; that the appeal raises weighty and substantial issues of law; and that the defendant/respondent has commenced the process of executing the decree.

3. The respondent filed grounds of opposition dated **28/5/2018** on the same date in which he raised following grounds:-

(1) That the applicant has not satisfied the conditions or criteria for granting of an order for stay of execution.

(2) That the application has been filed after inordinate delay and the applicant has not advanced any plausible reasons or excuse for the inordinate delay and equity assists the vigilant and not the indolent.

(3) That the applicant does not merit or deserve the exercise of the honourable court's discretion in his favour.

4. The respondent also filed a replying affidavit on **28th May 2018**. In that affidavit the respondent avers that the appeal filed by the appellant has little probability of success; that the applicant stands to suffer no substantial or irreparable damage; that what is intended to be executed herein is not the court's decree but the certificate of costs and therefore the application is baseless; that the application has been made after an unexplained delay; that the respondent is in occupation and use of the land and there is no decree to be executed following the dismissal of the plaintiff's suit against her; that she is entitled to costs; that costs are in any event capable of being refunded if paid and that in the event the court allows the application costs of **Ksh 185,200.70** be deposited in an interest earning joint account held by the respective parties' advocates.

5. I have considered the application at length as well as the parties' respective affidavits. There is no doubt that an appeal has been filed in the Court Of Appeal against this court's decision dated **29th May 2017**.

6. The main questions for determination in this application are whether the application has been brought timeously and whether the applicant would suffer substantial loss if the orders sought were not issued by this court, for indeed those are some of the requirements of **Order 42 Rule 6(2)** of the **Civil Procedure Rules** which states verbatim as follows:

(2) No order for stay of execution shall be made under subrule (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.

7. On the issue of delay in bringing the application it is noted that a considerable period of time has lapsed between the date of judgment that is 29th May 2017 and the date of the filing of the application in court that is 23rd May 2018. I have examined the affidavit of the applicant sworn on the 23rd May 2018 in the application and found that there is not even an attempt to explain the delay.

8. In the case of **Kitale ELC Case No. 12 Of 2012 Joseph Yano Versus Simon Kibet Kiptum** the court stated as follows:

“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”.

9. Drawing from the above approach and without more I find that that period amounts to inordinate and inexcusable delay.

10. On the issue of whether substantial loss may be suffered by the applicant if the orders sought do no issue the court notes that the suit concerns land. The plaintiff has already obtained a total of 16 acres of land that was held by his brother. There is no indication that he is destitute. The affidavit he has filed does not also show that he would suffer substantial loss if the orders sought herein were not granted. Besides the respondent is on the land, has been on the land and has indicated that the only thing that may happen is that the land may be transmitted to her name.

11. I am not therefore satisfied that the application dated 23rd May, 2018 has merit.

12. I therefore dismiss it with costs to the respondent.

Dated, signed and delivered at Kitale on this 12th day of July, 2018.

MWANGI NJOROGE

JUDGE

12/7/2017

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Ingosi for the defendant

Mr. Wanyonyi holding for Katama for plaintiff

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

12/7/2018