



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 131 OF 2013

ELISHA KARE BUSIENEL.....1ST PLAINTIFF
AGNES ROP.....2ND PLAINTIFF
STEPHEN KEMBOI.....3RD PLAINTIFF
JACKSON KIBOR.....4TH PLAINTIFF

VERSUS

**JAPHET KIPYEGO CHEPKWONY (*suing as*
*the administrator of the estate of***

ELIZABETH J. SIRMA.....1ST DEFENDANT
REBECCA SOY.....2ND DEFENDANT
GIRO COMMERCIAL BANK LTD.....3RD DEFENDANT

AND

LILIAN C. LAGAT.....1ST INTERESTED PARTY
EDWIN KIPLAGAT LIMO.....2ND INTERESTED PARTY
ERICK ROTICH NYONGIO.....3RD INTERESTED PARTY
JOEL KIMNGETICH ARAP KEMBOI.....4TH INTERESTED PARTY
WILLY ODHIAMBO SAKWA.....5TH INTERESTED PARTY
RUTH OKINDAH.....6TH INTERESTED PARTY
SOLOMON IHACHI SHIBELLENJE.....7TH INTERESTED PARTY
DANIEL K. SEUREY.....8TH INTERESTED PARTY
FESTUS M. KIPTOO.....9TH INTERESTED PARTY

FRANCIS BUSIENEI.....10TH INTERESTED PARTY
PENINAH J. KEMBOI.....11TH INTERESTED PARTY
HENRY OMONDI.....12TH INTERESTED PARTY
EDWARD MASINDE KULOBA.....13TH INTERESTED PARTY
JANET ANDUGU.....14TH INTERESTED PARTY

RULING

1. This is a ruling in respect of two separate applications filed by the defendants herein. They both seek stay of execution pending appeal. The application by the first defendant is dated **14/9/2016** and the one for the second defendant is dated **25/8/2016**.
2. The first defendant/applicant contends that he has preferred an appeal against the judgement of this court delivered on **18/7/2016**. That the court ordered title which was in the name of **Elizabeth Jepchoge Sirma** cancelled and a new title in the name of the plaintiffs and respondents be issue.
3. The first defendant/applicant further contends that the subject matter which is land is built on the ground and if stay is not granted, it will result in eviction and displacement which amounts to substantial loss. That there is sentimental attachment to the land and that if a cancellation of title was to proceed, it will render the appeal an academic exercise.
4. The second defendant/applicant on her part concedes that she has not preferred any appeal to the Court of Appeal but that she intends to make an application in the Court of Appeal for extension of time within which to lodge a notice of appeal. She however contends that she is aggrieved with the judgement of the court and would like to appeal against it.
5. The plaintiffs/respondents have opposed the two applications based on two separate replying affidavits sworn on **2/9/2016** and filed in court on **3/10/2016**. In respect of the application dated **25/8/2016** the respondents contend that the application is a non starter as there is no appeal preferred by the second defendant to enable her to move to court to seek orders of stay of execution pending appeal. That this application is calculated to frustrate the respondents.
6. In respect of the application dated **14/9/2016**, the respondents contend that the first defendant/applicant has not demonstrated that he will suffer substantial loss. That the first defendant is going on with sale of the properties which are subject of the judgement which is in their favour and that the first defendant is out to frustrate them from enjoying the fruits of their judgement.
7. In response to both applications, the respondents, contend that this court is *functus officio* and should therefore not entertain the applications herein. That there must be an end to litigation.
8. The court had directed that parties do file written submissions. The first defendant filed his submissions on **7/10/2016**. The plaintiffs filed their submissions on **10/10/2016**. The second defendant did not file any submissions.
9. I have gone through the applications filed herein, the respective supporting affidavits and further affidavits as well as the submissions by the counsel for the plaintiffs and the first defendant. I must commend counsel for their invaluable support to the court as seen in their submissions and authorities given.
10. Before I proceed to determine the applications before me, I have to deal with an issue of jurisdiction which was raised by the respondents. The respondents contend that once this court delivered a judgement

it became *functus officio* and cannot therefore entertain any application. In support of this argument, the respondents have cited the **Court of Appeal decision in Nyeri Court of Appeal Civil Application No. 21 of 2013 (UR 5/2013) between Dickson Muricho Muriuki and Timothy Kagondu Muriuki & 6 Others.**

11. The respondent's contention that this court has no jurisdiction to entertain the applications herein is without basis. **Order 42 of the Civil Procedure Rules** gives this court powers to entertain an application for stay of execution pending appeal. The **Dickson Murichu Muriuki case (Supra)** was dealing with a situation where the Court of Appeal had rendered a final decision and thereafter an application was made asking the court to address certain new issues. The Court of Appeal found that it had become *functus officio* and that if there were any new issues or points of law which arose after the judgement, then those issues were to be addressed by the Supreme Court.

12. In the instant case, jurisdiction to entertain the applications is donated by statute. I therefore find that the respondent's argument is without foundation. This court has jurisdiction to entertain an application for stay pending appeal.

13. I will first deal with the application by the second defendant. This application is incompetent. The Civil Procedure Rules allow a party who has preferred an appeal to seek stay of execution pending appeal. Under **Order 42 Rule 6(4)** an appeal to the Court of Appeal is deemed to have been filed when under the Rules of that court, notice of appeal has been given.

14. In the case of the second defendant, she has conceded that she has not filed a notice of appeal. It therefore follows that no court can entertain an application for stay of execution in respect of a non-existent appeal. I find that the application by the second defendant is misconceived.

15. With regard to the application by the first defendant, the provisions of **Order 42 Rule 6(2)** sets out the conditions under which for grant of stay pending appeal can be given. First, the application has to be brought without undue delay. Second, there has to be demonstration of substantial loss. Third, there has to be such security as the court orders for the due performance of such decree as may ultimately be binding on him as been given.

16. I must now decide whether to allow stay of execution based on the conditions given under **Order 42 Rule 6(2)**. The judgement which is being appealed was delivered on **28/7/2016**. The first defendant filed the application for stay on **14/9/2016**. The application was therefore filed almost one and half months later. I do not find this delay to be unreasonable.

17. Has the first defendant demonstrated that he will suffer substantial loss if stay of execution is not granted? There is no set down criteria on how the court should go about assessing what substantial loss is. The court has however to consider the circumstances of each case.

18. In the instant case, the respondents had filed a suit against the first applicant in which they sought a declaration that title Nos. **Eldoret Municipality Block 14/586 and 604** which were registered in the name of **Elizabeth Jepchoe Sirma** are jointly owned by the respondents and the first and second applicants. The court found that the two properties ought to be owned by both the respondents and the applicants. An order was given that the registration be changed for Elizabeth's name to that of the respondents as well as the applicants.

19. In considering an application for stay the interests of each party have to be taken into account. The first defendant herein contends that there are buildings on the ground and that if stay is not granted, there will be evictions and displacements. That the first defendant has sentimental attachment to the suit properties. There was absolutely no evidence placed before the court that there are buildings on the suit properties. I am of the view that the mere fact that a party has sentimental attachment to a property is not enough to demonstrate that substantial loss would result if stay is not granted.

20. The two properties are about **53 acres**. The judgement which is being appealed against, held that the properties ought to be registered in the names of both the first applicant and the respondents as well as the

second defendant. There were six partners who should enjoy the fruits of the judgement. The first defendant/applicant is one of them. He cannot therefore be heard to say that he will suffer substantial loss.

21. This suit was filed in 1998. Injunctive orders were issued restraining any dealings over the suit properties. Though the injunctive orders at some stage ceased to operate due to dismissal of the application which resulted into the orders, the parties herein on 19/3/2013 entered into a consent in which they agreed to preserve the suit properties until hearing and determination of the suit.

22. Notwithstanding the consent order, the first defendant went ahead to sell portions of the properties without caring about the order prohibiting any dealings or the pending suit. The respondents filed an application for contempt but this application was not prosecuted. This clearly shows that if the first defendant was to be granted stay, he will continue to sell the properties to the detriment of the respondents.

23. Considering the competing interests, I would rather have the property in the joints names of all the applicants and respondents rather than the same remaining in the first defendant's name who has no respect for the law and who is clearly out to sell the land to defeat the judgement.

24. Already, there is an application by persons who are seeking to come into this suit on the ground that they bought their parcels from the first defendant. The interests of these persons can be taken care of from the first defendant's share. I therefore do not see any substantial loss which the first defendant will suffer if stay is not granted.

25. Security for costs is usually considered if the applicant has demonstrated that there is some substantial loss which will ensue. Based on the reasons given hereinabove, I find that the two applications lack merit. The same are hereby dismissed with costs to the respondents.

It is so ordered.

Dated, signed and delivered at Kitale on this 7th day of **November, 2016.**

E. OBAGA

JUDGE

In the presence of Ms. Mufutu for applicant in the application dated 14/9/2016.

Court Assistant - Isabellah.

E. OBAGA

JUDGE

7/11/2016