**REPUBLIC OF KENYA**

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

**AT ELDORET**

**MISC. APPLICATION NO. 8 OF 2015**

**THE COMMITTEE NYAKINYUA JOGOO USALAMA FARM.....APPELLANT**

**VERSUS**

**JOSEPH K. MWANGI & 17 OTHERS.....RESPONDENT**

**RULING**

The applicants have come to court for a temporary stay of execution of the judgment and decree in Eldoret Hccc No. 40 of 1995 between the ***Committee Nyakinyua Jogoo Usalama Farm Vs Joseph K. Mwangi & 17 Others*** pending interpartes hearing and final determination of appeal. The applicants further pray for leave to appeal out of time against the said judgment. The application is based on grounds that the appeal is meritorious and that the delay in filing the appeal was not deliberate and therefore excusable. Moreover, that the grant of the orders will not prejudice the respondent. That the application is made in the best interest and fairness.

The application is supported by the affidavit of ***Veronica Chepkoech Kiprono*** who states that she is currently the chairperson of the applicant and initially a member of the applicant hence competent to make this affidavit. She was a member of the applicant by virtue of being a state choir member during the era of His Excellency the late Hon. Jomo Kenyatta. That they were generally 32 members who usually sung traditional songs and performed traditional dances through a group called Nyakinyua Dancers during state functions and as appreciation of their work, the late Head of state His Excellency Hon. Jomo Kenyatta granted them land measuring 100 acres situated at Jogoo area, Uasin Gishu County and that all of them have been in actual use and occupation of the subject land based on their shares. Sometimes in 1995, a group of other people emerged from nowhere and started demanding that they be given land yet they were not members. Based on above claims, the said 18 persons went to the Land Dispute Tribunal and lodged a complaint claiming the said land as evidence vide Tribunal proceedings and award.

They were dissatisfied with the award of the Tribunal and lodged the appeal herein as evidence vide memorandum of appeal and by then, the applicant had a committee acting on behalf of all the members. Unfortunately, the post election violence of 2007/2008 that affected most part of the country caused most members including their official of the applicant to be displaced. That it was during the same period (2007/2008) that the court proceeded to make the decision against the applicant as evidence vide the Judgment. That they only learnt of the existence of the judgment when they were served with a letter dated 28.2.2014 from M/s Kibichiy Advocate addressed to the area Chief and the District Land Adjudication/Settlement Officer as evidence vide the letter.

That at the material time to the letter, there was no committee in place hence they were called by the area chief and informed of the position of the existence of the letter based on the strength of the letter afore

stated. They were advised and forced by the circumstances to hold a members meeting in order to constitute officials to pursue *inter alia* the matter in court as evidence vide the Minutes of the meeting held on 13.11.2014 and among the issues for the constituting of the committee, was to get an advocate to advise and if possible to pursue the cause matter to further level as it has been evidence vide the above Minutes. She believes that they have a good appeal with high chances of success. The delay in lodging the appeal was not deliberate but due to the circumstances beyond their control. They stand condemned unheard if the status quo in relation to this proceedings in this matter is maintained.

In the replying affidavit, the respondents through ***Jacob Kimaru Machira*** states that the honourable court gave judgment on the 30th September, 2010 directing the 18 respondents herein to be allocated 2 acres each in Nyakinywa Jogoo Usalama Farm. That he is well informed that in the said judgment, the court ordered the administration to ensure the plaintiffs are allocated land as per their report dated the 23rd March, 1989. The plaintiffs/applicants have not given any valid reason for the delay in filing the appeal since it is now five years since the pronouncement of the judgment and the respondents will be greatly prejudiced since they had made an application for the enforcement of the said judgment. It is stated that the applicants instructed an advocate who had been in conduct of this matter on their behalf until it was concluded. That he is well informed by his Advocates that an application was made seeking to enforce the judgment and the said advocate appeared on behalf of the applicants seeking more time to get instructions from the applicants. That in response to paragraph 10 of the affidavit, the applicants have not stated how they were affected by the post election violence since they have not stated that they are internally displaced persons. The judgment was issued on the 29th November, 2010 which was two years after the post election violence. The applicants assertion that they only learned of the judgment vide a letter dated 28.2.2014 shows that they have been indolent and ought to have worked with their advocate since they are the ones who took the respondents to court. The matter has been in court for more than 25 years and there is need for litigation to end since judgment in favour of respondents in both the Lower Court and High Court and therefore, the appeal has no chance of success. That by the time they were conducting a meeting on the 13.11.2014 to look for another advocate, they had one on record and whom they never got in touch with for their case. That as such, the application before court should not be allowed in view of all the above sentiments.

In a supplementary affidavit, ***Veronica Chepkoech Kiprono*** states that the applicant has been the occupiers of the suit land measuring 100 acres for a very long period of time in which the actual use and occupation is based on their shares. The applicant was dissatisfied with the judgment allegedly issued on 30th September, 2010, directing the respondent to occupy the said suit land. The delay in filing the appeal was not deliberate as impliedly and/or expressly stated by the respondent and it was not and has never been an after thought based on the circumstances. The cause of the delay was as a result of the impacts of post election violence of 2007/2008 that caused most members of the applicant to be displaced and the issue of post elective violence is in public knowledge that most people were affective and/or displaced as IDP's which effect is a still fact to-date/recent. The impact of the post election violence 2007/2008 affected the functions and duties of the applicant given that the affected members therein could not be easily traced after the post election violence 2007/2008. The effect has had serious ramification to the living of many people who were officials and/or members.

In her view, the applicant's members acted with due diligence upon being issued with the letter dated 28.2.2014 regarding the said judgment issued by the court hence the allegations that the applicants were indolent is not justified. In fact the applicant became vigilant upon knowing the existence of the order as they immediately held a meeting on 13.11.2014 in order to constitute officials of the applicant for the same purposes and respond to this matter. The delay therefore, was not deliberate but due to the circumstance beyond their control.

The applicants submit that they knew of the matter when the deponent was informed by the area chief through a letter by the respondent's advocate. She engaged other parties to commence a meeting over the issue.

The respondent submits that the applicants have not explained the delay as they have not explained how post election violence affected them as they have not demonstrated that they we internally displaced

persons.

I have considered the affidavits on record and submissions of parties and do find that the application for stay of execution pending appeal is made under Order 42, Rule 6 thought not cited. The order provides that:-

> ***(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.***
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> ***(2) No order for stay of execution shall be made under subrule (1) unless—***
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> > ***(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and***
> >
> > ***(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.***
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> ***(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.***
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> ***(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.***
>
> **(5)** ***An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.***
>
> **(6)** ***Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.***

This order is applicable where the application is made timeously without unreasonable delay and on proof that there is likely to be substantial loss and on giving of security.

I have considered the application and do find that there is no good reason given for the delay to apply for stay of execution pending appeal since the date of the delivery of the decision on 30th September, 2010. The applicants have not also demonstrated that the advocate on record was not aware of the decision of the High Court dismissing the appeal.

Likewise, I do not find any good reason to file an appeal out of time as the post election violence happened in 2007-2008 and not 2010. Moreover, it is not explained how the post election violence caused the delay to appeal in time. The appeal was dismissed on 30.9.2013 whilst the application is made on 10.4.2015. Last but not least, the appeal was dismissed with costs and therefor, there is nothing to be stayed as the order sought to be stayed is negative as the same was a dismissal. Ultimately, the application is dismissed with costs.

**DATED AND DELIVERED AT ELDORET THIS 26TH DAY OF FEBRUARY, 2016.**

**ANTONY OMBWAYO**

**JUDGE**