



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L NO. 200 OF 2012

Formerly HCC 16 of 2005

JABER MOHSEN ALI.....1ST PLAINTIFF

CHELUGOI MOHSEN ALI.....2ND PLAINTIFF

VS

PRISCILLAH BOIT.....1ST DEFENDANT

JAMES C. BOIT.....2ND DEFENDANT

(Application for stay pending appeal; principles to be applied; simultaneous application for eviction; subject matter being land which was declared to be of the plaintiffs; defendants given 30 days to vacate; no vacation of premises within the 30 days; application for stay pending appeal coming after the 30 days given to vacate; whether such application has been filed after unreasonable delay; held that application for stay has been filed after unreasonable delay; defendant ordered to cede possession to the plaintiffs for the duration of the appeal; to preserve property, orders of inhibition issued)

RULING

1. I have two applications before me. The first is that dated 4 September 2014 filed by the defendant. It is an application seeking stay of execution of the decree pending appeal. The second application is that dated 5 September 2014 filed by the plaintiffs seeking orders of eviction against the defendant. Probably a little background will shed light as to why these two applications have been filed.

2. This suit was filed on 24 February 2005. The plaintiffs in the suit contended that they are the registered proprietors of the land parcel Uasin Gishu/Sosiani/28 which is a parcel of land measuring 19.5 hectares. They therefore wanted the defendants evicted from the suit land. The defendants filed defence and counterclaim. It was their position that the mother of the plaintiffs, one Aziza Chepkemboi (deceased), had sold the suit land to their father, one Paul Boit (deceased), through a sale agreement entered into in the year 1972. Alternatively, they claimed the suit land by way of adverse possession. The 1st defendant passed on in the course of the proceedings and the matter was left to the 2nd defendant to handle.

3. I heard the dispute and delivered judgment on 31 July 2014. I held that there was no proof of sale, and even if there was, such sale was null and void for want of consent of the Land Control Board. I also held that the defendants had not proved their claim for adverse possession. I held that the plaintiffs are the rightful owners of the suit land. I ordered the defendants to vacate the suit land forthwith, and no later than 30 days from the date of judgment. In default, I held that the plaintiffs were at liberty to apply for their eviction. A Notice of Appeal was filed on 5 August 2014.

4. The 30 days granted to the defendants to vacate the suit land lapsed on 30 August 2014 without an application being filed to extend the same. It is on 4 September 2014 that the application for stay pending appeal was filed. On 5 September 2014, the plaintiffs filed their application for eviction orders. In their application for eviction, the plaintiffs averred that the defendants are in illegal occupation of the suit land as the 30 days granted for them to vacate had lapsed. They in fact went further to ask that James Boit, the 2nd defendant, be committed to civil jail for being in disobedience of the order informing the defendants to vacate the suit land within 30 days.

5. In the application for stay of execution pending appeal, the defendant has averred that he risks being evicted unless stay is granted. It has been stated that the suit land is a vast land that needs to be preserved pending the outcome of the appeal. In the supporting affidavit, the defendant has deponed that his father purchased the suit land in the year 1972 and developed it extensively. He has stated that he now resides on the suit land and that is the only home he knows. He has deponed that execution of the decree will lead to demolition of the buildings and other destruction of property. He has stated willingness to obey any order that may be issued as a condition for stay pending appeal.

6. In response to the application for stay, the plaintiffs through the affidavit of the 2nd plaintiff, have stated that the application for stay has been filed beyond the 30 days that the court gave in the judgment. It has also been stated that the defendant has not furnished security. It was also averred that the defendant is cutting down trees on the suit land. It is their position that they deserve the fruits of their judgment. It is averred that if stay is to be granted, the defendant must stop cutting trees, pay the sum of Kshs. 901,670/= in form of costs, and provide security in the sum of Kshs. 3,000,000/= which they have said will be the earnings on the 50 acres of land in issue per annum.

7. I directed that the two applications be heard simultaneously, for if I decline the application for stay pending appeal, I would have no reason to disallow the application for eviction. The application for eviction therefore hinges on the success or failure of the application for stay of execution pending appeal. I will therefore address myself first to the application for stay pending appeal. I have taken note of the submissions of Mr. Gicheru for the defendant and Mr. Chebii for the plaintiff. Mr. Gicheru relied on the case of ***Kemfro Ltd v Kabare Baragwi & Ngariama Co-operative Society & 3 Others , High Court at Nairobi, Civil Case No. 2069 of 1996*** where Mbogholi Msahga J, allowed an application for stay pending appeal, in a matter where the appellant was in possession of certain premises. Stay was also granted in the case of ***Kukyama Mbuvi v Mutisya Kisangi, Court of Appeal at Nairobi, Civil Application No. NAI 234 of 1995*** on the basis that if the property exchanged hands, the respondent could dispose of the land, and a successful appeal would be rendered worthless. Mr. Chebii also relied on several authorities, but from what I can see, the subject matter in the said authorities were money decrees.

8. Applications for stay pending appeal are guided by the provisions of Order 42 Rule 6 which provides as follows :-

Order 42 Rule 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.

9. The applicant needs to demonstrate three elements. There must be demonstration that substantial loss will result if stay is not granted; secondly, the application must be made without unreasonable delay; and finally, there needs to be security for the due performance of the decree. Much has been said about the respective strengths of the cases of the parties but that is not a consideration under Order 42 Rule 6. Apart from the three elements, the essence of an application for stay pending appeal is aimed at preserving the subject matter of litigation to avoid a situation where a successful appellant only gets a paper judgment. That said, it must be appreciated that the respondent is a successful litigant who is entitled to benefit from the fruits of the judgment. The interests of both parties therefore needs to be balanced as was stated by the

10. Let me first start with the issue of delay. In the judgment of 31 July 2014, I gave the defendants 30 days to vacate the suit land. When judgment was delivered, there was no application to have this period of time extended. It follows that any occupation of the suit land that went beyond the period of 30 days was illegal. That is probably the reason why the plaintiffs applied on the 5 September 2014 to have the 2nd defendant evicted and for him to be declared to be in contempt of court.

11. This application for stay pending appeal has been filed after the period given to the defendants to vacate. The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter. In the case of ***Christopher Kendagor v Christopher Kipkorir Eldoret E&L 919 of 2012*** the applicant had been given 14 days to vacate the suit land. He filed an application one day after the 14 days. The application was denied, the court holding that, the application ought to have come before expiry of the period given to vacate the land.

12. Mr. Gicheru for the defendants was of the view that the 4 days period after the period given to vacate was not inordinate. On my part I am not convinced.

13. In my view, where a party has been given a particular timeframe within which he should comply with a judgment, then he ought to apply to stay that judgment before that timeframe lapses. In my opinion, an application for stay coming after the stated days for compliance with the judgment will constitute unreasonable delay, unless a good explanation is offered, giving reasons why the application has come after the period given for compliance. This is because there is a reason as to why the court considers a certain number of days to be reasonable for compliance with the judgment, and the continued non-compliance after the given duration, constitutes a violation of the judgment of the court. In the case of possession of premises, the successful litigant is entitled to expect that the unsuccessful party will vacate the premises within the time given in the decree. Continued occupation, beyond the period given is certainly occupation that is illegal and constitutes trespass. The court does not condone an illegality. The reason that there ought not to be unreasonable delay for one to be entitled to stay pending appeal was not placed there in vain. It is incumbent upon a litigant to move with speed.

14. In the instance of this case, the defendant has not stated why he did not apply for stay within the 30 days timeframe given to him to vacate. It is my considered view that the defendant has applied for stay of execution pending appeal after unreasonable delay. That element of unreasonable delay tilts the scales in favour of the plaintiffs in so far as possession of the premises is concerned. The defendant must therefore cede possession of the suit land to the plaintiffs for the duration of the appeal.

15. If I had been convinced that the application has been filed in good time, of which I am not convinced, I would have allowed the defendant possession of the premises, but subject to him giving security, which would have catered for the element of loss of user that the plaintiffs would have suffered for not using the suit land for the duration of the appeal. The plaintiffs had quantified the loss of user at Kshs. 3 Million, which was not controverted by the defendant. Considering that the appeal would probably have taken 2 years to complete, I would have asked the defendant to furnish security in the sum of Kshs. 6 Million. This would have had to be in the form of cash, to be deposited in a joint interest earning account of the counsels for the plaintiff and defendant, or by way of bank guarantee.

16. But I have already held that this application has come after unreasonable delay and the defendants therefore has to cede possession forthwith to the plaintiffs.

However possession alone does not adequately protect the subject matter of litigation. In balancing the interests of the plaintiffs and defendants, the subject matter ought to be preserved. For that reason I order the plaintiffs not to cut down trees, or in any other way utilize or waste the land outside the normal farming activities. The house on the suit land should also be kept in a good state of repair.

17. Separate from the above, I also bar the plaintiffs from leasing, charging, selling, or in any other way encumbering the suit land. In addition, I issue an order of inhibition, inhibiting the registration of any disposition in the register of the suit land.

18. Having disallowed the application for stay in so far as possession of the suit land is concerned, I have no reason not to allow the application for eviction. I allow it only that I will grant the defendants a further seven days to vacate the premises. If they do not so vacate, the plaintiff to proceed and appoint a court bailiff to execute the eviction order and the OCS Turbo to provide security to the court bailiff while executing this order.

Costs of both applications to the plaintiffs.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 23RD DAY OF OCTOBER 2014

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Delivered in the presence of:

Delivered in the presence of:

Mr. J.K. Chebii present for plaintiffs

Mr. S.M. Mathai holding brief for Mr. Onkoba of Gicheru & Co. for defendants.