



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**E&L 441 OF 2012**

*Formerly HCC 85 OF 2008*

**JOSEPH TIREITO.....PLAINTIFF**

**VS**

**JACOB KIPSIGAT ARAP LAGAT.....1ST DEFENDANT**

**ANNA JEPKEMBOI NGENY.....2ND DEFENDANT**

***(Application for stay pending appeal; principles to be applied in stay pending appeal in matters of land; need to preserve the subject matter of litigation while at the same time balancing the interests of the successful litigant to enjoy the suit land; claim by plaintiff that he is entitled to certain land registered in name of defendants; judgment entered for the plaintiff; register of suit land ordered rectified; whether this should be stayed; possession of suit land; whether successful plaintiff should be given possession of the suit land; order that register do remain unaffected but possession be given to the successful plaintiff)***

**RULING**

1. The application before me is that dated 26 March 2014 filed by the defendants. It is an application for stay pending appeal.
2. The dispute in this case revolved around the ownership of a land that was originally registered as L.R No. 779/339 situated in Eldoret. It was the case of the plaintiff that the 1st defendant was entitled to a one quarter share of the said land, which share was equivalent to 26.5 acres. It emerged in the course of the proceedings that the said land parcel L.R No. 779/339 was sub-divided to create the parcels of land Eldoret Municipality Block 25 (Luliet)/1, 2, 3 and 4. In my judgment, I held that the plaintiff is entitled to the whole of the land parcel Eldoret Municipality Block 25 (Luliet)/1 measuring 24 acres, which land is currently registered in the name of the 1st defendant, and a portion of 2.5 acres comprised in the land parcel Eldoret Municipality Block 25 (Luliet)/2, which land is in the name of the 2nd defendant. I ordered the name of the 1st defendant cancelled as proprietor of the land parcel Eldoret Municipality Block 25 (Luliet)/1 and in place thereof the name of the plaintiff be registered as proprietor. I also ordered the land parcel Eldoret Municipality Block 25 (Luliet)/2 reduced by an acreage of 2.5 acres, and this 2.5 acres to be included in the land parcel Eldoret Municipality Block 25 (Luliet)/1, and a new title for 26.5 acres for the land parcel Eldoret Municipality Block 25 (Luliet)/1 be issued to the plaintiff. I further issued an order of permanent injunction barring the defendants from interfering with the 26.5 acres that I declared is owned by the plaintiff. It is this decree that the defendants are aggrieved with and intend to file an appeal.

3. In this application, it has been stated that the defendants are aggrieved by the judgment and have filed a Notice of Appeal. It is said that the appeal has high chances of success, that the defendants stand to suffer irreparable loss and damage, and that the appeal will be rendered nugatory if the order of stay is not granted.

4. The plaintiff has filed a replying affidavit in which he has deponed that he is entitled to the fruits of the judgment. He has also deponed that the defendants have no arguable appeal and that they have not furnished security. He has also deponed that there has been no demonstration of substantial loss.

5. Miss. Chege and Mr. arap Mitei for the applicants, urged me to allow the application and relied on three authorities. Mr. Balongo for the plaintiff, urged me not to grant the order of stay pending appeal. I have considered their submissions and I take the following view of the matter.

6. Applications for stay pending appeal are covered by Order 42 of the Civil Procedure Rules, 2010. Rules 6 (2) and (4) of Order 42 are relevant and they provide as follows :-

(1) ...

(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.

(3) ...

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

It will be noted from Rule 6(2) above that three requirements need to be met. First the court must be satisfied that substantial loss will result if stay is not granted; secondly, security needs to be provided for the due performance of the decree, and thirdly, the application must be filed without unreasonable delay. It has been stated by the defendants that they have a good appeal, but the plaintiff thinks otherwise. However, in my view, this is irrelevant, for the strength or otherwise of the appeal, is not one of the considerations required by Order 42 Rule 6 above. I will straight away go to whether the defendants are entitled to the order of stay pending appeal based on the requirements of Order 42 Rule 6.

7. I will start with the issue of delay. The judgment was delivered on 26 February 2014. After pronouncing the judgment, the defendant orally sought a stay of 30 days which I granted. This application was filed on 26 March 2014 before expiry of the 30 days allowed for stay. It will be noted that it was filed before the lapse of the duration of stay, and in my view, it cannot be said that it was filed after unreasonable delay.

8. The second limb is that of substantial loss. This is indeed the cornerstone of any application for stay pending appeal. The applicant needs to demonstrate that failure to make an order of stay pending appeal will cause him substantial loss. Substantial loss can be envisaged if the subject matter of the appeal is liable to be destroyed, so that success in the appeal, will be rendered nugatory. When assessing substantial loss, it should also be appreciated that the successful litigant is entitled to enjoy the fruits of his judgment. A balance between the two therefore needs to be found. As was stated by the Court of Appeal in the case of **Reliance Bank v Norlake Investments Ltd (2002) 1 EA 227**, there needs to be a balance, based on the claims of both parties. In my view, the balance lies in preserving the subject matter of the judgment, so that if the appellant is successful on appeal, he does not merely get a paper judgment, yet, in as far as may be possible, the successful litigant ought to be allowed to enjoy the fruits of the judgment, unless the enjoyment of the same, is going to obliterate the subject matter of litigation, or will cause undue hardship to the other party, which would be unreasonable in the circumstances of the case.

9. When considering how to exercise its discretion, the court must take into account the various competing interests and the several factors that affect the peculiar circumstances of the case. Thus in a money decree, if the respondent can show that he can repay the money decreed, the general principle is

that he should be allowed the benefit of the decree, since the subject matter, money, will not be lost as he is capable of refunding the same. This was indeed the principle applied in the case of ***Kenya Shell v Kibiru (1986) KLR 410***.

10. In land matters, the land of course needs to be preserved in a state in which a successful appellant will not find that it no longer exists, or its character has changed. Critical factors to take into consideration include the nature and user of the land, the length of possession by the applicant, and the issue whether the applicant can provide security for the loss of use that will be suffered by the respondent while the appeal is pending determination. In the case of ***George Kiprono Kili vs Christopher Kili (Eldoret ELC 1001 of 2012)*** I allowed an application for stay pending appeal subject to the appellant depositing security for the loss of use that was to be occasioned to the successful plaintiff.

11. I have already laid out the subject matter of the litigation. I had ordered the name of the plaintiff to be registered as proprietor in place of that of the 1st defendant in respect of the land parcel Eldoret Municipality Block 25 (Luliet)/1. I had also ordered an excision of 2.5 acres of the land parcel Eldoret Municipality Block 25 (Luliet)/2. So that the appeal is not rendered nugatory, this subject matter needs to be preserved. I will therefore stay the order cancelling the registration of the 1st defendant as proprietor of the land parcel Eldoret Municipality Block 25 (Luliet)/1 and also stay the order excising 2.5 acres out of the land parcel Eldoret Municipality Block 25 (Luliet)/2. These two parcels of land should remain as they are pending hearing of the appeal. To buttress their preservation, I order that no party should sell, lease, charge, encumber or in any other way adversely deal with the two parcels of land. I also issue an order of inhibition, inhibiting the registration of any disposition in the register of these two parcels of land.

12. However as I said earlier, in as much as possible the successful plaintiff needs to be allowed to enjoy the fruits of his judgment so long as the same does not destroy the subject matter of litigation. In the circumstances of this case, and considering the positions of the applicants, I do not think that the plaintiff ought to be deprived of the possession and use of the land, and in my view, I think he ought to enjoy user of the same pending hearing of the appeal. I therefore order that he be allowed exclusive possession, use and occupation of the 26.5 acres pending hearing of the appeal. To preserve the character of the land, the plaintiff should not make any additional structures on the same.

13. As to security, I think the order of inhibition and injunction suffice as adequate security.

14. I therefore make the following final orders :-

***There will be stay pending appeal on the following terms.***

***1. That the defendants who are the current registered proprietors of the land parcels Eldoret Municipality Block 25 (Luliet)/1 and Eldoret Municipality Block 25 (Luliet)/2 will not sell, charge, lease, or otherwise encumber the two land parcels.***

***2. That there is issued an order of inhibition, inhibiting the registration of any disposition in the register of the land parcels Eldoret Municipality Block 25 (Luliet)/1 and Eldoret Municipality Block 25 (Luliet)/2 and this order ought to be registered by the Lands Registrar in charge of the register of these two parcels.***

***3. That possession of the 26.5 acres in dispute shall be with the plaintiff but the plaintiff ought not to destroy any existing structures, or make any additional structures on the land, or in any other way alter the character of the said land.***

15. The costs of this application will abide the costs of the appeal.

It is so ordered.

**DATED AND DELIVERED AT ELDORET THIS 30TH DAY OF SEPTEMBER 2014**

**JUSTICE MUNYAO SILA**

**ENVIRONMENT AND LAND COURT AT ELDORET**

*Delivered in the presence of:*

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*Mr. Arap Mitei for the defendants/applicants.*

*Mr. E.M. Balongo for the plaintiff/respondent.*