



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L 245 OF 2012

Formerly HCC 46 of 2006

KIPSANG CHEPKWONY.....PLAINTIFF

VS

DAVID KIPTOO CHELUGET & ANOTHER.....RESPONDENT

(Application for stay pending appeal; principles to be applied; need to preserve the status of the land; security however to be tendered)

RULING

This ruling is in respect to two applications filed by the unsuccessful defendants seeking stay of execution of the decree pending appeal. The first application is dated 5 November 2013 and is filed by the 2nd defendant. The second application is dated 12 November 2013 and is filed by the 1st defendant. The defendants want stayed the judgement of this court that was delivered on 26 September 2013 pending determination of their intended appeal.

In this case, the plaintiff claimed 18.5 acres of the land parcel Nandi/Kipkarren Salient/119 (the suit land) . This land was originally registered in the name of the 1st defendant and measures about 37.5 acres in total. There was a decree issued by the Mosop Division Land Disputes Tribunal which awarded the plaintiff 18.5 acres of the suit land, since the 1st defendant could not provide 18.5 acres out of the land parcel Nandi/Cheptil/430 which he had sold to the plaintiff. Before execution of that award, the 1st defendant transferred the land to the 2nd defendant, who is his son. The plaintiff being unable to execute the award because the land had changed hands, filed this suit seeking a cancellation of the transfer of the land from the 1st to the 2nd defendant and a declaration that the said transfer was fraudulent. After hearing the evidence of the plaintiff and defendants, I was of the view that the transfer of the suit land from the 1st to the 2nd defendant was fraudulent and aimed at defeating the award that was in favour of the plaintiff. I also made an order that the name of the 2nd defendant be cancelled from the register, declared the plaintiff entitled to 18.5 acres of the land, and ordered the 1st defendant to sign all requisite documents to transfer 18.5 acres of the suit land to the plaintiff. Since the plaintiff occupied about 6 acres of the land Nandi/Cheptil/430, I ordered that he cedes possession of that land to the 1st defendant in lieu of obtaining the 18.5 acres in the suit land. I also awarded costs of the suit to the plaintiff.

On 9 October 2013, each defendant filed a Notice of Appeal and thereafter filed the two applications for stay of execution pending appeal. The 1st defendant in his supporting affidavit has averred that he has a good appeal and that he stands to suffer irreparable loss and damage if the orders sought are not granted. It is the same reason given by the 2nd defendant. The plaintiff in his replying affidavit has also averred that staying execution will also occasion him injustice.

Counsel for the 2nd defendant submitted that the 2nd defendant stands to suffer irreparable loss since the suit land is his home. He stated willingness on the part of the plaintiff to tender any security as may be ordered. On the part of the 1st defendant, it was argued that the 1st defendant stands to suffer irreparably because he will have to look for alternative land for his son. In his submissions, counsel for the plaintiff submitted that the 1st defendant does not stand to suffer any loss as he does not own the suit land. He also submitted that the defendants have not offered any security for the due performance of the decree.

The requirements for grant of stay of execution pending appeal are spelt out in Order 6 Rule 2 which provides as follows :-

6 (2) No order for stay of execution shall be made under subrule (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.

Thus I need to be satisfied of three issues :-

(i) That the application has been made without unreasonable delay

(ii) That the applicants stand to suffer substantial loss; and

(iii) That the applicants are ready to offer security for the due performance of the decree.

Let me first with the issue of delay. I had in my judgment given the defendants 45 days to comply with the decree. This application has been filed before the lapse of the 45 days. It cannot therefore be said to have been filed after unreasonable delay.

The second issue is substantial loss. Substantial loss is the cornerstone which underpins the grant of an application for stay pending appeal. If an applicant cannot demonstrate substantial loss, then the application must fail. I am not too convinced that the 1st defendant stands to suffer any loss since he no longer owns the suit land. The land is now owned by the 2nd defendant. It is probably the 2nd defendant who stands to suffer loss since he will lose land that is now registered in his name and for which he has use and occupation of. On the other hand, I must take into consideration that the plaintiff has been successful in his suit and is entitled to the fruits of his judgment.

I can see for myself that if the decree is executed, the entire character of the suit land and of the land parcel Nandi/Cheptil/430 will change; so too their occupation. If this decree is executed and the defendants succeed on appeal, there will have to be another reversal in the registration of the title and in its occupation. This I think will occasion hardship to the parties. I think for the circumstances of this case, it is best that each party remains in occupation of the respective parcels in which they reside. The suit land and the land parcel Nandi/Cheptil/430 also need to be preserved as they are. If the appeal is dismissed, then the parties can proceed to comply with the decree once and for all.

However, it is clear that the plaintiff stands to suffer loss for not using the land which he is now entitled to utilize according to the decree. The defendants must therefore tender security for the loss that the plaintiff stands to suffer. The plaintiff occupies about 6 acres of the land parcel Nandi/Cheptil/430. He was to cede possession of this to acquire 18.5 acres of the suit land. He will lose user of about 12.5 acres every year for the duration of the appeal. I think the defendants need to furnish security so as to compensate the plaintiff for the loss that he will suffer in the event that the defendants lose the appeal. I will engage in some speculation, but it is the only way that I can give a rough assessment of the loss that may be suffered by the plaintiff and for which the defendants need to furnish security. I will assume that each acre of land will give a profit of at least kshs. 40,000/= per year, which for 12.5 acres comes to Kshs. 500,000/= per year. I will assume that the appeal will take about 3 years to finalize. The plaintiff's loss

according to my assumption will be about Kshs. 1.5 million. The defendants need to tender security of this amount. Further the occupation and registers of the land parcels Nandi/Cheptil/430 and of the suit land need to be preserved.

I therefore allow the two applications on the following conditions :-

- 1. I order the defendants not to lease, charge, or in any other way encumber the land parcels Nandi Kipkarren Salient/119 and Nandi/Cheptil/430.*
- 2. I issue an order of inhibition inhibiting the registration of any dispositions on the land parcels Nandi/ Kipkarren Salient/119 and Nandi/Cheptil/430.*
- 3. I issue an order directing that there be no change in the occupation and user of the land parcels Nandi/ Kipkarren Salient/119 and Nandi/Cheptil/430 and I direct that the two land parcels be preserved as they are.*
- 4. I order the defendants jointly and/or severally to deposit a sum of Kshs. 1.5 million as security the same to be deposited in an interest earning account in the joint names of counsel for the plaintiff and counsel for the defendants within the next 60 days and in default, the above orders shall lapse and the decree may be executed by the plaintiff.*
- 5. If the defendants succeed on appeal, the above sum and interest to be released to the defendants and if they lose the appeal, the above sum and interest to be released to the plaintiff.*
- 6. Costs of the application to be in the intended appeal.*

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 13TH DAY OF FEBRUARY 2014

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Delivered in open court in the presence of:

Mr. E.M. Momanyi present for plaintiff /respondent

Mrs L.C. Kamau for 1st defendant/applicant

Mr. C.K. Mitei for the 2nd defendant/applicant