



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ELC CASE NO. 45 OF 2013 (O.S)

JAMES KIPLIMO ROTICH..... APPLICANT

VERSUS

TAPRANDICH CHUMO..... RESPONDENT

RULING

What is coming up for determination is the application dated 21st August 2017. The said application is brought by way of Notice of Motion pursuant to order 42 rule 6 and order 43 of the Civil Procedure Rules as well as section 3A of the Civil Procedure Act. The Applicant seeks an order of stay of execution of the court's orders issued on the 30th May 2017 pending appeal.

A brief background of the case is necessary to put the matter into perspective. On 10th July 2013 the applicant filed suit by way of Originating Summons seeking to be declared as the proprietor of land parcel number KERICHO/CHEPSEON BLOCK 4/392 which is registered in the name of the Respondent by adverse possession. In his affidavit in support of the Originating Summons he claims that he has been in peaceful, uninterrupted occupation of the said parcel of land since 1970 while the Respondent, although the registered owner thereof has never used, developed or lived therein. The Respondent filed a response in which he states that the suit land was allocated to him in 1992 and he was issued with a title deed. He depones that the Applicant has frustrated his efforts to occupy the said parcel of land through intimidation and threats of violence. Together with the Originating Summons, the Applicant applied for orders of injunction to restrain the Respondent from interfering with the applicant's peaceful enjoyment of the suit property. The said application was dismissed on the 26th February 2014.

On the 26th March 2015 the court gave directions to the effect that the O.S would proceed by way of viva voce evidence and the case was fixed for hearing on 25th November 2015. When the matter came up for hearing, the Applicant and his counsel failed to appear in court and the case was dismissed for non-attendance. The applicant subsequently filed an application to set aside the order of dismissal on 8th February 2017. By the court's Ruling dated 30th May 2017, the said application was disallowed. It is against this Ruling that the applicant has filed a Notice of Appeal. The instant application therefore seeks a stay of execution pending the said intended appeal.

The application is anchored on the grounds set out on the face of the application and the applicant's supporting Affidavit sworn on the 21st August 2017. In the said affidavit, the applicant depones that he was aggrieved by the orders made on 30th May 2017 and he instructed his advocate to lodge an appeal against the said orders. He further depones that he has been in occupation of the land which is the subject matter of the appeal since 1973 and he has no other place of residence. He therefore stands to suffer substantial loss if the application is not granted. He depones that he is willing to abide by reasonable conditions/ terms of security for costs that the court may impose.

The application is opposed by the Respondent through the Grounds of Opposition and his Replying affidavit sworn on the 30th August 2017. In the said affidavit the respondent avers that the applicant has merely filed a Notice of Appeal but has not yet filed an appeal within the requisite period of 60 days after delivery of the Ruling.

The parties opted to canvass the application by way of oral submissions.

In his submissions Mr. Motanya, learned counsel for the applicant submitted that if the application was not granted, the appeal would be rendered nugatory. He reiterated what is stated in the applicant's supporting affidavit that the applicant was willing to furnish security for costs.

Opposing the application Mr. Siele Sigira learned counsel for the Respondent submitted that the application is an abuse of the process of the court and is fatally defective for failing to annex a copy of the order against which the appeal is sought. He submitted that the applicant's suit was dismissed on 11th November 2015 and since the Ruling of 30.5.2017 did not reinstate the said suit, the court was *functus officio*. He faulted the applicant for the delay in filing the application for stay of execution, which was filed 3 months after the Ruling was delivered. He submitted that since the applicant had not yet filed the appeal it was not possible for the court to establish if the appeal had high chances of success. He finally submitted that the applicant had not met the threshold for the grant of an application for stay of execution.

The main issue for determination is whether the applicant has met the threshold for grant of an order of stay of execution.

The principles that the court must consider in order to grant an application for stay of execution pending appeal are set out in the case of **Global Tours and Travels Limited Nairobi Winding Up Cause No. 43 of 2000** cited in **Kenya Power & Lighting Company Ltd V Esther Wanjiru Wokabi 2014 eKLR** where Ringera J (as he then was) stated as follows:

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice.. the sole question is whether it is the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously”.

The court must therefore consider the following principles

- a) *Whether the application was filed without undue delay*
- b) *Whether the applicant has established that he has an arguable appeal*
- c) *Whether the applicant has established sufficient cause that it is in the interest of justice to grant the orders sought.*
- d) *Whether the applicant is willing to furnish security for costs*

An analysis of the instant application from the above perspective shows that the application was filed within a reasonable time as the Ruling was delivered on 30th May 2017 while the application was filed on 21st August 2017.

Regarding the question as to whether the applicant has an arguable appeal, I am unable to determine whether the Applicant has filed the Memorandum of Appeal as what is on record is a Notice of Appeal. I am therefore unable to establish whether the Applicant has an arguable appeal.

On the question as to whether the applicant has established sufficient cause, the applicant has stated that he has been living on the suit property since 1970 and he stands to suffer great prejudice if the stay of execution is not granted.

Regarding the issue of security for costs, the applicant has stated in his supporting affidavit that he is willing to abide by any conditions that the court may impose. This was reinforced by his advocate who submitted that the applicant is willing to furnish security for costs.

I have carefully considered the application herein, the affidavits, pleadings and the rival submissions. In light of the above analysis, I am persuaded that the application is merited and I grant it on condition that applicant deposits the sum of Kshs. 167, 930 in court as security for costs within 30 days from the date hereof. If the said amount is not deposited within the stipulated period, the order for stay of execution shall automatically lapse.

Each party shall bear their own costs.

Dated at Kericho this 11th day of December 2017

J.M ONYANGO

JUDGE

In the presence of:

Mr Siele for the Respondent

No appearance for the Applicant

Court Assistant: Rotich