



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**LAND CASE NO. 57 OF 2011**

**GATATHA FARMERS CO. LTD.....PLAINTIFF/RESPONDENT**

**VERSUS**

**OTIENO OKIRO.....DEFENDANT/APPLICANT**

**KAITET TEA ESTATE (1977) LTD.....INTERESTED PARTY**

**RULING**

1. By the application dated **3/8/2018** the defendant seeks a stay of execution of the decree herein and all consequential orders pending hearing and determination of **Court of Appeal No. ELD 27/2018**.
2. The application is brought under provisions of **Section 3 & 3A of the Civil Procedure Act Order 42 Rule 6 of the Civil Procedure Rules**.
3. The grounds upon which the application is made are contained at the foot of the application. They are that: - the applicant has an arguable appeal with high chances of success; that the applicant having been aggrieved with the judgment of this honourable court delivered on **30/5/2018** has preferred an appeal to the Court of Appeal at Eldoret vide **Appeal No. ELD 27/2018** filed on **25/7/2018**; that the applicant and his family members have been threatened by the respondent with eviction, and that if execution proceeds the applicant's appeal will be rendered nugatory.
4. In response to the application the Interested Party filed grounds of opposition dated **14/8/2018**. The grounds are that the application is frivolous, vexatious, unfounded and lacking in merit; that the application is incompetent, misconceived, bad in law and abuse of the court process hence it should be dismissed *in limine*; that the application is based on mere apprehension as no material evidence has been placed before the court to support the application's claim of intended eviction; that the application does not meet the requisite principles for granting of the order sought as set out in **Order 42 (6) (2) of the Civil Procedure Rules, 2010**, which the applicant heavily relies on and that the Court has no jurisdiction to entertain the present application.
5. The sworn affidavit of **Peter Mburu Gakwa**, the Chairman of the Plaintiff/respondent was filed on **29/8/2018**.
6. The parties filed submissions on the application, with the applicant filing his on **27/8/2018**, the interested party on **19/9/2018** and the respondent on **29/8/2018**. I have considered the application and the replies by the respondents.
7. I have in particular considered the grounds in the memorandum of appeal annexed to the supporting affidavit.
8. I note that the issues raised by all those grounds were dealt with by this court except the issue raised in one: that the trial judge ought to have disqualified himself from handling the suit as he was related to one of the respondents' members. It was not dealt with for the obvious reason that no such intimation and no application for recusal on that ground was ever made before the trial court.
9. **Order 42 rule 6** 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 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.***

10. Stay of execution is a discretionary remedy. The rules require the applicant to show sufficient cause that warrants a grant of stay. The conditions are that the application must be brought without undue delay, that substantial loss may result to the applicant unless the stay is granted and 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.

**Whether there has been undue delay.**

11. The decision in the suit was rendered on **30/5/2018**. The application was presented to court on **3/8/2018**. The applicant therefore brought the application **62 days** after the decision of this court was made. There is no explanation whatsoever in the supporting affidavit for that delay. The notice of appeal having been filed on **5/6/2018**, five days after the judgment, I find that delay to be inordinate.

**Whether substantial loss may result to the applicant unless the stay is granted.**

12. In the case of **Civil Application No. Nai 97 Of 1986 - Kenya Shell Limited And Benjamin Karuga Kibiru Ruth Wairimu Karuga eKLR**, the Court Of Appeal stated as follows:

**“It is usually a good rule to see if order XLI rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay.”**

13. The affidavit is the source of much evidence that the court relies on in applications. The affidavit of the applicant is bare of any details of any loss that he would sustain. This court has nothing to consider when it comes to this ground, and therefore the court finds that no substantial loss has been proved.

**Whether security for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.**

14. The plaintiff sought declaration of ownership as well as an injunction. The plaintiff was successful in its claim.

15. However no offer of security of any kind has been made by the applicant. All that he states is that the appeal would be rendered nugatory. Again on this ground the court has nothing before it to consider.

16. In my view the application must fail as the applicant has failed to satisfy all the three conditions above and this court has no alternative but to dismiss the application before it.

17. I hereby dismiss the application dated **3/8/2018** with costs to the respondents.

**Dated, signed and delivered at Kitale on this 24<sup>th</sup> day of October, 2018.**

**MWANGI NJOROGE**

**JUDGE**

**24/10/2018**

Coram:

Before Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Ingosi holding brief for Kiura for plaintiff

Mr. Okiro (defendant) in person present

N/A for interested party

**COURT**

Ruling read in open court.

**MWANGI NJORGE**

**JUDGE**

**24/10/2018**