

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 691 OF 2012

KIPLAGAT KOTUT.....PLAINTIFF

VERSUS

ROSE JEBOR KIPNGOK.....DEFENDANT

RULING

By application dated 16.12.2015, Kiplagat Kotut (*herein referred to as the applicant*) has moved this court for orders that this court be pleased to extend time within which the applicant is to comply with orders made on 20th November, 2015 directing that plaintiff to deposit Kshs.1,680,000/= on account to security pending hearing and determination of the application. The applicant also seeks an order for independent agricultural assessor to conduct and file a report in so far as production of the suit property is concerned. He also seeks for an order that this court does review or vary the orders made on 20.11.2015 to be in line with assessment report to be filed by independent assessor. The application is based on grounds that the orders were reached and/or made based on a report prepared by sub-county Agribusiness Development Officer, Kesses Sub County which is based on untrue position in so far as production of the suit property is concerned and that several issues and figures used by the officers in arriving at his conclusion were exaggerated.

He contends that most part of the land approximately 13 acres such is not arable and that the agricultural officer who wrote the report never visited the ground to ascertain the status on the ground and that the respondent would never suffer any prejudice if at all the orders sought are granted. The applicant is ready to meet the cost of conducting the further assessment. That the applicant is willing and ready to deposit a security of Kshs.250,000/= on account of security for the performance of decree. The application is supported by the affidavit of Kiplagat Kotut who states that the orders made by this honourable court on 20.11.2015 have been explained to him whereof he wishes to state that the orders that he deposits Kshs.1,680,000/= as a security for the performance of the decree were reached and/or made based on a report prepared by sub-county Agribusiness Development Officer, Kesses Sub-County and largely reiterates the grounds in the notice of motion.

The application is opposed by the Decree holder who states that the said application is defective in form and substance and amounts to abuse of court process and is an afterthought brought under undue delay and upon lapse of the 30 days granted and without the judgment debtor making the deposit as ordered by the Honourable Court. That this Honourable Court is *functus officio* in the matter and that the judgment debtor is seeking to revisit and/or re-open the application for stay.

That he stay order delivered on 20th November, 2015 was conditional upon the Judgment debtor depositing Kshs.1,600,000/= (One Million six Hundred Thousand) into court as security for costs within 30 days from the date of the ruling. That the judgment debtor has violated the said order by failing to deposit the security as ordered by the Honourable Court and as such is not entitled to the orders sought.

That the judgment debtor is intent on fresh litigation using existing pleadings which is irregular, untenable and prejudicial to the decree-holder who continues to be deprived of the fruits of her judgment and right to utilize the suit property. That the judgment debtor is calling upon this Honourable Court to sit on its own appeal which is unacceptable. That the said application does not meet the requirements of Order 45 of the Civil Procedure Rules. That the issue of the agricultural report was a fact within the knowledge of the judgment debtor when the judgment debtor's application for stay of execution was made. That the issues in the said application ought to have been raised during the hearing of the judgment

debtor's application for stay of execution. That the said application has been brought under undue delay upon lapse of the period granted and calculated at defeating the orders of the Honourable Court. That judgment debtor is not deserving the exercise of this court's discretion by his conduct alone. That the judgment debtor has no regard to court orders and is calling upon the Honourable court to entertain an illegality.

Mr. Korir learned counsel for applicant eloquently submits that the application is made under Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules and argues that there was mistake because the assessor never visited the suit property and that the applicant never prepared the independent report.

Mr. Kibii learned counsel for respondent, argues firmly that the application is incompetent in law and substance and has been brought by the applicant to avoid paying security.

I have considered the application and raised submissions by counsel for the applicant and respondent and do find under Order 80 and rule 45 of the applicant ought to demonstrate that there is mistake error apparent on face of record or any sufficient reason.

Mr. Korir relies substantially on his omission to file a valuation report. With due respect to Mr. Korir, the reason for his failure to file a valuation report has not been explained and therefore, he cannot take advantage of the said failure. Article 159 of the Constitution is not designed to assist parties who are not diligence in prosecuting their application but those who in good faith omit taking a proper action in civil proceedings. The application is intended to introduce new evidence after judgment. We are not told why the new evidence could not be availed during the hearing of the application. This court finds that the application is meant to defeat justice as the valuation report has not been annexed as an exhibit in the application. This gives credence to the argument by the Decree-holder that it is intended to delay execution of the decree herein.

The upshot of the above is that I do not find any ground for review or variation of the decision made on 20.11.2015. The application is dismissed with costs.

DATED AND DELIVERED AT ELDORET THIS 29TH DAY OF JANUARY, 2016.

ANTONY OMBWAYO

JUDGE