



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 17 OF 2014

RICHARD

TOROITICH:.....:PLAINTIFF

VERSUS

1. MIKE K. LELMET)

2. ELISHEBA C. LELMET)

3. PAULINE J.

LELMET):DEFENDANTS

**4. ESTHER J. LELMET) Sued as administrators of WILLIAM CHERUIYOT
LELMET**

RULING

1. The applicant filed a notice of motion dated 4th July, 2014 in which he seeks orders of stay of execution of orders made in this case on 28/5/2014 and any other that may be issued pursuant thereto pending appeal. The plaintiff had filed a suit against the defendants in this suit. He also filed an application for injunction. At the hearing of the application for injunction, a preliminary objection was raised on behalf of the defendants on grounds inter-alia that the suit was time barred. The preliminary objection was upheld and the plaintiff's suit as well as the application for injunction were struck out with costs.

2. The applicant contends that if stay of execution is not granted, the appeal which he intends to prefer will be rendered nugatory. The applicant annexed a draft memorandum of appeal to the application.

3. The application is opposed by the respondents through grounds of opposition and replying affidavit. The respondents contend that the applicant has not brought himself within the threshold of order 42 of the Civil Procedure Rules and as such no stay of execution can be granted.

4. I have considered the lengthy submissions filed by both the applicant and respondents counsel. Order 42 Rule 6 (2) provides as follows;- ***“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”.

5. It is clear that three conditions must be met before stay can be granted under Order 42 Rule 6 (2). First an applicant must file the application without unreasonable delay. Secondly an applicant must

demonstrate that he will suffer substantial loss if the order is not given. Thirdly security for the due performance of the decree or order has to be given.

6. In the present case, the ruling of the court dismissing the applicant's suit and notice of motion was given on 28/5/2014. The application herein was filed on 8/7/2014. The application was filed slightly over one month after the ruling. I do not find this delay to be unreasonable.

7. On whether the applicant has demonstrated that he will suffer substantial loss, I do not find that the applicant will suffer any substantial loss if stay is not granted. The applicant's suit was struck out with costs. If there is any execution to be carried out, it is execution for costs which have not even been taxed. The applicant will not therefore suffer any substantial loss if stay is not granted. The court did not order any action to be taken against the applicant following the dismissal of the case. There is therefore ideally nothing to be stayed. ***In Peter Anyang' Nyong'o & 2 others –Vs- Minister for Finance & another [2007] eKLR*** the applicants who were members of Parliament filed an application for leave to apply for orders of certiorari to quash the decision of the Government of Kenya through the Ministry of Finance to offer 25% of Safaricom shares through initial Public offer on the Nairobi Stock Exchange among other prerogative orders. The applicants were refused leave to bring Judicial Review by the High Court. The applicants being aggrieved by the decision of the High Court filed a Notice of Appeal to the court of Appeal and filed an application under Rule 5 (2) (b) of the Court of Appeal Rules seeking stay of execution of the decision of Minister for Finance through the Permanent Secretary of Treasury to acquire 25% of Safaricom shares pending hearing and determination of the intended appeal from the ruling of the High Court.

8. Professor Muigai who was acting for the respondents in the application raised a preliminary objection that the substantive order sought by the applicants in the application namely an order of stay in terms of prayers 3 of the application is incapable of being granted by the court as the same seeks stay of a “decision” and not of any ongoing positive process or action of the respondent. Professor Muigai relied on the ***case of Western College of Arts and Applied Science -Vs- Orange [1976] KLR 63***. In this case the applicant had sued the respondent in the High Court to recover money lying in a bank account in the respondent's name which the respondent claimed belonged to Sang'alo Institute of Science and Technology. After the High Court dismissed the suit with costs, the applicant filed a notice of Appeal and applied under Rule 5 (1) for a temporary injunction to restrain the respondents from operating the bank account until the determination of the appeal and a stay of execution. The then East African court of Appeal declined to grant an injunction or a stay of execution. Law V.P at page 66 paragraph C, D had this to say;-

“But what is there to be executed under the judgement, the subject of the intended appeal? The High Court has merely dismissed the suit, with costs. Any execution can only be in respect of costs.... In the instant case, the High Court has not ordered any of the parties to do anything or refrain from doing anything or to pay any sum. There is nothing arising out of the High Court Judgement for this court in an application for stay to enforce or to restrain by injunction”.

9. The case quoted hereinabove squarely fits in the present circumstances. The court by its order of 28/5/2014 merely dismissed the plaintiff's suit. There was no order made in that suit capable of being stayed. It is only costs which can be stayed and as I have said, the same have not been taxed and process of execution has not begun. There is therefore no substantial loss the applicant will suffer. If the applicant is apprehensive that the respondents will proceed with their counter-claim and evict him, that is not a matter for determination at this stage. The counter-claim has not been prosecuted and stay of its results cannot be given in anticipation of the orders which may arise from the same in the future.

10. Having found that there is no substantial loss demonstrated or will be suffered, I cannot consider the issue of security costs. This is because security for costs can only be ordered when it has been found that the applicant will suffer substantial loss. For the reasons given hereinabove, I find that the applicant's application lacks merit. The same is hereby dismissed with costs to the respondents.

It is so ordered.

Dared, signed and delivered at Kitale on this 25th day of September, 2014.

E. OBAGA

JUDGE

In the presence of Professor Sifuna for respondents and Mr Momanyi for Mr Njeru for applicant. Court Clerk – Kassachoon.

E. OBAGA

JUDGE

25/9/2014