



**REPUBLIC OF KENYA**

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

**LAND CASE NO. 74 OF 2011**

**RAPHAEL KIBUSI.....PLAINTIFF**

**VERSUS**

**PETER SIRIRIA.....DEFENDANT**

**R U L I N G**

1. The defendant's application dated 17/3/2017 seeks the following orders:-

(1) .....spent

(2) **That this Honourable Court be pleased to grant an order of stay of execution pending hearing and determination of the appeal in the Court of Appeal**

(3) **That in the meantime there be an interim order of stay of execution pending hearing and determination of this application *interpartes*.**

2. The basis of the said application is that the defendant has preferred an appeal to the Court of Appeal and the respondent has applied for eviction of the plaintiff from the land in dispute and that the Appeal would be rendered nugatory should eviction issue.

3. An affidavit sworn by the defendant was filed on 17/3/2017 in support of the application. A Notice of Appeal dated 25/5/2015 was annexed to the affidavit and marked "PSI". A request for a copy of the judgement which is undated is annexed as "PS3". It was received by Ms. Ambutsi & Co. Advocates on an undisclosed date.

4. A further affidavit sworn by the defendant on 13/4/2017 was filed on 18/4/2017. It disputes the execution of the replying affidavit by the plaintiff, and exhibits copies of the Memorandum of Appeal in the appeal in which the decision of this court read on 13/5/2015 is appealed against. The number of the Appeal case is not given, however it is clear that the appeal was received by the Deputy Registrar of the Eldoret Court of Appeal Registry who stamped it on 11/4/2017 and that the Record of Appeal was served upon Ambutsi & Co. Advocates on 11/4/2017.

5. The plaintiff opposed the application by filing two affidavits which he swore which are dated 27/3/2017 and 31/7/2017 respectively. The plaintiff accuses the defendant of employing delaying tactics to ensure that the plaintiff does not enjoy the fruits of his judgment.

6. The plaintiff also urges that the applicant has not satisfied the mandatory provisions of **Order 42 Rule 6 of the Civil Procedure Rules** as the application has not been made timeously and the applicant has merely stated that he stands to suffer substantial loss if the application is declined and he does not give

details of the alleged loss.

7. The plaintiff further argues that he believes that the defendant would not be prejudiced in any way if the eviction order issued as paragraph 5 of the judgement delivered on 13/5/2017 indicated that the defendant testified that he resides on **Plot No. 153** and not **Plot No. 151**, and that the defendant acknowledged this in his Memorandum of Appeal dated 31/3/2017.

8. It was a finding of this court that the defendant does not have any basis for remaining on the suitland or even cultivating it. The court also found that though the defendant testified that he does not reside on the suitland or cultivate it, this was a mere denial which contradicted the defendant's pleadings. That defendant had testified that he resides on **Plot No. 153** and he did not adduce evidence to show that the plaintiff obtained title to **Plot No. 151** fraudulently.

9. I have also perused the Memorandum of Appeal filed. **Ground No. 2** therein reads as follows:-

**“That the learned Trial Judge erred in law and in fact in issuing eviction orders against the appellant and yet it is (sic) not staying on parcel LR No. Saboti/Saboti Block 6/Sukwo/151”.**

10. If the defendant does not reside on the suitland, he has nothing to fear as eviction orders may not result in a physical ejection of him and his property out of the suitland.

11. I therefore find that in that event, the requirement that the court must be satisfied that the defendant may suffer substantial loss if no order of stay is granted has not been met. This court not satisfied that the defendant would suffer any substantial loss as he is resident on another parcel, and it can not issue the orders sought.

12. This court is also bound to examine the timelines of the application at hand. The judgment was read on 13/5/2015. Yet the application was filed in March, 2017 almost two years down the line. The court is not satisfied that the application was brought within reasonable time after the judgment was read. This is not the conduct of a diligent litigant who is interested in his litigation.

13. Besides the land is registered in the name of the plaintiff and until fraud is proved, which it was not done at the hearing in this court, the plaintiff remains the sole person entitled to the suitland. It has not been claimed by the defendant that the plaintiff intends to dispose of the suitland. In any event, all throughout the proceedings the land was still registered in the plaintiff's name. It has also not been demonstrated to this court that the plaintiff would not be able to compensate the defendant with damages in the event the appeal succeeds.

14. I find that the application dated 17/3/2017 has no merit and I hereby dismiss it with costs to the defendant.

**Dated, signed and delivered at Kitale on this 28<sup>th</sup> day of September, 2017.**

**MWANGI NJOROGI**

**JUDGE**

**28/09/2017**

Before – Mwangi Njoroge Judge

Court Assistant – Picoty

Mr. Bisonga holding brief for Ambutsi

Mr. Barongo holding brief for Ingosi for Defendant

**COURT**

Ruling read in open court in the presence of counsel for the parties.

**MWANGI NJOROGE**

**JUDGE**

**28/09/2017**