



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 49 OF 2013

MICHAEL KIPKOSGEI KWAMBAI.....PLAINTIFF

VERSUS

JANE NAFULA MOMANYI.....1ST DEFENDANT

BENEDICTO MAISIBA.....2ND DEFENDANT

R U L I N G

1. The Applicant filed a Notice of Motion dated 29/2/2016 in which he seeks stay of execution of a judgement delivered on 13/7/2015 pending hearing and determination of an appeal filed in the Court of Appeal. The Applicant contends that he is dissatisfied with the judgement of the court and that he has preferred an appeal against the said judgement. That if stay of execution is not granted, the appeal he has preferred will be rendered nugatory.

2. The application is opposed by the first Respondent through grounds of opposition filed 21/4/2016. The Respondent contends that there is no decree capable of being executed by the Respondent and that the application is therefore premature and ought to be dismissed.

3. I have considered the Applicant's application as well as the opposition to the same by the Respondent. Order 42 Rule 6(2) sets out three conditions which must be satisfied before stay pending appeal can be granted. The first condition is that the application for stay must be made without unreasonable delay. The second is that the Applicant must demonstrate that there will be substantial loss if stay is not granted. The third condition is that there has to be such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.

4. In the instant case, the judgement being appealed against was delivered on 13/7/2015. The application for stay was filed on 23/3/2016. There was a delay of over 8 months. This delay is unreasonable and is not explained. The Applicant tried to explain the delay on the ground that there was delay in obtaining typed proceedings. I do not think that it was necessary for the Applicant to wait for typed proceedings before applying for stay. There was nothing preventing him from applying for stay even without waiting for typed proceedings.

5. Is there any substantial loss which the Applicant will suffer if stay is not granted? To answer this question, a look at the judgement is necessary. The Applicant had sued the Respondents claiming that they had encroached on to his land. The Applicant's suit was dismissed with costs to one of the Respondents because the Plaintiff did not prove that there was any encroachment on to his land. It is therefore clear that there is no decree resulting from dismissal of his case which is capable of being

executed. If there is any execution, it is execution on costs which were granted to the Respondent. This cannot be said to cause substantial loss to the Applicant or render the appeal nugatory.

6. The Applicant argued that the Respondents have been taking people to the land with a view to selling the same. This was a submission from the bar and has no backing. The Applicant has title to his land. The Respondents have their own land which is not part of the land held by the Applicant. The Applicant's claim that the Respondents are intent on selling his land is therefore without basis.

7. The issue of security is normally considered if substantial loss is demonstrated. I therefore find that the Applicant's application lacks merits. The same is hereby dismissed with costs to the first Respondent.

It is so ordered.

Dated, signed and delivered at Kitale on this 30th day of June 2016.

E.OBAGA

JUDGE

In the presence of Applicant in person.

Court Assistant – Isabellah.

E. OBAGA

JUDGE

30/6/16