REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT KITALE

LAND CASE NO. 119 OF 2012

TABARNO BUSIENEI

MOSES THUKU MWANGI.....PLAINTIFFS/RESPONDENTS

VERSUS

SUSAN KIPRONO.....DEFENDANT/APPLICANT

R U LI N G

1. The applicant Susan Kiprono filed a notice of motion dated 22/10/2014 in which she seeks stay of execution of the judgment of this court delivered on 6/10/2014, pending the hearing and determination of an appeal she has filed against the said judgment. The application is brought under the provisions of order 42 rule 6 of the Civil Procedure Rules.

2. The applicant contends that she has already preferred an appeal against the judgment delivered on 6/10/2014 and that if stay of execution is not granted, she will suffer substantial loss as the land in issue is the only source of livelihood for her. She contends that her appeal has high chances of success and if stay is not granted, the appeal will be rendered nugatory.

3. The application is opposed through a replying affidavit by the second respondent filed on 27/11/2014. The respondents contend that the applicant's application is incurably defective and the supporting affidavit is incompetent. The respondents also contend that the applicant has not brought herself within the legal threshold for grant of stay of execution pending appeal.

4. The respondents also contend that the applicant's claim that the land is her only source of livelihood is a lie since the applicant has never been in possession of the land. They therefore contend that the appeal will not be rendered nugatory as the ownership will revert to the applicant in case the appeal by her succeeds. The respondents are even willing to deposit in court any title which will result from the decree awaiting the outcome of the appeal.

5. I have given due consideration to the applicant's application as well as the opposition to the same by the respondents. Order 42 rule 6 of the Civil Procedure Rules provides as follows:-

6 (1) "**N*o 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 ….....”***

6 (2) “No order for stay of execution shall be made under sub-rule

1. unless -

(a) 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

(b) 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".

From the provisions of sub rule (2), it is clear that three conditions must be considered. They can be summarized as follows:-

1. The application for stay has to be brought without unreasonable delay.

2. The court must be satisfied that substantial loss will ensue if stay is not granted.

3. The applicant has to give security for the due performance of the decree.

6. In the instant case, the judgment being appealed from was delivered on 6/10/2014. The application for stay was filed on 23/10/2014. I find that the application was filed without unreasonable delay. I now move on to consider whether the applicant will suffer substantial loss if stay of execution is not granted. The subject matter of this suit was land which was 32 acres. The land belonged to one Kiprono Arap Tanui who died on 10/3/1988. Prior to the demise of Kiprono Arap Tanui, the deceased had started the process of selling the land to the first respondent herein. The first respondent started litigating over the land in issue with the brothers of the deceased who had taken out letters of administration in respect of his estate. The High Court in Eldoret ordered that the first respondent herein takes 22 acres and the administrators of the estate of Kiprono Arap Tanui take 10 acres.

7. A brother to the first respondent filed a claim before the Land disputes Tribunal laying claim to the share held by his sister. The tribunal ruled that the first respondent herein takes 11 acres and her brother 11 acres. The administrators of the late Kiprono Arap Tanui sold their interest to the father of the second respondent herein. The applicant herein later went and obtained another death certificate and conducted a second succession cause which culminated in the applicant being registered as the proprietor of the whole parcel of 32 acres. The respondents then filed a case against the applicant seeking cancellation of the title in her name on grounds that the same was fraudulently obtained.

8. Evidence during the hearing showed that the applicant has never been in possession of the land in issue. It is the first respondent who has been in possession since the 70's and later the father of the second respondent since the mid 2000. The issue which then arises is whether in the circumstances the applicant has demonstrated that she will suffer substantial loss if stay is not granted. The claim by the applicant that the land in issue is her only source of livelihood is not true. She has never been in possession of the land.

It is the respondents who are in possession. The subject matter of this suit is land. The land is still registered in the name of the applicant who has never been in possession. There is no substantial loss which she will suffer if stay is not granted. Infact the respondents are ready and willing to deposit in court titles which will come out as a result of execution of decree pending appeal. In the event that her appeal succeeds the ownership will still revert to her. There is therefore no basis upon which she claims that her appeal will be rendered nugatory.

9. The respondents should not be denied the fruits of their judgment. The mere ground that an appeal has been preferred is no ground for stay of execution. One is supposed to prefer an appeal when there are strong grounds for doing so. I do not have to consider the third condition because normally, it is considered where the court has found that there will be substantial loss which the applicant will suffer.

10. There was an argument that the supporting affidavit to the applicant's application was not signed and is therefore incompetent. I also notice that the replying affidavit is not dated. It is important that any

document purporting to be from a particular person be signed for it to be said to be from that person. Failure to sign the affidavit goes to the root of the application. I fault the advocate who commissioned the affidavit without ascertaining that it had been signed. Failure to sign an affidavit cannot be excused. This is not a procedural technicality which can be excused. Equally important is dating a document. This is the only way when one can know when the document was sworn. However, be that as it may, I have concentrated on the merits of this application which I find has no merits.

It has not met the threshold set out under order 42 rule 6 of the Civil Procedure Rules. I dismiss the same with no order as to costs.

It is so ordered.

[Dated, signed and delivered at Kitale on this 26th day of January, 2015.]

E. OBAGA.

JUDGE.

In the presence of Mr. Kiarie for respondent and applicant in person.

Court Clerk – Kassachoon.

E. OBAGA.

JUDGE.

26/1/2015.