



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT ELDORET**

**ELC NO. 215 OF 2017**

**IN THE MATTER OF SECTIONS 7, 17, 38 OF THE LIMITATION OF ACTIONS ACT, CAP. 22**

**AND**

**IN THE MATTER OF ORDER 37 RULE 7 OF THE CIVIL PROCEDURE RULES, 2010**

**AND**

**IN THE MATTER OF SECTIONS 30(f) AND 30(g) OF THE REGISTERED LAND ACT, CAP 300 (REPEALED)**

**AND**

**IN THE MATTER OF SECTION 28(h) OF THE LAND REGISTRATION ACT 2012**

**AND**

**IN THE MATTER OF LAND PARCEL KNOWN AS MOGOBICH/CHEPTILILIK/BLOCK 1 (KIPSEBWO)/225**

**BETWEEN**

**FELIX KIPCHOGE LIMO LANGAT.....PLAINTIFF**

**AND**

**ROBINSON KIPLAGAT TUWEL.....DEFENDANT**

**RULING**

This ruling is in respect of a Notice of Motion dated 12<sup>th</sup>September, 2018 by the defendant/applicant seeking for the following orders:

- a) That there be stay of execution of the judgment and decree of the Honourable court pending the hearing and determination of this application inter partes and or further orders of the court.
- b) There be stay of stay of execution of the judgment and decree of the Honourable court pending the hearing and determination of the intended Appeal to the Court of Appeal.
- c) There be stay of registration or dealings or any subdivision over land parcel No. Mogobich/Cheptililik /Block 1 (Kipsebwo) /225 pending the hearing of this application inter partes thereafter pending the hearing and determination of the intended Appeal to the Court of Appeal.

The application was filed during the High Court vacation under certificate of urgency and the court ordered that the status quo before the judgment be maintained pending the hearing and determination of the application inter partes.

Counsel argued the application on behalf of the applicant and submitted that the intended appeal shows sufficient cause as the main dispute

was possession which they will be arguing in the Court of Appeal.

Mr. Magare submitted that the applicant will suffer irreparable loss if the stay is not granted especially if subdivision is effected and transfer done to the plaintiff. It was Counsel's submission that they have undertaken to damages given that the title to the suit land is available and would be sufficient security and would not deal adversely with the title.

Counsel for the defendant /applicant also submitted that the application was made without undue delay that is 7 days after the judgment. He stated that the court has powers to grant stay of execution and that the defendant is ready and willing to provide security as the court may order. He therefore urged the court to grant the order.

The application was opposed by Counsel for the plaintiff who relied on the replying affidavit on record. Mr. Mogambi submitted that the applicant had not satisfied the conditions in Order 42 rule 6 (2) to enable the court grant the orders. That no sufficient reason has been demonstrated to warrant the stay of execution.

Counsel urged the court to dismiss the application with costs. In brief reply Counsel for the applicant submitted that it is the court to give the terms and conditions of the stay and not the applicant to state the nature of security to be provided. He reiterated his earlier submissions and urged the court to allow the application. Counsel cited the case of **Malcom Bell v Daniel Toroitich Arap Moi & Another [2006] eKLR**, where the court granted stay of execution pending the hearing and determination of the intended appeal.

### **Analysis and determination**

The application before me is for stay of execution pending appeal and applications of this nature are governed by the provisions of Order 42 Rule 6 (2) which provides 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.*

From the above, it is incumbent upon the applicant to prove that:-

- a) *The application was filed without unreasonable delay.*
- b) *That the applicant stands to suffer substantial loss unless the order of stay of execution is made.*
- c) *That the applicant is ready to offer such security as the court may order for the due performance of the decree or order that may ultimately become binding on him.*

On the first issue of delay I wish to state that the judgment was delivered on 6<sup>th</sup> September 2018 and the current application was filed on 14<sup>th</sup> September 2018 which indicates that the application was filed without unreasonable delay.

On the second issue of substantial loss which is the foundation of applications for stay of execution pending appeal as was held in the case of **Kenya Shell Limited vs Benjamin Karuga Kigibu & Another (1982-1988) 1 KAR 1018**.

*It is usually a good rule to see if order 41 Rule 4 of the Civil Procedure Rules can be substantiated if there is no evidence of substantial loss for 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 cornerstone of both jurisdiction for granting stay."*

Further in the case of **Andrew Kuria Njuguna Versus Rose Kuria NBI Civil Case No. 2 of 2001** the court held that:

***"Coming to the substantial loss likely to be suffered by the applicant if the stay order is not granted, she was bound to place before the court such material and information that should lead this court to conclude that surely she stood a risk of suffering substantial loss, money wise or other and thereafter grant the stay".***

The applicant stated that he is likely to suffer substantial loss as he is in occupation of the suit land and if the title is subdivided and a transfer effected it will change the substratum of the case. It was Counsel's argument that the plaintiff will not suffer any prejudice as he is not in possession. This argument of Counsel defeats the purpose of the application as the court had found that the plaintiff is in occupation and that is why a judgment was entered in his favour. Submitting that the defendant is the one in occupation is like arguing the appeal in a court that is functus officio. If the court had found that the defendant was in occupation then we would not be dealing with the application for stay of execution.

It is important for the court to balance the interests on both the applicant and the victorious litigant who should also not be denied the opportunity to enjoy the fruits of his or her judgment. Parties who are unsuccessful also have an opportunity to try their luck in the next court and that is why there is a hierarchy of courts. This does not mean that every application for stay of execution should be allowed without looking at the merits of the application. As earlier stated the applicant must meet the threshold for such applications.

The requirement of proof of substantial loss does not only mean monetary terms but also the inconvenience of having to subdivide and transfer part of the suit land to a third party and later to retransfer in case the applicant is successful. We should always look at the bigger picture and what the implementation of the decree entails and the agencies involved. I would reluctantly find that substantial loss has been demonstrated

On the last issue on security for the performance of the decree, Counsel submitted that they are ready and willing to offer security for the performance of the decree as the court may order. This is a case involving land where the defendant has title to the suit land. In the interest of justice I will order a stay of execution of the decree with a condition that the defendant deposits the title to the suit land in court within 30 days and not to interfere with the character of the land until the intended appeal is heard and determined. The condition must be adhered to failure of which the stay order lapses.

**Dated and Delivered at Eldoret this 19<sup>th</sup> day of December, 2018.**

**M. A. ODENY**

**JUDGE**

Ruling read in open court in the presence of Mr. Koech holding brief for Mr. Wambua for Plaintiff and Mr. Ngetich holding brief for Mr. Magare for Defendant.

Mr. Koech: Court Clerk