



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 18 OF 2015

FESTUS KIPTOO.....PLAINTIFF

VERSUS

EVANS M. OMWENGA.....1ST DEFENDANT

THE LAND REGISTRAR, UASIN GISHU COUNTY.....2ND DEFENDANT

THE ATTORNEY GENERAL.....3RD DEFENDANT

RULING

The application dated 5th October 2015 by Festus Kiptoo seeks an order that there be a stay of execution of the court order issued on 1st October 2015 and all other subsequent proceeding herein pending appeal. The application is based on grounds that on 1st October 2015 the court delivered its ruling on the plaintiff application dated 20th January 2015 and dismissed the application. The plaintiff was dissatisfied with the decision and lodged an appeal against the decision. He stands to suffer substantial loss if stay is not granted as the defendants will move to dispose off, sell, transfer, take possession or alienate the suit property. The plaintiff will suffer grave prejudice if stay is not granted.

The application is supported by the affidavit of Festus Kiptoo who states that he is aggrieved by the decision of Court and as such has lodged an appeal to the superior Court against the order issued by the court and that he is informed by his advocates on record that so as to enable the Superior Court to effectively determine the appeal, it is imperative that the orders sought be granted in order to safeguard the interests of the applicant. He is informed by his advocate on record that he appeal is meritorious and has high chances of success and that this application has been made without undue delay as he was only able to get a copy of the typed ruling on 1st October, 2015 to enable him prepare the appeal. That as a beneficiary of the estate of the deceased, he stands to suffer irreparable losses and damages in the event the orders sought are not granted, for reasons that the beneficiaries of the estate of the deceased shall be prejudiced in the event the defendant/respondent sells and/or disposes the suit land and as beneficiaries of the estate, they stand to lose their inheritance and their rights to own property under the estate of the deceased. As beneficiaries, they stand to lose their bargaining power over the suit property, which is a vital investment in the estate. The suit property shall be a source of livelihood for the beneficiaries of the estate. The suit property is a pivoted assess and a land resource critical to the well being subsistence of the estate and its beneficiaries. He believes that he has the *locus standi* to seek the order sought pursuant to the Letters of Administration issued to him by the High Court at Eldoret vide ad Litem Cause No. 207 of 2015. That he is ready, willing and able to abide by any reasonable conditions for provision of security as the Court may prefer and that since the subject matter is, land, the court should consider the same to suffice as reasonable security as neither of the parties is either in possession nor occupation of the said property. The application is made in good faith with the sole intention of aiding the court in comprehensively and justly determining the facts in issue between the parties. The Defendant/

Respondent shall not be prejudiced if the application is allowed since neither of the parties is in occupation and or has been in occupation of the property since the institution of this suit.

The 1st Defendant filed grounds of opposition that the application is frivolous, vexatious and scandalous and that it is fatally defective and abuse of the process of the court. It is not meritorious and based on the misapprehension of facts.

The plaintiff applicant submits that substantial loss may result if stay is not granted and that the application is made without unreasonable delay. On security, the plaintiff argues that the suit parcel is the security in this matter as it is neither in the possession of the plaintiff nor defendant.

The 1st defendant on his part argues that the applicant has not demonstrated that he is likely to suffer substantial loss. Moreover, that the plaintiff has not offered security for the court to grant stay of execution.

I have considered the application for stay of execution pending appeal and with due respect to counsel for the plaintiff, though the application was filed without inordinate delay as it was brought to court 3 days after the ruling, I do find that the application is misconceived as the order sought to be stayed is negative as opposed to on positive order incapable of execution. It is a dismissal of an application for injunction and therefore it cannot be stayed.

It is trite law that negative orders are incapable of execution hence cannot be stayed.

In the case of Kanwal Sarjit Singh Dhiman –Vs- Keshavji Jivraj Shah [2008] eKLR, the Court of Appeal, while dealing with stay of a negative order, held as follows:

“The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December, 2006. The order of 18th December, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only (see Western College of Arts & Applied Sciences vs. Oranga & Others [1976] KLR 63 at page 66 paragraph C).” (*emphasis mine*)

The Application is founded on Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules which provides as follows:

“6.(1) No appeal or second appeal shall operate as a stay of 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.

(2) No order for stay of execution shall be made under sub-rule (1) unless—

(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.”

On substantial loss, the plaintiff has not demonstrated the substantial loss that he is likely to suffer. The

burden is on the applicant to prove that he will suffer substantial loss that cannot be refunded by the respondent and not for the respondent to prove that he is capable to refund. I have not seen a valuation report of the said property to be able to decide whether there is substantial loss. The Court of Appeal **Civil Application No. Nai 15 of 2002 ABN AMRO BANK, N. V -V- LE MONDE FOODS LIMITED** held as follows:-

“We agree with Mr. Regeru for the Respondent that the burden was upon the bank to show that its appeal would be rendered nugatory if a stay is not granted. But in requiring an applicant to discharge that burden, the Court must also be alive to certain limitations which an Applicant such as the bank, must of necessity suffer from. The bank in this case is required to pay over to the Respondent over Kshs.30 million. An officer of the bank has sworn that they are not aware of any assets owned by the Respondent. They swear that they have checked the returns filed by the Respondent with the Registrar of Companies and they are unable to find in those returns what property, if any, the Respondent owns. They, of course, cannot be expected to go into the bank accounts, if any, operated by the Respondent to see if there is any money there. So all an Applicant in the position of the bank can reasonably be expected to do is, to swear, upon reasonable grounds, that the Respondent will not be in a position to refund the decretal sum if it were paid over to him and the pending appeal was to succeed. In those circumstances, the legal burden still remains on the Applicant, but the evidential burden would then have shifted to the Respondent to show that he would be in a position to refund the decretal sum if it is paid out to him and the pending appeal were to succeed. This evidential burden would be very easy for a Respondent to discharge. He can simply show what assets he has – such as land, cash in the bank and so on.”

I do find that security is not an issue having found that the application is misconceived. The same is dismissed with costs.

DATED AND DELIVERED AT ELDORET THIS 27 TH DAY OF MAY, 2016.

ANTONY OMBWAYO

JUDGE