



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L APPEAL CASE NO. 17 OF 2016

ALEX SIMIYU.....1ST APPELLANT/APPLICANT

ALFRED WAFULA WANYAMA.....2ND APPELLANT/APPLICANT

VINCENT NYONGESA.....3RD APPELLANT/APPLICANT

VERSUS

FRANCIS SIMIYU SAMITA.....DEFENDANT/RESPONDENT

RULING

Alex Simiyu, Alfred Wafula Wanyama and Vincent Nyongesa (hereinafter referred to as the appellants) have come to this court against **Francis Simiyu Samita (hereinafter referred to as the respondent)** praying for a stay of execution pending the hearing and determination of the Eldoret Environment and Land Court Appeal No. 17 of 2016. The application is based on the affidavit of Vincent Nyongesa who states that after the ruling of the Lower Court, they filed an application for stay of execution pending appeal but the same was dismissed on 24.1.2017. Consequently, there are no orders for stay pending appeal. The applicant states that the appeal is arguable with high chances of success. The applicant has lived on the suit parcel of land since the year 1960 and have no other place of abode. According to the applicant, the orders of eviction will not affect the applicant only but the entire family of 50 people and are likely to be rendered homeless. Accordingly, the appeal has been filed expeditiously and without undue delay. The applicant is ready to abide with any reasonable conditions which may be set by this honourable court as a condition for stay.

The respondent filed grounds of opposition stating that the decree has been executed and therefore, there is nothing to stay and that the applicants have no arguable appeal with any chances of success as the respondent is the registered owner of land parcel **No. Kakamega/Moi's Bridge/1063** measuring 2.18 hectares. Moreover, that the respondent will suffer irreparable loss and damage if the orders sought herein are granted as the applicants means are unknown and therefore, they are unlikely to compensate him in the event the appeal fails. The applicant had 60 days to vacate the land but never did so.

In a further affidavit, the 1st applicant states that they are in possession of the suit land which is their home and that they reside on the said land with their families. The suit land is their sole source of income and that they have nowhere else to go. The respondent attempted to evict them but failed. The applicants have annexed photographs depicting the situation on the ground. The respondents have not filed any affidavit save the grounds of opposition. Paragraphs 2, 4, 5, 6 are statements of facts that were required to be proved by affidavit and therefore, the same are found not to be points of law.

M/s Kesso argues that the application herein was filed expeditiously as the ruling in the Lower Court

dismissing the application or stay was delivered on 24.1.2017, whilst the application was filed on 31.1.2017.

On substantial loss, she argues that the applicants have stayed on the parcel of land since the year 1960 and therefore, any eviction will cause them substantial loss that cannot be compensated by the respondents. On security, the applicants are ready to abide by any conditions for security.

Mr. Mukabane, learned counsel for the respondent argues that judgment was delivered on 16.8.2016 wherein the applicant was ordered to vacate within 60 days. The applicant made a similar application in the Lower Court but was dismissed on 24.1.2017. On security, he argues that the respondent has been in court since 2000 and has never enjoyed the property. He does not now who will pay costs.

I have considered the application under the provision of Order 42, Rule 6 of the Civil Procedure Rules 2010 which provides for Stay in case of appeal thus: -

(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.

I do agree with M/s Kesso for the applicant that the application has been brought to court expeditiously within approximately 6 days. On substantial loss, I also agree with M/s Kesso that the applicant having demonstrated that he has been in possession since the 1960s, he is likely to suffer substantial loss if evicted and ultimately, succeeds on appeal as his houses will be demolished and that he will lose shelter for himself and family.

On the issue of security, I do find that it is not necessary as the applicant does not hold title to the land as the same is held by the respondent and serves as security as the appellant cannot dispose of the land in any manner whatsoever. Ultimately, the application is allowed thus a stay of execution is hereby issued pending the hearing and determination of the Eldoret Environment and Land Court Appeal No. 17 of 2016. Costs in the appeal. Orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 28TH DAY OF JUNE, 2017.

A. OMBWAYO

JUDGE