REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 515 OF 2013

TERESA CHEBICHII RUTTO(ADMINISTRATIX OF THE ESTATE OF THE LATE ERNEST KIMAIYO.....PLAINTIFF

VERSUS

TALALEI KIPTENAI.....DEFENDANT

RULING

The application before court is dated 5.11.2015 wherein the applicant prays for orders that there be stay of execution of the decree herein pending the hearing and determination of the appeal to the Court of Appeal, which application is based on grounds that the defendant/applicant is dissatisfied with the decree herein and has issued Notice of Appeal to the Court of Appeal. The plaintiff/respondent has already extracted a decree with clear intention to fast track execution and that if stay of execution is not ordered, the land parcel which is the subject matter of the intended appeal shall be dealt with and/or disposed of thereby rendering the appeal nugatory. The application has been made promptly without any delay. That justice, fairness, equity and balance of convenience tilts towards granting of orders sought. According to the applicant no prejudice shall be suffered by any party should stay be granted as both parties shall have their day in the Court of Appeal.

The application is supported by the affidavit of Talalei Kiptenai who states that if stay is not granted, the suit property shall no longer be available at the time of appeal hence effectively rendering the appeal nugatory. That he stands to suffer substantial loss and damage should stay not be granted as the plaintiff shall proceed to subdivide the land and dispose it off with the result that it will not be available for recovery after appeal. He contends that pending the hearing of the appeal, the property to be preserved.

The plaintiff filed a replying affidavit stating that the court heard all the parties and made its decision based on the evidence adduced before it. She is advised by her counsel on record which advice she verily believes to be sound that the applicant has not furnished any new evidence to warrant this honourable court to set aside the decree. The Applicant has failed to prove that he has a meritorious appeal with high chances of success as no memorandum of appeal has been annexed to the instant application. That she is further advised by her counsel on record which advice she verily believe to be sound that the Applicant has not satisfied the requirements for issuance of stay orders.

That the Applicant was represented by counsel at the time the judgment was read his counsel never sought any stay thereafter, an indication that they intended to appeal against the said decision. That the trial court after delivery of judgment went ahead and issued a decree as provided by law. This honourable court cannot set aside its own decree unless new facts/evidence have been discovered after judgment otherwise it is functus officio. That issuing the orders sought in the instant application will amount to this

trial court sitting in an appellate position on its own decision. That the orders sought in the instant application ought to have been sought before the Court of Appeal as provided by Section 66 of the Civil Procedure Act, Cap. 21. That the orders being sought before this honourable court have been overtaken by events upon the issuance of the decree and as such any recourse lies only with the Court of Appeal. That the court made its decision on the evidence tendered which evidence has not changed to warrant the setting aside of the decree properly issued by this court.

The respondent believes that the applicant is a victim of its own misfortunes by failing to seek stay at the time judgment was delivered yet he and his counsel were present. That the orders being sought by the Applicant are not just unrealistic but legally untenable since the execution in question is legally grounded. That no evidence has been furnished to this Honourable court that they (her siblings and her) intend to dispose their portion of the property as alleged.

The respondents have indeed been prejudiced by the Applicant's occupation and use of their parcel of land for over forty years and allowing the prayers sought in the instant application will only aggravate the prejudice further. That allowing the instant application will amount to justice delayed which is justice denied.

In the above light therefore and in the best interest of justice, she prays that the Applicant's instant application be disallowed and they be allowed to enjoy the fruits of their judgment. This Honourable court reserves the discretion to disallow the instant application in the best interest of justice which discretion she urges it so to exercise. That the instant application has been filed in bad faith primarily to delay justice at their expense.

Order 42, Rule 6(2) of the Civil Procedure Rules provides for stay of execution. The rule provides that 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. No order for stay of execution shall be made under sub-rule (1) unless—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 (2) 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 defendant/applicant argues that the defendant may suffer loss if the title is cancelled as the respondent may sell the suit land to third parties whom the applicant may not recover from. Further, that the respondent may change the suit property and hence defeating the applicant intent to realize his suit land as the chargee will have an interest hence encroaching the suit land. He argues that the *status quo* should be allowed.

He further argues that the application has been made without delay. The applicant is ready to deposit in court the title of the suit land as security as a sign of good faith.

The respondent/decree holder argues that the applicant has not demonstrated the nature of substantial loss that will be suffered and has not demonstrated that the substantial loss cannot be compensated by way of costs. Moreover, the decree holder argues that there is no valuation of the property to enable the court make an order on security.

I have considered the application, supporting affidavit, replying affidavit and rival submissions and do find that the issue of whether the appeal is arguable is not relevant before this court but relevant in the Court of Appeal under Rule 5(2) (b) of the Court of Appeal rules in the Appellant Jurisdiction Act, Cap. 9, Laws of Kenya. The relevant issues before court is whether the appellant has come to court timeously, whether there is likely to be substantial loss if stay is not granted and that the applicant should be able to

deposit some security with the court.

I have looked at the judgment, decree and the application and do find that the same was made timeously within 10 days of the decision.

On substantial loss, the applicant/judgment debtor states that the property is likely to be sold or charged hence causing a loss to the suit land. I do find this to be a valid argument on substantial loss, however, it has not been demonstrated that the decree holder will not be able to compensate the judgment debtor with damages if the latter succeeds on appeal. It is always the burden of the applicant to prove that the decree holder is not a person of means and therefore not likely to compensate the judgment debtor in case of success in the Court of Appeal.

The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of ***Silverstein N. Chesoni [2002] 1KLR 867,*** and also in the case of *Mukuma V Abuoga*. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the Civil Procedure Rules 2010R and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:

I have weighed the interest of the decree holder and the interest of the judgment debtor and do hereby issue an order of stay of execution of the order cancelling the registration in respect of the resultant parcels of the suit property, thus Eldoret/Municipality/Block 21 (King'ong'o)/1 2382-2466. However, this court orders that 36 acres of land to be released for utilization by the decree holder until the appeal is heard and determined. Orders accordingly. Each party to bear its own costs.

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

ANTONY OMBWAYO

JUDGE