



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO 2293 OF 1998**

TIKOISHI OLE NAMPASO.....1<sup>ST</sup> PLAINTIFF

DAVID OLE NAMPASO.....2<sup>ND</sup> PLAINTIFF

NICHOLAS OLE NAMPASO.....3<sup>RD</sup> PLAINTIFF

=VERSUS=

KIPKURUI ARAP LANGAT.....1<sup>ST</sup> DEFENDANT

PETER TESOT.....2<sup>ND</sup> DEFENDANT

PHILEMON KOECH.....3<sup>RD</sup> DEFENDANT

SAMWEL KIPKEMOI MARINDANY.....4<sup>TH</sup> DEFENDANT

PHILIP SIGEL.....5<sup>TH</sup> DEFENDANT

BENARD LANGAT.....6<sup>TH</sup> DEFENDANT

KIMUTAI KOSKE.....7<sup>TH</sup> DEFENDANT

JEREMIAH BIOMDO.....8<sup>TH</sup> DEFENDANT

JACKSON KIPLAGAT A. MUTAI.....9<sup>TH</sup> DEFENDANT

GRACE CHEBII KOSKE.....10<sup>TH</sup> DEFENDANT

ARAP KEROTWET KIPKOECH.....11<sup>TH</sup> DEFENDANT

DISTRICT LAND REGISTRAR.....12<sup>TH</sup> DEFENDANT

**RULING**

1. This is the Notice of Motion dated 17<sup>th</sup> September 2018 brought under Order 51, Order 42, Rule 6 (1), (2), (3) and (4) of the civil procedure Rules 2010 and all other enabling provisions of the law.

2. It seeks

*1. Spent*

*2. That this Honorable court be pleased to grant a stay of execution of the judgment and orders given on 19<sup>th</sup> April 2018 pending the hearing and determination of the intended appeal.*

3. *That costs of this application be provided for.*

3. The grounds are on the face of the application and are:-

1. *That on 19<sup>th</sup> April 2018, Judgment was delivered in this case in favour of the plaintiffs.*

2. *That being dissatisfied with the said judgment the 1<sup>st</sup> – 11<sup>th</sup> defendants filed a notice of appeal.*

3. *That by a letter dated 30<sup>th</sup> April 2018, counsel for the 1<sup>st</sup> -11<sup>th</sup> defendants wrote to the deputy registrar of this court applying for certified copies of the proceedings and judgement for purposes of appeal.*

4. *That the 1<sup>st</sup> – 11<sup>th</sup> defendants are apprehensive that if an order of stay is not granted they may be evicted from the suit properties by the plaintiffs.*

5. *That the plaintiffs have threatened to evict the 1<sup>st</sup> -11<sup>th</sup> defendants from the suit properties.*

6. *That if the orders sought are not granted the intended appeal will be rendered nugatory.*

4. The application is supported by the affidavit of Peter Tesot, the 2<sup>nd</sup> defendant/applicant sworn on the 17<sup>th</sup> September 2018. It is also supported by the affidavit of Johnson Mitey Advocate for the 1<sup>st</sup> -11<sup>th</sup> defendants sworn on the 17<sup>th</sup> September 2018.

5. The application is opposed. There is a replying affidavit sworn by Tikoishi Ole Nampaso, the 1<sup>st</sup> plaintiff/respondent sworn on the 29<sup>th</sup> October 2018.

6. The application was canvassed by oral submissions on the 30<sup>th</sup> October 2018.

7. I have considered the notice of motion, the affidavits in support and the annexures. I have considered the replying affidavit and the oral submissions of counsel. The issue for determination is whether this application is merited.

8. Order 42 rule 6(2) of the Civil Procedure Rules provides that:-

*“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”*

9. It is the defendants'/applicants' case that they have been on the suit properties since 1984. This is what is deposed by Peter Tesot the 2<sup>nd</sup> defendant/applicant in paragraph 5 of the affidavit in support.

In paragraph 7 he deposes

*“that we have constructed permanent houses, have livestock and crops on the parcel of land and will suffer irreparable loss should we be evicted by the plaintiffs herein.”*

10. The said Peter Tesot has also annexed certified copies of Register showing that each of the defendants/applicants herein is the registered proprietor of his/her parcel of land. They are annexed and marked “PT1” to “PT 12.

11. In paragraph 13 he states:-

*“That on 17<sup>th</sup> August 2018 the plaintiffs came to the suit properties in the company of police officers and intimidated us while demanding that we vacate the area”.*

It is clear from the above that the plaintiffs intend to evict the 1<sup>st</sup> -11<sup>th</sup> defendants from the suit properties. I find that the defendants/applicants have demonstrated that they will suffer substantial loss as a result of the intended eviction if these orders are not granted.

12. I have gone through the court record and I find that the judgment herein was delivered on 19<sup>th</sup> April 2018. By an application dated 20<sup>th</sup> June 2018 the defendants/applicants sought similar orders. The said application was however dismissed as counsel who prosecuted it did not hold a current practicing certificate by then. I find that the application for stay of execution was brought without undue delay. In his affidavit in support the defendants/applicants advocate Johnson Mitey deposes :-

***“That on 2<sup>nd</sup> May 2018 we filed a notice of appeal which was duly served upon counsel for the plaintiffs herein. Annexed and marked “JK1” is the said Notice of Appeal”.***

Under Order 42 rule 6(4) of the Civil Procedure rules provides that:-

***“For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given”***

13. It is not in dispute that the plaintiffs’/respondents’ counsel has been served with a notice of appeal. The defendants/applicants’ counsel has explained the delay in filing the memorandum of appeal.

14. I have gone through the affidavit of Peter Tesot, the 2<sup>nd</sup> defendant/applicant. It is true he has not stated whether the 1<sup>st</sup> – 11<sup>th</sup> defendants/applicants are giving any undertaking as to damages or security of costs. It is one of the prerequisites for grant of stay of execution pending appeal under order 42 Rule 6(2) (b) of the Civil Procedure Rules. I have given due consideration of this provision. It is set in mandatory terms. The court has discretion to order that security of costs be made. I hereby exercise this discretion in favour of the defendants/applicants in finding that they ought to give undertaking as to security of costs. In the case of **Peter Ondande t/a Spreawett Chemist vs Josephine Wangari Karanja (2006) eKLR**. L. Kamaru J stated as follows:-

***“The issue for determination by the court is whether the applicant has established a case to enable the court to grant stay of execution. Sought for the court to grant stay of execution it must be satisfied that substantial loss may result to the applicant if stay is not granted. Further the applicant must have filed the application for stay of execution without unreasonable delay. Finally, the applicant must provide such security as may ultimately be binding upon him.”***

I am also guided by the case of **Julius Musili Kyunga vs Kenya Commercial Bank Ltd & Another [2012] eKLR**.

15. I have considered the circumstances herein and find that the appeal may be rendered nugatory if these orders are not granted. The 1<sup>st</sup> – 11<sup>th</sup> defendants/applicants risk being evicted from their respective suit properties.

16. I hereby exercise this courts’ discretion in their favour. I find merit in this application and I grant the orders sought namely:-

***(a) That there be stay of execution of the judgment delivered on 19<sup>th</sup> April 2018 and all consequential orders pending the hearing and determination of the intended appeal on condition that the 1<sup>st</sup> – 11<sup>th</sup> defendants/applicants do deposit Kshs.300,000 in court as security for costs within forty five (45) days from the date hereof.***

***(b) That costs of this application be borne by the 1<sup>st</sup> – 11<sup>th</sup> defendants/applicants.***

It is so ordered.

**Dated, signed and delivered in Nairobi on this 13TH day of DECEMBER 2018**

.....

**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

.....Advocate for the Plaintiffs

.....Advocate for the Defendants

.....Court Assistant