



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L NO. 495 OF 2012

Formerly HCC 37 of 2009

THOMAS KIPLER SUM.....PLAINTIFF

VS

PHILIP KIPKORIR SAMICH.....1ST DEFENDANT

ROBERT KIPKEMBOI KIRUI.....2ND DEFENDANT

LABAN CHERUIYOT.....3RD DEFENDANT

TANAN KIPKRUI YEGO.....4TH DEFENDANT

(Applications for stay pending appeal and application for eviction; judgment delivered on 7 November 2013 and defendants ordered to vacate suit land by 31 December 2013; application for stay pending appeal being filed on 10 February 2014; held that there has been unreasonable delay in filing the application; application for stay dismissed; application for eviction allowed)

RULING

1. I have before me two applications which I directed that they be heard together. These are the applications dated 29 January 2014 filed by the plaintiff and the application dated 10 February 2014 filed by the defendants. In the application dated 29 January 2014, the plaintiff is seeking orders to have the defendants evicted from the land parcel Uasin Gishu/Tapsagoi Settlement Scheme/929,981, and 982 (the suit lands). The application dated 10 February 2014 seeks orders of stay pending appeal.

2. Probably a little background will shed light as to why these two applications have been filed.

3. In this suit, the plaintiff sought orders for a declaration that the continued occupation by the defendants of the suit lands is unlawful and he sought orders to have them evicted from the parcels of land. It was his case that he had merely granted the defendants a licence to occupy the suit lands which licence he revoked. The case of the defendants was that they are entitled to the suit lands by virtue of a sale agreement through which the plaintiff sold the land to them. I heard the suit, and on 7 November 2013, I entered judgment for the plaintiff. I ordered the defendants to vacate the suit lands by 31 December 2013.

4. In the application dated 29 January 2014, the plaintiff has applied for an order of eviction as the defendants have failed to move out of the suit lands as ordered in the judgment. The defendants have resisted this application and have their own application seeking to stay the judgment pending appeal. It

follows that if I am to allow either application, the other must fail, and that is the reason that I directed that they be argued together.

5. Miss. Ngelechei for the plaintiff urged me to dismiss the application for stay pending appeal and allow the application for eviction. She argued that no appeal has been filed yet the time for filing appeal has lapsed. She also pointed out that the defendants have not offered any security. She also stated that the application for stay has been filed after unreasonable delay, since it has come after the time for vacating the suit lands has lapsed.

6. Mr. arap Mitei for the defendants stated that a Notice of Appeal has been filed and the defendants are entitled to stay pending appeal. He also submitted that an application for extension of time to file appeal out of time is pending before the Court of Appeal. He did not think that the application for stay has been filed outside reasonable time as November and December fall within the festive season.

7. I have looked at the material supplied in supporting and opposing each of the two applications and considered the submissions of counsel. I will first deal with the application for stay pending appeal, for if I am to allow it, then I cannot allow the application for eviction.

8. 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.

9. 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.

10. Let me start with unreasonable delay. Delay in every case is dependent on the surrounding circumstances. Even one day after judgment can amount to delay depending on the nature of the judgment. In our case, judgment was delivered on 7 November 2013. The defendant was asked to vacate the suit land by 31 December 2013. This application for stay pending appeal was filed on 10 February 2014 about 40 days after the date that the defendant was to have vacated the suit land. In my view, there has been unreasonable delay. I would have expected the application for stay to come before expiry of the days given to vacate the suit land. Since no application was forthcoming, that is the reason why the plaintiff thought fit to file an application for eviction.

11. No good explanation has been given to excuse the delay. The explanation that November and December are a festive season is in my view not a good reason. Does it mean that the defendants thought it more important to make merry than to safeguard their occupation of the suit land ? If this is the choice that they made, then they have to bear the consequences of it. It was also stated in the affidavit that the delay was caused by changing lawyers. This to me is also not a good reason. The applicant had a duty to

move with speed if he was to protect his continued occupation of the suit land. I do not see how a change of lawyers affected his rights.

12. I agree that substantial loss may be occasioned to the defendants but owing to the unreasonable delay, I am unable to sympathise with the defendants. They have failed to meet one of the cardinal principles for stay pending appeal. For the sole reason that there has been unreasonable delay in bringing this application for stay pending appeal, I dismiss the said application.

13. Let me now turn to the application for eviction. The days given for the defendants to vacate the suit land have long lapsed. I have no reason not to allow the order for eviction. I allow it. I now order the defendants to forthwith vacate the suit properties. If they do not leave within 7 days of this order, I order the plaintiffs to engage a court bailiff who shall effect this order of eviction. I further order the OCS Turbo Police Station to provide security to the court bailiff.

14. Although I had in the main suit ordered each party to bear their own costs, for these two applications, I direct that costs be borne by the defendants. The defendants shall also bear any costs of eviction.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 24TH DAY OF SEPTEMBER 2014

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Delivered in the presence of:

Delivered in the Presence of:

Mr. J.K. Maritim holding brief for M/s Kalya & Co for plaintiff

N/A for Ms Arap Mitei for defendants