



**REPUBLIC OF KENYA**

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

**E & L CASE NO. 87 OF 2015**

**(Formerly Kitale Hcc No. 18 of 2008)**

**ELDORET EXPRESS COMPANY LIMITED.....APPLICANT/PLAINTIFF**

**VERSUS**

**TAWAI LIMITED.....RESPONDENT/DEFENDANT**

**AND**

**NATIONAL LAND COMMISSION.....INTERESTED PARTY**

**RULING**

**Eldoret Express Company Limited, (hereinafter referred to as the Judgment Debtor)** has filed an application against **Tawai Limited (hereinafter referred to as the Decree holder)** for stay of execution pending appeal. The application is based on grounds that the Judgment herein was delivered on 16.8.2017 and that the respondent/defendant intends to execute the Judgment/Decree of the court therein made on 16.8.2017. The applicant is dissatisfied with the judgment delivered on 16.8.2017 and has therefore preferred an appeal to the Court of Appeal and has already filed notice of appeal. That if stay of execution is not granted, substantial loss may result to the applicant as the land he is to be evicted from is of 640 acres. That the appeal has reasonable chances of success and if execution is carried out it will render the appeal nugatory as the applicant would have been evicted from the suit land. According to the applicant, there has been no delay in bringing this application and that the applicant is exercising his statutory right of appeal hence need for stay of execution. That it is in the wider interest of justice that the application herein be allowed.

The application is supported by the affidavit of Simon Mbugua Thungu, the director of the applicant, who states that if stay of execution is not given, he will suffer substantial loss as the respondent may evict him and demolish all his buildings and structures on the suit land and render the appeal nugatory. That the land in dispute occupied by himself since 2001 is 640 acres or thereabouts. That there has been no delay in filing this application. That he has been advised by his Advocates on record which he verily believe to be true that it is only fair and just in law for stay of execution be granted while he is exercising his statutory right of appeal herein. That he is further advised by his Advocates on record and which he verily believe to be true that the appeal herein has reasonable chances of success and it also raises weighty issues of law hence need for a stay of execution otherwise the appeal will be rendered nugatory. That it is in wider interest of justice that the application be allowed. That no one will be prejudiced if the orders sought are granted.

The general position taken by the Decree holder and the respondents is that no security has been offered by the Judgment debtor. Moreover, that no substantive loss has been demonstrated. According to Mr. Charles Wafula Masinde, there is no sufficient cause shown to continue perpetrating illegal occupation and fraud which the court has uncovered and that the intended appeal is a delay tactic.

Mr. Onyancha learned counsel for the applicant submits that If eviction is issued, the plaintiff is likely to suffer substantial loss. The property is 640 acres on which the applicant has cows since the year 2000 upto now. Evicting such a person is likely to cause substantial loss. The application has been filed within reasonable time as Judgment was read on 16.8.2017 wherein stay was granted orally. He filed the application within 15 days. They have filed a notice of appeal and they have also applied for proceedings

and paid for the same. If stay is not granted, the respondents will evict the plaintiff. Removing the defendants, if the appeal succeeds will be a tiresome job.

I have considered the application, replying affidavits, grounds of opposition on record and do find that the applicant has satisfied this court that the application was filed without unreasonable delay. Judgment was read on 16.8.2017 whilst the application was filed on 19.8.2017. There is no delay at all. On whether the plaintiff is likely to suffer substantial loss if stay is not granted and he succeeds on appeal, I do find that the plaintiff is likely to be evicted from the parcel of land which he has developed and is rearing cows and therefore if he succeeds on appeal having been evicted, he would have suffered substantial loss. Moreover, the judgment debtor has no document of ownership the same having been nullified, there is no likelihood that he will transact on the land his title documents having been nullified. Last but not least, the judgment debtor is willing to give security of a log book of a bus valued at Kshs.14,000,000. I do further find that the applicant has met a test provided for in Order 42, Rule 6(2) of the Civil Procedure Rules, 2010.

Ultimately, I do grant the application thus there be stay of execution of decree dated 16<sup>th</sup> August 2017 and issued on 18<sup>th</sup> August 2017 for a period of 7 months but subject to review, pending hearing and determination of the appeal. The applicant to deposit in court security in terms of a log book of motor vehicle registration number KCL 072U, a brand-new Scania bus registered in the name of Eldoret Express Ltd or its director, the valuation report within 7 days failure of which execution to issue. It is further ordered that the Director Transport and Safety Authority is prohibited from dealing with the aforementioned security in any manner whatsoever. Orders accordingly.

**DATED AND DELIVERED AT ELDORET THIS 2<sup>ND</sup> DAY OF OCTOBER, 2017.**

**A. OMBWAYO**

**JUDGE**