



**REPUBLIC OF KENYA**

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

**E&L NO. 170 OF 2012**

*Formerly HCC 95 of 2004*

**DANSON MUNIU NJERU .....PLAINTIFF**

**VS**

**WILLIAM KIPTARBEI KORIR.....1ST DEFENDANT**

**PETER KIPSAT LELEI.....2ND DEFENDANT**

**SUSAN KEMEL.....3RD DEFENDANT**

**NIXON KIPCHUMBA.....4TH DEFENDANT**

**DAVID BUTTY .....5TH DEFENDANT**

**WILLIAM BUTTY.....6TH DEFENDANT**

**DINAH KORIR.....7TH DEFENDANT**

***(Application for stay pending appeal; Notice of Appeal filed 7 months after judgment; Notice of Appeal clearly out of time; No valid appeal filed to warrant stay pending appeal; application must automatically fail; delay; application coming 7 months after judgment; delay inordinate; application dismissed)***

**RULING**

The application before me is that dated 22 September 2014. It is an application for stay pending appeal.

In this suit, the plaintiff sued the defendants seeking orders to have them evicted from the land parcel Cheptiret/Cheplaskai Block 3/ Sertwet/103. The defendants on the other hand counterclaimed, contending that they purchased the said parcels of land. After a full hearing, I gave judgment on 26 February 2014 and held for the plaintiff. I made orders inter alia that the defendants do vacate the suit land. Through this application, the defendants want orders to stay that decree pending appeal. I should probably mention that shortly upon judgment, the defendants changed advocates.

In the supporting affidavit, the defendants have stated that they have filed a Notice of Appeal to signal their intention to appeal. They say that they have a good appeal. They have stated that the delay in filing this application was occasioned by the reason that their previous counsel failed to inform them of the judgment of the court and that they only came to know of the judgment when certain persons came with an eviction order.

Mr. Wanyonyi for the applicants urged me to allow the application based on the application and supporting affidavit.

On the other hand, Mr. Momanyi strongly opposed the application. He submitted that there was no Notice of Appeal, and that there has been unreasonable delay. He also raised the issue that the law firm of M/s Kimaru Kiplagat, are not properly on record in the matter.

I have considered the rival submissions and I take the following view of the matter.

Applications for stay pending appeal are covered 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.*

It will be seen that three elements are important, that is that there will be substantial loss unless the order of stay is granted, secondly, that security is tendered for the due performance of the decree, and finally, the application must be filed without unreasonable delay.

Apart from the above, I think one can only obtain a stay pending appeal if there is a proper appeal. With regard to an appeal to the Court of Appeal, Order 42 Rule 6 (4) provides as follows :- *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.*

The Court of Appeal Rules, made under the Appellate Jurisdiction Act, CAP 9, Laws of Kenya, at Rule 74 provides as follows :-

*Notice of appeal*

*(1 Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in ) duplicate with the registrar of the superior court.*

*Every such notice shall, subject to rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal.*

*(2*

*) (3) -(6) (not relevant)*

It will be seen from the above that the Notice of Appeal must be filed within 14 days of the decision. The judgment herein was delivered on 26 February 2014. I have seen the Notice of Appeal alluded to. It was filed on 23 September 2014, which is about 7 months after judgment. It is nowhere close to 14 days and the same was clearly filed out of time. It cannot therefore be said that there is a valid appeal lodged. There being no appeal, this application automatically fails.

Even assuming that there was a valid appeal, the application would still have failed for the reason that there has been great delay. The application is coming, again, 7 months after the judgment. The explanation that the previous advocate did not inform them of the judgment has not impressed me at all. The parties knew when the hearing of the matter closed and the dates given for judgment. Simple due diligence or a follow-up with their advocate would have revealed to them that judgment has been delivered. They cannot blame their previous counsel for their own indolence.

Whichever way I look at it, this application does not meet the threshold of Order 42 Rule 6. I have no option but to dismiss it with costs.

For the record, I have not seen anything wrong with the representation of M/s Kimaru Kiplagat for I have seen that they came on record through a consent that was signed between them and the previous counsel in line with Order 9 Rule 9 (b), assuming that the said consent was duly served.

Orders accordingly.

**DATED AND DELIVERED AT ELDORET THIS 9TH DAY OF OCTOBER 2014**

**JUSTICE MUNYAO SILA**

**ENVIRONMENT AND LAND COURT AT ELDORET**

*Delivered in the presence of:*

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*Mr. L.C. Kamau holding brief for Mr. Wanyonyi of M/s Kimaru Kiplagat & Co for defendants/applicants.*

*N/A for M/s Anassi Momanyi & Co for plaintiff/respondent.*