



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 2 OF 2014

(FORMERLY HIGH COURT CIVIL APPEAL NO. 66 OF 2008)

SAMUEL NYABIBA NYAKERI.....APPELLANT

VERSUS

PETER OKIABERA OMWENGA.....RESPONDENT

RULING

The respondent, **Peter Okiabera Omwenga** comes to the court with an application for orders that pending the hearing and the determination of an appeal from the decision of the honourable court there be stay of execution of the decree of this court to the extent that the respondent do remain in possession of land reference Nzoia/Sisal/Moi's Bridge Block 1/3406 and or continue collecting rent from the tenants thereon. In the alternative, the status quo currently prevailing regarding possession and the collection of rent be maintained.

The application is based on grounds that the respondent has been in possession of the land and collecting rent and that the decision of the honourable court only stopped transfer of the land to the respondent. The respondent has filed a notice of appeal against the decision of the honourable as he is not satisfied with the decision of the honourable court.. The respondent has been left without a remedy hence the appeal. The status quo regarding possession and the collection of rent ought to be maintained as the honourable court did not order eviction of the respondent. The respondent stands to suffer substantial loss. If need be, the respondent is ready to give security for the due performance of the decree.

The application is supported by the affidavit of Peter Okiabera Omwenga who states that on 12.3.2015, the honourable court made a decision whereby it set aside an order of the Lower Court ordering transfer of land reference Nzoia Sisal/Moi's Bridge Block 1/3406 into his name. That he is in possession of the suit land and collects rent from the tenants thereon. That immediately the decision was made, the appellant's advocate wrote a letter to the tenants directing them to start paying rent to the appellant or face eviction. That on 20.3.2015, his advocate wrote a response to the letter advising the tenants to continue paying rent to him. That the appellant's advocates' letter was written despite the fact that there is stay of execution of the decree of this court. That the tenants have continued to pay rent to him even after the decision was made. That the honourable court ought to order stay of execution of the decree pending the hearing and determination of the appeal.

According to the respondent, the decree of the court has left him without a remedy as he has lost both parcels of land hence the *status quo* currently prevailing ought to be maintained. He believes that unless stay of execution is granted, he stands to suffer substantial loss. He is ready to offer security for the due performance of the decree. The applicant has already filed a notice of appeal and sought proceedings and prays that the court considers granting him stay of execution. That in the alternative, the status quo ought

to be maintained.

In the replying affidavit by Samuel Nyakeri Nyabiba, he states the subject matter of this appeal is title number Nzoia Sisal/Moi's Bridge Block 1/3406 a commercial building comprising 11 shops and a fuel service station. That in April 2008, when his application for stay was dismissed due to non-attendance of his advocate to prosecute the application for stay of execution the applicant moved into his said property and started collecting rent from his existing tenants which he continued to do until the judgment in this appeal. Upon expiry of 30 days on 13th April, 2015, he retook the premises, did repairs costing him Kshs.25,000/= and also instructed his tenants to start paying rent to him. That the total rent payable from the premises is approximately Kshs.30,000/= per month. That the applicant has collected over Kshs.2,520,000/= since he forcibly commenced rent collection from the suit premises.

The applicant has no known source of income apart from the rent from his premises. The respondent states that the applicant is a man of straw surviving on the business of hawking eggs and chicken in Eldoret town. That he is entitled to restitution of the rent so far collected in terms of Section 91 of the Civil Procedure Act and he intends to move the subordinate court for orders accordingly. That he is a farmer and businessman and capable of satisfying any decree that the Court of Appeal may issue upon determination of the intended appeal. He has been advised by his advocates on record which advice he verily believe to be true that the Applicant's intended appeal is a frivolous one and without any chances of success, leave alone, arguable. According to the respondent the applicant has not demonstrated that he will suffer substantial loss or any other loss if stay is not granted. That the suit property is in his name and he should be allowed to enjoy the fruits of this judgment. The application is therefore without merit, the same being designed to delay justice and continue to deprive him of his rental income.

The respondent/applicant submits that the application was filed on 10.4.2015 without unreasonable delay thus less than one month after the decision of the honourable court which was made on 12.3.2015.

On the issue of substantial loss, the applicant argues that he stands to lose his land in Matunda and the land in Racecourse/Langas Eldoret. He claims to have developed the parcel of land in Eldoret hence he stands to suffer substantial loss.

The applicant submits that he is ready to submit to any conditions on the security for the due performance of the decree, however, he adds that no security is required for the due performance of the decree.

Mr. Samba for the respondent argues that there is no doubt that the application for stay was filed without unreasonable delay but adds that the applicant has not demonstrated that substantial loss may result if stay is not granted. He submits that other than stating that he is likely to suffer substantial loss, he has not proved with any specific evidential material of the loss.

I have considered the application made by the respondent for stay of execution of decree and pending appeal and do find that the application is made timeously and therefore, the 1st condition for grant of stay pending appeal in my view has been satisfied. On the second condition on substantial loss, I do find that it has not been demonstrated in the supporting affidavit how the respondent will suffer substantial loss. It is trite law that who alleges proves. The applicant has merely alleged that he will suffer substantial loss without providing evidence. The evidential burden of proof is on the applicant to prove that the respondent has no means to pay in case the appeal succeeds.

In Gandhi Brothers Vs. H K Njage T/A H K Enterprises Nairobi (Milimani) HCCC No. 1330 of 2001, Justice Ringera **stated as follows:**

“Where service of summons is asserted by one party and denied by the other, both the assertion and the denial being on solemn oath taken before a Commissioner for Oaths the Court cannot but be left in a quandary in the absence of cross-examination of the deponents to the contradictory affidavits. In those circumstances the Court is constrained to decide the matter on the basis of fundamental rule of evidence, which is codified in Section 3 of the Evidence Act Cap. 80 Laws of Kenya that a fact is not proved if it is neither proved nor disproved. It is therefore not proved”.

The applicant has not proved any kind of loss. Despite the above observation, this court finds that this is a case where stay should be granted as it involves a rented property that generates monthly rent which is likely to run into millions of Kenya Shillings.

I do grant stay on condition that the monthly rental income from Nzoia Sisal/Moi's Bridge Block 1/3406, a commercial building be deposited in a joint account to be opened in the names of the Advocates for the applicant and respondents herein until the hearing and determination of the appeal. The said account to be opened within the next 14 days. Orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 22ND DAY OF FEBRUARY, 2016.

ANTONY OMBWAYO

JUDGE