



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KITALE**

**LAND CASE NO. 136 of 2007**

**LUCIA KIBUI MUCHIRI.....PLAINTIFF**

**VERSUS**

**KOTON WANDABE.....1<sup>ST</sup> DEFENDANT**

**RAYMOND NYERIS PLAL.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The application dated **24/8/2018** and filed in court on the same date has been brought by the defendant. It seeks the orders that there be stay of execution of the judgment and decree pending the hearing and determination of the appeal in the Court of Appeal.
2. The applicant has brought the application under **Order 42 Rule 6, Order 51 Rule 1 and Section 1A, 1B, 3A and 63(e)** of the **Civil Procedure Act**.
3. The application is supported by the sworn affidavit of the plaintiff dated 23<sup>rd</sup> August 2018.
4. The grounds upon which the application is made are contained at the foot of the application. Briefly, they are that:- the court delivered judgment herein on **21/7/2018** in favour of the plaintiff/respondent as against the defendants/applicants; that the defendants are aggrieved by the said judgment; that the defendants have filed a notice of appeal to the Court of Appeal with intention of appeal against the whole of the judgment of the court; that the said appeal is meritorious and has high chances of success; that should the plaintiff execute, the said appeal shall be rendered nugatory and the defendants shall suffer irreparable damage and loss as the said judgment is to the effect that the applicants be evicted from his home of residence; that it would be in the interest of justice that this application be allowed that the plaintiff is a man of straw and shall not be able to satisfy the ultimate decree or part of it either in the very likelihood of a successful appeal and that this application is made timeously and in the sole interest of justice and fairness.
5. In reply to the application the plaintiff filed a replying affidavit sworn on **6/10/2018**. In that affidavit the contents of the judgment of this court in this matter are reiterated in detail. The deponent describes the delay in bringing the application as inordinately long and unexplained. He further states that the application is not supported by any affidavit sworn by the 1<sup>st</sup> defendant and that the plaintiff is entitled to the fruits of his judgment. The plaintiff undertakes not to interfere with the existing structures on the suit land and not to dispose of it or lease it while awaiting the determination of the appeal. It is further averred that the allegation that the plaintiff is a man of straw is not relevant to this application since the decree in the matter is not a "money decree."
6. I have examined the application and the response as well as the submissions of the parties.
7. The defendants/respondents filed her submissions on **30/10/2018** and the plaintiff /respondent on 30/10/2018.
8. **Order 42 rule 6(2)** of Civil Procedure Rules provides as follows:-

***"(2) 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. The questions that arise in this kind of application are whether there is an appeal in place, the application has been made without delay and whether that substantial loss would result if the order of stay sought was not granted and if there is any security offered for the due performance of the decree.

10. It must first be verified that there is an appeal in place before the court delves into any other issue in an application of this nature. **Rule 82** provides that an appeal has to be filed within **60** days. There is a Notice of Appeal and a request for a certified copy of proceedings in the record. I am satisfied that there is an appeal in place within the contemplation of **Order 42** of the **Civil Procedure Rules** and **Rule 81** of the **Court Of Appeal Rules**.

11. The next question is on delay. Judgment was read on **19<sup>th</sup> July 2018**. The notice of appeal was filed on **23/7/2018**. The application was lodged on **24/8/2018**. In the case of **Utalii Transport Company Ltd & 3 Others -vs- NIC Bank Ltd & Another 2014 eKLR** the Court had this to say:-

**“Whereas there is no precise measure of what amounts to inordinate delay and whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case the subject matter of the case, the nature of the case, the explanation given for the delay and so on and so forth.**

**Nevertheless inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable, conclusion that it is inordinate and therefore caution is advised for courts not to take the word “inordinate” in its dictionary measuring but in the sense of excessive as compared to normality”.**

12. The delay in this case amounts to slightly less than two months. Considering that it may have been necessary to have consultation between advocate and client, and that there was even a change of advocates before the application was filed, I do not think that that amounts to inordinate delay.

13. The third issue is whether the applicant would suffer substantial loss. Though in the grounds on the face of the application an allusion is made to the suit land being 2<sup>nd</sup> applicant’s home, there is no affidavit evidence in support of this statement.

14. The judgment provided that the 1<sup>st</sup> defendant will be refunded the entire purchase price that he had paid to the 1<sup>st</sup> defendant for the annulled transaction or be provided with alternative land. This court has already pronounced itself on what it deems to be the proper rights of the parties in the suit.

15. I fail to see how the applicants would suffer substantial loss by execution of the said judgment more so in view of the fact that there is no affidavit in support of the application sworn by the 1<sup>st</sup> applicant and the 2<sup>nd</sup> applicant does not express himself to be swearing the facts in his supporting affidavit with the authorization and on behalf of the 1<sup>st</sup> applicant, and they have not demonstrated that they reside on the suit land.

16. The respondent has undertaken not to dispose of the suit land or deal it in any manner that would render the appeal nugatory. That has not been specifically answered by the applicants. What the applicants have done is to offer unspecified security in the 2<sup>nd</sup> applicant’s supporting affidavit. That can not aid the applicants in this case. For this reason I find that the applicants would not suffer substantial loss.

17. In the end I find that the application dated **24/8/2018** has no merit and the same is hereby dismissed with costs.

**Dated, signed and delivered at Kitale on this 3<sup>rd</sup> day of December, 2018.**

**MWANGI NJOROGE**

**JUDGE**

**3/12/2018**

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Kiarie for plaintiff/respondent

N/A for the applicants

**COURT**

Ruling read in open court.

**MWANGI NJOROGE**

**JUDGE**

**3/12/2018**