

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L APPEAL CASE NO. 4 OF 2015

SIRO LEO..... APPELLANT

VERSUS

JULIUS AMBOGA ASAVA..... 1ST RESPONDENT

IRENE EDESA ASAVA..... 2ND RESPONDENT

(Suing as administrators of the Estate of the late JACKTON AKIBAYA)

RULING

The application herein is dated 5.5.2015 wherein the appellant seeks orders that there be stay of execution of the judgment and decree in Eldoret CMCC No. 6 of 2011 pending the hearing and determination of the appeal herein. The application is based on grounds that the subordinate court delivered judgment on 15th December, 2014 in Eldoret CMCC No. 6 of 2011. The Appellant/Applicant being dissatisfied with the decision of the learned trial Magistrate has preferred the instant appeal against the said decision which appeal has high chances of success. The Appellant/Applicant herein stands to suffer irreparably if the orders herein sought are not granted and that the appeal shall be rendered nugatory as the respondent has commenced the process of adjudication of the suit land herein being Kingongo Block 21/580. That no prejudice will be suffered by the respondents if the orders sought herein are granted. The respondents have purported to commence to survey the parcel of land known above with a view to subdivide and/or transfer the same to third parties. That this application is brought expeditiously and without unreasonable delay.

The application is supported by the affidavit of Siro Leo who states that he is the Appellant herein duly conversant with the matter in controversy hence competent to make and swear this affidavit. The subordinate court herein did deliver its judgment on December 2014, which judgment he was dissatisfied with and preferred instant appeal. Though the appeal herein has not been heard and determined the respondents herein acting through their Advocates have commenced the process of implementing the decree of the subordinate court with a view to survey the said Plot No. Kingongo Block 21/580 and may transfer the same to third parties to his detriment and this may render the instant appeal herein nugatory. That no prejudice will be suffered by the respondents herein if the orders sought herein are granted. He believes that this application is brought expeditiously in the interest of justice and without unreasonable delay. The respondent did not file a replying affidavit but claims to have filed grounds of opposition which I did not see on record.

Mr. Okara, learned counsel for the Appellant submits that the court delivered judgment on 15.12.2014. The Appellant filed the appeal on 14.1.2015 and that the application was made on the 5.5.2015. The application took long due to the typing of the proceedings and that the Magistrate kept the file when she was interdicted. According to Mr. Okara, the respondents are likely to commence the execution of the decree by causing a survey of the suit land which is likely to cause the appellant/applicant irreparable harm and substantial harm. The appellant/applicant has been in occupation for more than 10 years. The appellant undertakes to pay damages if any gives the reasons for the delay in filing of the application thus the absence of the court file and that the Trial Magistrate was interdicted. He submits that the application is made in good faith and therefore prays for stay of execution pending appeal.

Mr. Birech learned counsel for the respondent submits that the import of the judgment and decree paragraph 2 shows that the rights of the appellant and respondent were recognized by the trial court. The

right of the respondent was also recognized. The import of the ruling is that the surveyor goes on the ground. None of the parties will be affected by the exercise as each party will know the size of his land. According to Mr. Birech, from 1997, the appellant was stopped from using the land in dispute and therefore there is no prejudice if the application for stay is not allowed. The court's judgment was given on 14.12.2014 and no application was made for stay in the lower court. The application should have been made in that court first. Undertaking was filed on 4.6.2015 however it is a mere undertaking without value. No security has been given.

Mr. Okara in reply submits that the trial court found that one parcel belonged to appellant and the other parcel to the respondent and therefore there is need to grant the orders sought to maintain the status quo. They did not file the application before the trial court because of the interdiction of the trial court.

I have considered the application and do find that judgment was entered on the 15.12.2014 and the decree issued on 14/1/2015. The appeal was filed on 14.1.2015 whilst the application for stay was filed on 5.5.2016. Order 42 is very clear on the grounds for allowing an application for stay of execution pending appeal. Thus, the application must be made timeously and that the applicant must demonstrate substantial loss and that security should be provided.

On the issue of filing the application expeditiously, I do find that the application was filed more than 4 months after the judgment was made and exactly 4 months after the filing of the Memorandum of Appeal. I do find a delay of 4 months to be inordinate. The explanation given by the appellant that the trial file was with the Magistrate who was on interdiction was not supported with any evidence such as a letter to the Chief Magistrate or the executive officer requesting for the file for purposes of this application. Moreover the reasons given for delay are not sufficient as the application was to be filed in the appeal lodged in Environment and Land Court and not in the Magistrate's Court. The Memorandum of Appeal was filed in the High Court hence all proceedings were to be undertaken in the High Court (now Environment and Land Court). In my view the applicant went to sleep after filing the memorandum of appeal only to wake up when he received two letters dated 1/3/2015 and 1/4/2015 from the respondents counsel and ministry of lands respectively, whose import was that a team of surveyors was to visit the parcel numbers Eldoret municipality block 21/580 on the 8/5/2015 in order to implement the court order.

On the issue of substantial loss, the appellant has not demonstrated how he is likely to suffer substantial loss if the decree is executed. The decree requires the Government Surveyors and certified surveyors accepted by both parties in the company of their respective lawyers on record to confirm the findings on the ground as the findings and award of the court. Moreover, the applicant has not furnished sufficient security in respect of the decree. The upshot of the above is that the application is dismissed with costs.

DATED AND DELIVERED AT ELDORET THIS 29TH DAY OF JULY, 2016.

ANTONY OMBWAYO

JUDGE