



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 78 OF 2003

JAMES KITERIE ALFAYO.....PLAINTIFF

VERSUS

MARGARET WAMBETE.....DEFENDANT

RULING

- 1.** The applicant filed a Notice of Motion dated 17/5/2016 in which he sought stay pending appeal. The applicant contends that he has already preferred an appeal to the Court of Appeal against this court's judgment which was delivered on 15/9/2015 and that costs have been assessed and execution may take place anytime. He further contends that the appeal has high chances of success and that he is a sickly man who has been living on the suitland for long and that if he is evicted, he has no any other home to go to and his appeal will be rendered nugatory.
- 2.** The applicant's application is opposed by the respondent based on a replying affidavit sworn on 20/6/2016 and filed in court on the same date. The respondent contends that the applicant has not met the threshold for grant of stay of execution pending appeal. That the application was not brought without unreasonable delay. That there is no demonstration of substantial loss and that the applicant is out to continue staying on the suitland to the detriment of the respondent who should enjoy the fruits of her judgment.
- 3.** *Order 42 of the Civil Procedure Rules* which governs appeals is clear on the conditions which must be met before stay pending appeal can be granted. Mere filing of an appeal does not entitle an applicant to stay of execution. The applicant must first bring the application for stay without unreasonable delay. Secondly, there must be demonstration of substantial loss. Thirdly, there has to be security given for the due performance of the decree as may ultimately be binding on him.
- 4.** In the instant case, judgment being appealed against was delivered on **15/9/2015**. The application for stay of execution was made on **23/5/2016**. The application was made after a period of over 8 months. This delay has not been explained. I therefore find that the delay is unreasonable in the circumstances.
- 5.** The next consideration is whether the applicant has demonstrated that he will suffer substantial loss should stay of execution be rejected. The applicant had filed a suit against the respondent seeking a declaration that he was the sole owner of **Plot No. 38 at Kitale Settlement Scheme Phase 1** and an injunction restraining the respondents from interfering with the suitland. The respondent filed a defence and raised a counter-claim in which she contended that she was on her own plot which was not **Plot No. 38** and that the applicant should be evicted from the plot in issue.

6. After the case was heard, it was found that **Plot No. 38** was a different plot than the one the applicant was claiming. The two plots in issue were apart by 400 metres. The applicant's claim was dismissed and the respondent's counter-claim was allowed. The applicant now claims that he has no any other place to go to and that he has been staying on the suitland for long. The applicant has not demonstrated what substantial loss he will suffer if execution was carried out. Demonstration of substantial loss is the cornerstone for grant of stay of execution. The mere fact that he has been staying for long is not a ground for grant of stay of execution. He may have stayed for long but that does not prevent the respondent from enjoying the fruits of her judgment.

7. What is in issue is a fixed asset. There is no indication that the respondent is intent on selling it. I do not see how the appeal by the applicant will be rendered nugatory in the circumstances. If the applicant succeeds in the appeal, he will simply come back to the land. The respondent works outside the country. She cannot fail to meet or repay any costs which will have been paid by the applicant. The issue of costs is normally considered if there is demonstration of substantial loss. I therefore find that the applicant has failed to meet the threshold set out in **Order 42 Rule 6 of the Civil Procedure Rules**. I proceed to dismiss his application with costs to the respondent.

It is so ordered.

Dated, signed and delivered at Kitale on this **26th** day of **July, 2016**.

E. OBAGA

JUDGE

In the presence of Ms. Wamocho for applicant.

Court Assistant – Isabellah.

E. OBAGA

JUDGE

26/7/2016