



**REPUBLIC OF KENYA**

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

**ELC NO. 210 OF 2012**

**CATHERINE C. KITTONY..... PLAINTIFF**

**VERSUS**

**JONATHAN MUINDI.....1<sup>ST</sup> DEFENDANT**

**THE CHAIRMAN KAPSARET**

**DIVISION LAND DISPUTES TRIBUNAL.....2<sup>ND</sup> DEFENDANT**

**THE ATTORNEY GENERAL.....3<sup>RD</sup> DEFENDANT**

**RULING**

**INTRODUCTION**

This ruling is in respect of an application dated 29<sup>th</sup> May 2017 brought by way of Notice of Motion by the Plaintiff/Applicant for orders:

1. Spent
2. That pending the hearing and determination of this application, there be stay of execution of the judgement and Decree of the Environment and Land Court at Eldoret (Delivered on 24<sup>th</sup> May 2017) being Catherine Kitony Vs Jonathan Muindi Dome, The Chairman Kapsabet Division Land Disputes Tribunal and the Attorney General.
3. That pending the hearing and determination of the intended Appeal, there be a stay of execution of the judgement and Decree of the Environment and Land Court at Eldoret (Delivered on 24<sup>th</sup> May 2017) being Catherine Kitony Vs Jonathan Muindi Dome, The Chairman Kapsabet Division Land Disputes Tribunal and the Attorney General.
4. That the Honourable Court do issue such other directions and/or orders as the Court may deem just and expedient to grant.
5. That the costs of this application be in the cause.

This application was brought under certificate of urgency on 29/5/17 where the court certified the same as urgent and granted interim orders pending the hearing and determination of the application. On 29/6/17 when the application was scheduled for hearing *inter partes*, the 1<sup>st</sup> defendant informed the court that he

had not been served with the application. The court ordered that the application be served on the 1<sup>st</sup> defendant and the same be heard on 21/9/17.

Miss Cheso for the Applicant argued the application and stated that she would rely on the grounds on the face of the application together with the supporting affidavit sworn by Catherine Kitony and the authorities filed in court.

Counsel submitted that Order 42 Rule 6(2) of the Civil Procedure Rules lays the foundation and what an applicant must satisfy to be granted stay pending Appeal. She stated that an applicant must bring the application expeditiously, the court must be satisfied that substantial loss may result to the applicant unless the order is made and finally the applicant must be willing to furnish such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant.

Miss Cheso submitted that the applicant had met all the limbs above as the applicant filed the application expeditiously. She submitted that judgement was delivered on 24/5/17 and the application was filed on 29/5/17. Counsel further submitted that the substantial loss likely to be suffered by the applicant is that the Appeal will be rendered nugatory. The 1<sup>st</sup> defendant is in possession and occupation of the 5 acres awarded by the judgement and there is no likelihood that they will be evicted.

It was further submitted by Counsel that the applicant has already filed an appeal which is Eldoret Civil Appeal No. 33/17 and the same has been served on the parties within the stipulated time. What is pending is a mention date for directions. She submitted that if stay is not granted then the applicant will suffer loss as a decree has already been extracted and may have already been lodged with the Uasin Gishu Land Registrar for split of the title. It was her submission that the decree has been partially executed as the court has already cancelled the title and the respondent may deal with the property as he so wishes to the detriment of the applicant.

Finally, on the issue of security of costs Counsel cited the case of Charles Ngatia Vs Ekira Gathoni Kariithi & another (2014) e KLR which had similar facts. She submitted that a stay of execution will not reverse the decree. She urged the court to grant the orders as prayed.

The 1<sup>st</sup> respondent Francis Muindi relied on the replying affidavit filed in court and urged the court to dismiss the application with costs. He stated that the application is a waste of judicial time and the same should not be entertained.

### **Analysis and Determination**

This is an application for stay pending appeal which falls under Order 42 Rule 6 (2) of the Civil Procedure Rules which provides for stay in case of an appeal. The conditions for granting such stay are well settled as was submitted by Counsel for the applicant. The application must be brought to court expeditiously without unreasonable delay, the court should be satisfied that substantial loss may result to the applicant if the orders sought is not granted, and court may order such security for the due performance of the decree.

I have considered the application together with the supporting and replying affidavits and the submission of counsel for the applicant and find that the applicant has met the threshold for granting stay. The judgement was delivered on 24/5/17 and this application was filed on 29/5/17, that is barely 5 days after the said judgement. I find that the application was filed timeously without unreasonable delay.

Further the decree involves the split of a title and the court having cancelled the suit title, I find that it would be in the interest of justice to grant stay as the substantial loss would be that the appeal would be rendered nugatory. It is also not in dispute that the respondents are in occupation and the grant of this stay would not change the status quo. The decree has already been extracted as seen in the court file and execution of the decree may proceed to the detriment of the pending appeal which has already been filed and served on the respondent.

On the issue of security of due performance of the decree, I reiterate what Ombwayo J stated in the case of Charles Ngatia Vs Ekira Gathoni & another (2014) e KLR that:

*“the issue of security in this matter is not relevant as the parcel of land in dispute is protected by the decree of the court and that a stay of execution will not reverse the decree”.*

From the foregoing, I find that the application has merit and is therefore allowed.

Dated and delivered at Eldoret on this 12<sup>th</sup> day of October, 2017.

**M.A ODENY**

**JUDGE**