REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L NO. 652 OF 2012

(Formerly Hcc No. 146 of 2010)

JOSEPH KIBET TUWEI.....PLAINTIFF

VERSUS

LYDIA JEMAIYO TOO.....1ST DEFENDANT

CHERUIYOT A. LIMO.....2ND DEFENDANT

RULING

On 27th November 2014, the court found that the title by the 1st and 2nd defendants was obtained irregularly and un-procedurally and therefore could not be allowed to stand. The title in contention was obtained after the demise of the proprietor without the process of succession as envisaged by the Law Of Succession Act Cap 140 Laws of Kenya. For the above reasons, the court had no option but to cancel the title of the 2nd defendant and ordered the same to remain in the name of Mesa Mukoro as proprietor and further directed the Land Registrar to give effect to the order.

Lydia Jemaiyo Too, the 1st defendant was dissatisfied with the decision of the court and filed a Notice of Appeal in the Eldoret Environment and Land Court on the 11.12.2014. The same was dated 4.12.2014 and lodged in the Court of Appeal registry on 9.12.2014. It is not clear whether the notice of appeal was lodged before the Deputy Registrar, High Court or the Registrar, Court of Appeal but that is not the issue before me.

What is before me is the application dated 10th December, 2014 by Lydia Jemaiyo Too hereinafter referred to as the intended appellant against Joseph Kibet Tuwei, the intended respondent praying for a stay of execution till the appeal instituted by the applicant is heard and determined.

The application is made on grounds that the applicant was aggrieved by the outcome of the judgment as delivered on 27th November, 2014 and therefore has filed the Notice of Appeal in preparation to lodge appeal. The Applicant believes that he stands to incur heavy loss and damages if the execution can be effected by the Respondent herein in terms of loss of stamp duty. The Applicant confidently believes that the grounds she has raised will merit a success in the appeal. The Respondent was only interested in two (2) and therefore will not suffer irreparable damages.

The application is supported by the affidavit of the appellant who states that the Honourable Court delivered judgment on 27th November, 2014 in which she was aggrieved. She claims to have purchased parcels of land known as **NANDI/KIPSIGAK/582** and **NANDI/KIPSIGAK/1029** in the year 1997 from Joseph Sitienei and the family of the late Meza Mukoro. That the transaction was between Aska Nyaboge Meza and Japheth Kipkering Meza and Reuben Kiptanui as the Vendors, therefore the respondent is a

stranger. That at the time of the proceedings, the Honourable Court did not take into consideration the same transaction as was held on 26th October, 1997. That as the judgment stands; she is apprehensive as the execution can be effected immediately at the lapse of the stipulated period. She is making this application of stay of execution to have the orders as delivered in the said judgment not to be effected as she has already lodged a Notice of Appeal and has applied for certified typed proceedings and judgment and that the court also did not take into consideration the evidence of the plaintiff who was only interested in two (2) acres.

She claims that if orders prayed for are not granted, she will suffer irreparable loss and damage as she had already exchanged the said parcels to the 2nd defendant in the proceedings namely Cheruiyot A. Limo who had no prior knowledge of any defect of the titles and neither did she since she bought from one Joseph Sitienei.

That the family of the late Meza Mukoro had ratified the transaction and therefore they are not interested with the land as exhibited by the letter of the Chief annexed and marked **"LJT 3"** which was seeking administration of only parcel Number Nandi/Kiminda/361.

The application is opposed by the respondent who states that the delay in the execution is not in his best interest as it will prejudice his claim over the suit properties and that he knows of his own knowledge that no appeal has been preferred against the judgment and Decree in this case the subject of this application as he is informed which information he verily believes to be true that an Appeal to the Court of Appeal must be lodged within 60 days from the date of the judgment appealed against.

That he is further informed that a Notice of Appeal is not an appeal and therefore the absence of an appeal, the notice of appeal cannot suffice. That the prayer for stay till the appeal instituted by the Applicant is heard and determined is a lie as there is no appeal. He contends that an appeal within the time provided by law having not been filed the stay of execution of the Decree should not be entertained at all for an appeal not filed.

That the respondent will suffer and has suffered loss and damage through this application and the unmerited appeal as he is out of the properties the subject matter of this suit. That the confidence advanced is a false confidence and hope as there was indeed fraud in the transfers and now admit to have been misled about the Titles and do not wish to be misled and duped further and lose all. The respondent believes that what appear to be the Grounds of Appeal appears to him to be those grounds determined by the trial Court and dismissed and or rejected and it appears that the applicant through this application is a self seeker as he has lost the properties, the exchanged parcel in Uasin Gishu and the suit properties in Nandi.

In his view, the application is not about how he is going to get the said properties back but about the applicants heavy loss and damages in terms of loss of Stamp Duty a fact not proven during the hearing. That as a point of law Joseph Sitienei, Aska Nyaboke and Reuben Kiptanui were not parties to this case and or witness and did not testify and therefore the Honourable Court cannot be asked to consider and entertain their opinions in this application and it would amount introducing new evidence in an application. That even if it were an appeal and the court be asked to determine its merits or demerits, it would involve the court delving in extraneous matters not in the appeal. That he does not wish to re-open the case and be told to go back to burnt Forest yet he negotiated and arrived at an arrangement to be settled in an alternative land with the plaintiff and one Hoseah Kogo in lieu of the suit lands.

The respondent ultimately believes that it will therefore in his interests if the application is disallowed and the proposed settlement adopted by the court and that the application is therefore without merit and an abuse of the court process and should be dismissed.

Mr. Cheruiyot A. Limo, the intended respondent filed a replying affidavit stating that any delay in execution would prejudice his claim over the property. He believes that no appeal has been preferred against the judgment and decree.

Mr. Isigi for the intended applicant submits that the Notice of Appeal was filed therein on 5.12.2014 and lodged in the Court of Appeal on 9.12.2014. The decree was issued on 11.12.2014. The application for stay of execution was made on 10.12.2015 and therefore there is no inordinate delay. On substantial loss he argues that the value of the property is Ksh.700,000.

Mr Choge for plaintiff respondent argues that no appeal has been instituted as from 27/11/2014 and that the period for the filing of appeal has expired. He further argues that the applicant has not demonstrated that if stay is not granted he is likely to suffer substantial loss.

Mr C.A. Limo acting in person argues that the period of appeal has expired Order 42, Rule 6(1) provides that no appeal as follows:-

1. No 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 but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

2. No order for say 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.

3. Notwithstanding anything contained in sub-rule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

For this court to grant the orders sought, it should be demonstrated that there is an ***appeal pending*** in court and that the application has been made ***without unreasonable delay***. Secondly, it must be demonstrated that if the stay is not granted, the ***appellant will suffer substantial loss***. Thirdly, the court should provide for ***security for due performance of the decree.***

On the issue of whether there is an appeal pending in court, I do find that a notice of appeal is deemed as an appeal unless struck out by the court and therefore the notice of appeal herein is deemed as a pending appeal in the Court of Appeal. Moreover, I find Mr Isigis argument that the appellant has applied for proceedings which have not been supplied by the court valid and therefore the argument by the respondents that there is no appeal on record is based on misapprehension of the law. This finding is supported by ***Rule 81 of the Court of Appeal rules*** on institution of appeals which provides that:-

(1) Subject to the provisions of rule 112, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged-

- ***(a) a memorandum of appeal, in quadruplicate;***
- ***(b) the prescribed fee; and***
- ***(c) security for the costs of the appeal-***

Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired

to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.

(2) An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless his application for such copy was in writing and a copy of it was served upon the respondent.

On unreasonable delay, this court is satisfied that there is no unreasonable delay as the application was filed within 13 days of the judgment and within 7 days of filing of the Notice of Appeal.

On substantial loss that the applicant is likely to suffer if stay is not granted, I do find that the applicant has not demonstrated the substantial loss that he is likely to suffer if he is not granted stay of execution. The burden of proof is on the applicant to demonstrate substantial loss and not to merely state that he will suffer substantial loss.

I do further find that the court ordered the property to revert to the deceased owner who died intestate. It is my view that the applicant will have an opportunity to contest in the succession cause where the property will be listed as the deceased's property. In any event the applicant has not demonstrated to this court that the respondent has no means to compensate him if the appeal succeeds.

The upshot of the above is that the application is dismissed with costs.

DATED AND DELIVERED AT ELDORET THIS 2ND DAY OF OCTOBER, 2015.

ANTONY OMBWAYO

JUDGE