



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L NO. 931 OF 2012

WELLINGTON LUSWETI BARAZA & 47 OTHERS....JUDGMENT DEBTORS

VS

LANDS LIMITED.....DEFENDANT

KIBOGY PROPERTIES LTD.....DECREE HOLDER

RULING

Before this court are two applications both dated 10/11/2014 filed by the decree holder and Judgment debtor respectively. The 1st application on record is the one filed by the decree holder seeking orders that the Judgment delivered on 30th October 2014 and the decree dated 5th November, 2014 be implemented by the **Officer Commanding Moiben police station** and the said eviction exercise be supervised by the **Officer Commanding Moiben Police Division** and the **County Commissioner of Uasin Gishu County** and the permanent structures erected on the suit parcel of Land No. 8319 be demolished. That the Officer Commanding Station and Officer Commanding Police Division Moiben police station and the County Commissioner Uasin Gishu County do conduct routine surveillance exercise within such period as the court may direct to ensure full compliance of eviction of the respondents.

The application is based on grounds that the judgment debtors instituted this suit seeking for adverse possession and a declaration for the transfer of title in their favour which suit proceeded to full hearing with the participation of the Judgment Debtor and the Decree Holder and judgment was pronounced on 30th October, 2014 whereupon the Honourable court declared the decree holder as the rightful owner of the suit property and dismissed the judgment debtor's case with costs to the applicant.

The decree holder laments that the respondents have blatantly refused and disobeyed to vacate from the suit land despite being served with the judgment and final decree of this honourable court and have commenced wanton and mass destructions of the suit land causing environmental havoc and degradation by indiscriminately cutting and felling trees within the suit land. Moreover they have blatantly refused and disobeyed to vacate from the suit land despite being served with the judgment and final decree of this Honourable Court.

In the supporting affidavit by **Jeremy Kiptoo Kibogy**, he states that the decree holder herein is the registered owner of that parcel known as L.R. NO. 8319 in respect of which the judgment debtors instituted this suit seeking for adverse possession. That the suit proceeded for main hearing and judgment delivered whereupon the suit was dismissed with costs to the defendants.

That upon Judgment being pronounced the decree holder issued immediate termination notice of licence of occupation by the respondents but the latter neglected and ignored the same. He claims that the respondents have blatantly refused and disobeyed to vacate from the suit land despite being served with

the judgment and final decree of this Honorable Court.

Instead of vacating the land as per the judgment of the honourable court they have started wanton and mass destruction of trees on the suit land causing hazardous environmental degradation and have refused in absolute disobedience to vacate from the suit land therefore denying him the fruits of the said judgment and therefore necessitating the filing of this application.

The application is opposed by the Judgment debtors through the affidavit of **Wellington Lusweti Barasa** who states that it is not disputed that this Honourable court dismissed their claim for the suit land comprising of 2018 acres on the 30th of October 2014.

That subsequent to their suit being dismissed, they instructed their advocate on record who filed a notice of Appeal on the 4th of November 2014 and without any undue delay and on their instruction the advocate filed an application under certificate of urgency dated 10th of November seeking stay of the judgment pending appeal. The application for stay was filed on the same day as that of the applicant.

He denies that they were served with the decree herein and claims that the affidavit of service dated 10th of November 2014 sworn by Vincent Ogutu is full of falsehoods and does not even meet the requirements of Order 5 of the Civil Procedure Rules 2010. He claims that the notice of termination of licence was never served on all the 75 plaintiff's directly and therefore the notice purportedly served through their advocates is irregular and improper service.

That even if the said notice was properly served upon them then they would still have required more time to vacate since they have established permanent homes in the suit land for decades and have their families which requires them to make alternative plans for relocation. They denied wanton destruction, cutting down trees and/or degradation of the environment and claim that the photographs annexed to Kibogy's affidavit are inconclusive and not taken from the suit land and do not show massive activity as alleged.

According to the judgment debtors, the application by the 2nd defendant/applicant is meant to frustrate them as it has not been demonstrated that in any way they have refused to move from the suit land or resisted any attempts by the applicant to move them out and that in the premises if the application is allowed they shall suffer prejudice and great irreparable loss and harm since there are more than 800 people occupying the suit land.

Mr. Kibii for the decree holder argues that by letter dated 3/11/2014 the applicant wrote a letter to the respondent counsel informing them that their licence to occupy his land had been terminated. He requested the advocate to advise his clients to immediately vacate the suit land to avoid execution. The letter was served on 5/11/2014. Upon service of the decree and notice of termination, the Judgment debtor descended on the property and destroyed trees on the suit land.

Mr. Omboto opposed this application on grounds that the application is misplaced as the prayers sought are for the implementation of judgment. There is no order sought for eviction and argues that there was no counterclaim for eviction.

The trial court found that the plaintiffs holds a licence that can be terminated by defendant and therefore according to Mr Omboto the notice of termination is directed at the counsel for the plaintiffs not the plaintiffs.

The second application dated 10/11/2014 by the Judgment debtor seeks orders that There be a stay of execution of the judgment delivered herein on the 30th October, 2014 pending the hearing and determination of the intended appeal. The application is based on grounds that the court delivered judgment on this suit on the 30th October, 2014 with which the judgment debtors are dissatisfied and intend to appeal against the said judgment. The judgment debtors have already filed a Notice of Appeal against the judgment. The intended appeal raises weighty and substantial issue of law and facts as the applicants have been in occupation of the suit land for over 50 years and have no alternative place to

relocate. That the decree holder upon the delivery of the judgment started arresting their livestock, demolishing their homesteads, destroying their crops and doing other tortuous acts without following due process of the law. That the judgment debtors have not been issued with any notice by the decree holder as ordered by this Honorable Court. The suit land is all the only dependency and they stand to suffer substantial loss the same being the source of their livelihood therefore should be granted stay to enable them exercise their undisputed right of appeal and/or in the alternative look for habitation. That the decree Holder will not be prejudiced in anyway as they have another chunk of land adjacent to the suit land.

The same is supported by the affidavit of **Wellington Lusweti Barasa sworn** on 10/11/2014. The import of the affidavit is that the Honorable court delivered its judgment in this suit on the 30th October, 2014. That being dissatisfied with the said Judgment he immediately instructed his advocates on record to lodge a Notice of Appeal against the Judgment. The decree holder started arresting their livestock, demolishing houses and destroying the perennial crops without following the due process of eviction they are apprehensive that should the decree holder enforce the orders without following the laid procedure on execution, they stand to suffer substantial and irreparable loss. The suit land has been their home and their family has no alternative home or place to relocate to hence the need to be given reasonable time to ventilate their grievances in other forums.

Wellington Lusweti Barasa further claims that should the orders be executed then the same will affect the family members psychologically and socially hence it is fair and just that stay be granted pending the hearing and determination of the intended appeal. That they are ready and willing to abide by any such conditions as the court may impose as a condition to granting stay orders. The decree holder will not suffer any prejudice or substantial and irreparable loss and if any they shall be at liberty to act appropriately at the end of the appeal. He concludes that the present application has been made promptly and without any undue delay.

The application is opposed by the respondent who filed a replying affidavit by **Jeremy Kiptoo Kibogy** who states that the 2nd respondent is the registered owner of the judgment property. He believes that the application is frivolous and unmeritorious and an abuse of court process calculated at denying him the fruits of the judgment and cause unnecessary hardship and delay in realizing the judgment.

That there is an application dated 10th November, 2014 under certificate of urgency that his counsel on record filed seeking for eviction orders against the applicants who descended on the judgment property and commenced wanton and indiscriminate exercise of cutting down trees and hauling the logs at night with the aim of defeating the cause of justice. According to Kibogy, the instant application is therefore an afterthought which application has been filed to further frustrate the decree holder and provide an avenue of wasting the judgment property and deplete the same within the shortest time possible.

That he is informed by his counsel on record, which information he verily believes to be true and correct, that in light of the court's finding in the judgment that the judgment debtors are trespassers, an order for stay of execution of the judgment would amount to perpetuating the said trespass.

That upon judgment being pronounced the decree holder issued immediate termination notice of licence of occupation by the applicants but they blatantly refused to vacate from the judgment property and commenced wanton and more destruction of the indigenous trees on the judgment property which is now at the verge of depletion. He annexed a valuation report indicating hazardous environmental degradation caused by the ongoing activities of the judgment debtors.

Mr Kibogy depones further that the applicants have deprived the decree holder the right of utilizing the judgment property for many years and continue to invade the remaining arable portions at an alarming rate and efforts to stop their encroachment have been in futile since they intimidate and threaten the him with violence and that he has suffered great financial loss due to the applicants' activities which are clearly intended in frustrating him. That some of the plaintiff/applicants including but not limited to the deponent herein who resides in Kimumu, Kangala and Wilson Shiuka among others, have moved out of the suit land in obedience of the order of court and that the majority do not live on the land, but have

structures thereon. He believes that the applicants have no financial means of satisfying an award of costs and damages should the intended appeal, which is frivolous and unmeritorious, be dismissed. He is also informed by his counsel on record, which information, he verily believes to be true and correct, that the applicants have offered no security for the performance of the decree as required in law. That the judgment debtors will neither suffer substantial loss nor injury by putting the decree holder in possession of the judgment property nor will the intended appeal be rendered nugatory since the decree holder has financial means to satisfy an award of costs and damages should the court of appeal determine the intended appeal in favour of the judgment debtors. According to Kibogy, they have not demonstrated any hardship or injury that they may occur on execution of the judgment that cannot be compensated by damages and costs. Lastly, he is informed by his advocate on record, which information he verily believes to be true and correct that the Honourable judge in his careful and well reasoned judgment did not overlook the rights of the applicants' licence of the judgment property.

Mr. Omboto argues that the application for stay is competent as it has been brought under the provisions of the Civil Procedure Rules. Order 42 (6) of the Civil Procedure Rules 2010 provides for stay pending appeal and sets condition for granting stay. **Mr. Omboto** argues that the applicants have met the conditions for stay. He argues that the **defendants will not suffer substantial loss** if stay is granted.

The plaintiffs have been on the suit land for over 50 years whilst the defendant came on the suit land in 1970, as lessees but never took physical possession. He argues further that if the stay is not granted the **applicant will suffer substantial loss** due to the fact that they have been on the suit land since colonial days and have been cultivating the land and their kins have been buried on the same. They stay on the said parcel of land and have even put up structures and planted maize and cassava and beans. He further argues that the application has been brought expeditiously. On security, the applicants argue that they are poor people who can only afford Kshs.500 each. He submits that the judgment debtor has been using crude methods to evict the applicants and yet the applicants have a licence.

Mr. Kibii's response is that the suit was dismissed hence there is nothing to stay. Moreover the competence of appeal is not the subject of determination by this court and that if court grants stay then the same should be of Kshs.260,000,000.

I have considered both applications and do find that the decision of the court was made on 30/10/2014. On the 4/11/2014, the Notice of Appeal was filed and on the 10/14/2014, the application was filed in a record time of 10 days after judgment. Order 42 (6) 2 (a) presupposes that for the court to grant the order of stay pending appeal, it must be satisfied that the application is made without unreasonable delay. I am satisfied that the application for stay pending appeal is made without unreasonable delay.

The above notwithstanding I have looked at the order extracted and do note that the court issued an order dismissing the suit with costs and advised the decree holder that he was at liberty to apply for eviction once he followed the right procedure.

On the application for stay pending appeal filed by the judgment debtor this court finds that the same is filed on misapprehension of the law as the court gave a negative order dismissing the suit and therefore there was nothing to stay.

In *MOMBASA SEAPORT DUTY FREE LTD Vs. KENYA PORTS AUTHORITY, Civil Application No. Nai 242 of 2006 (unreported) which quoted and approved the earlier decision of DEVANI & 4 OTHERS Vs. JOSEPH NGINDARI & 3 OTHERS, Civil Application No. 136 of 2004, where the Court had stated, inter alia;*

“By dismissing the judicial review application the superior court did not thereby grant any positive order in favour of the respondents which was capable of execution. If the order is granted it will have the indirect effect of reviving the dismissed application. This Court cannot undo at this stage what the superior court has done.

It can only do so after hearing the appeal. It seems to us that the application for stay of

execution of the dismissal order was not brought in error. It was designed to achieve that result which regrettably is impractical.”

The application for stay pending appeal can be determined by the findings above, however this court will proceed to determine the other issues raised. Applications for stay pending appeal are based on the provisions of Order 42 Rule 6 of the Civil Procedure Rules 2010. It is trite law that the applicant must demonstrate the following elements namely:

- 1. There will be substantial loss if stay is not granted.***
- 2. Application is made without unreasonable delay.***
- 3. Such security as the court orders for the performance of such decree or order as may ultimately be binding on him has been given by to applicant.***

I have already found that the application was filed without unreasonable delay hence I will not belabor the issue only to add that the applicant filed application within the 14 days required for the filing of the notice of appeal. On substantial loss the applicants state that they have occupied the land for the last 50 years and therefore have nowhere to go. They have cultivated the land which has been their only source of livelihood. However it is alleged by the decree holder that some of the squatters have left the land. Other than cultivating on the land the Judgment debtors have not shown any substantial loss they are likely to suffer. I do find that living on the land and cultivating food crops is not sufficient reason for the grant of stay pending appeal. In **Charles Wahome Sethi vs Angela Wairimu Gethi Court of Appeal Civil Appeal No. Nai 302 of 2007** the court of Appeal held that It is not enough for the appellants to say that they reside or live on the suit land and that they will suffer substantial loss. The applicants must go further and show the substantial loss that the applicants should they suffer if the respondent executes the decree in this suit against them.

On the issue of security, the applicants judgment debtors argued that they cannot afford security as they are people without means under Order 42 6 (2) b, the applicant has not offered sufficient security or undertaking in their affidavits. Mr. Omboto was non committal on security and offered a paltry ksh500 per person.

I do find that granting stay of execution prayed would be perpetuating trespass due to the fact that the Judgment debtor have been given Notice through their advocates to vacate the suit land. Notice was given on 3/11/2014, almost three months ago. Though the notice was served on their advocates, this court holds that the notice was proper as it was served on their advocates who are agents recognized in law.

The argument by **Mr. Omboto** that the application by the decree holder is incompetent cannot be entertained because the gist of that application is eviction of the Judgment debtors. Though lacking in style and construction, the decree holder seeks to evict the respondents from the suit property. There is a judgment of the court against the judgment debtors and therefore they have no right to remain on the suit land

The upshot of the above is that the application dated 10/11/2014 by the judgment debtors is dismissed whilst the application dated 10/11/2014 filed by the decree holder is allowed. The said eviction to be carried out after expiry of 30 days. Costs of both applications to be borne by the judgment debtor.

DATED AND DELIVERED AT ELDORET THIS 17TH DAY OF MARCH 2015.

ANTONY OMBWAYO

JUDGE