



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

LAND CASE NO. 60 OF 2015

BENEDETA CHERUTO MABWAI.....PLAINTIFF

VERSUS

WILLIAM RONO (Sued on behalf of the Estate of

DAVID KIPNGENO RONO1ST DEFENDANT

JANE CHEBWOGEN KIMETO2ND DEFENDANT

RULING

Introduction

1. By a Notice of Motion dated 18/12/2015 the Plaintiff seeks the following reliefs;
 - (a) Spent
 - (b) That the Hon Court be pleased to issue temporary Stay of Execution of decree issued on 15/10/2015 and all consequential Orders in the Sotik Land Dispute Tribunal Case No. 13/2010 till the hearing and determination of the suit.
 - (c) Any other order may be given as the court deems fit.
2. The application is supported by the grounds on the face of the application and the annexed affidavit of the application sworn on 18/12/2015.
3. The Respondent filed a replying affidavit sworn on 13/3/2018 in opposition to the application.

Issue for determination

4. The main issue for determination is whether the applicant has satisfied the conditions for the grant of a stay of execution.

Analysis and determination

5. The principles that the court must consider in order to grant an application for stay of execution pending appeal are set out in the case of Global Tours and Travels Limited Nairobi Winding Up Cause No. 43 of 2000 cited in Kenya Power & Lighting Company Ltd V Esther Wanjiru Wokabi [2014] eKLR where Ringera J (as he then was) stated as follows:

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice.. the sole question is whether it is the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously”.

6. The court must therefore consider the following principles

- a) Whether the application was filed without undue delay
- b) Whether the applicant has established that he has an arguable appeal
- c) Whether the application has established sufficient cause that it is in the interest of justice to grant the orders sought.
- d) Whether the applicant is willing to furnish security for costs

7. An analysis of the instant application from the above perspective shows that the application was filed on 18th December 2015 while the decree was issued on 15th October 2015. It is however noteworthy that the decision was made on 12.8.10. The delay which is quite lengthy has not been adequately explained.

8. The applicant's submission is that he filed an appeal at the Provincial Appeals Tribunal challenging the decision of Tribunal made on 11th October 2002 but due to the repeal of the Land Disputes Tribunal Act in 2012, the appeal was rendered useless. The applicant therefore intends to file a suit challenging the Tribunal's verdict and its adoption by the court on 12.8.10 Court in Sotik PM Land Dispute No. 13 of 2010.

9. According to the Applicant's affidavit, the suit was listed for mention on 24.12.2015 to confirm signing of the transfer documents failing which the Executive officer would be authorized to sign them on his behalf.

10. On his part the Respondent states at paragraph 5 of his Replying Affidavit that the application has been overtaken by events. He further states that the applicant filed a similar application in Sotik PM Land Dispute Case No. 13 of 2010 but failed to fix the same for hearing. A copy of the said application has been annexed to his affidavit.

11. In his Notice of Preliminary Objection filed on 13.3.18 the Respondent has raised a pertinent issue which is the fact that the applicant did not challenge the court's decision by filing an application for Judicial Review under the relevant law and instead wishes to challenge the same by way of plaint. This is irregular, unprocedural and an abuse of the court's process.

12. I agree with the Respondent's counsel's submissions and cannot help but wonder why it took the applicant such a long time to challenge a decision that was rendered way back in 2010. I find it unnecessary to examine the other grounds upon which an application for stay of execution ought to be granted. In arriving at this decision I am guided by the case of **Republic v Chairman Land Disputes Tribunal, Kirinyaga District & Another Ex- parte Peter Maru Kariuki (2005) eKLR** where Khamoni J stated as follows:

".... I would say to the applicant that he is questioning in this Judicial Review a decision which ought not to be questioned independently in a court of law as in law that decision no longer exists independently to be challenged or quashed in proceedings of this nature. The decision ceased to exist when it was adopted on 8th August 2003 as a judgment of the Principal Magistrates court at Kerugoya in that Court's Land Disputes Tribunal Case No. 17 of 2003 it is the said Principal Magistrates judgment which may have been properly sought to be quashed. To date there is no application to quash that judgment, neither is there an appeal against the judgment which therefore remains existing. It follows that this Notice of Motion dated 14th July 2004 has not been properly brought and is therefore incompetent."

13. For the foregoing reasons, I find and hold that the application has no merit and I dismiss it with costs to the Respondent.

Dated, signed and delivered at Kericho this 28th day of August 2018

J.M ONYANGO

JUDGE

In the presence of:

Mr. Kemboi for mr. Bii for the Defendant

No appearance for the Plaintiff

Court Assistant: Rotich