



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E&L 471 OF 2013

MARTHA KIGEN.....PLAINTIFF

VS

JOHANA TIBINO.....DEFENDANT

(Application for stay pending appeal; plaintiff succeeding in suit and defendant ordered

to exhume a body; whether the exhumation should be stayed pending appeal;

need to balance interests of parties; application allowed on conditions).

RULING

The application before me is that dated 5 August 2014 filed by the defendant. It is an application for stay pending appeal brought under the provisions of Order 42 Rule 6 of the Civil Procedure Rules, 2010.

The suit herein was commenced by the plaintiff on 17 October 2013. The complaint of the plaintiff was that the defendant buried his late father, one Kaptumo Tibino (the deceased), in the plaintiff's land described as Parcel No. 1104 Kapluk Adjudication Scheme (Baringo Adjudication Area). The plaintiff thus sought orders to have the remains of the deceased exhumed by the defendant. The defendant on the other hand claimed to be the rightful owner of the suit land. I heard the dispute and vide a judgment delivered on 24 July 2014, I held that the suit land belongs to the plaintiff and that the defendant had no right to inter his deceased father on the said land. I made an order directing the defendant to disinter the remains of the deceased within 15 days of the judgment and in default, the plaintiff be at liberty to apply for an order to disinter.

Through this application, the defendant wants an order of stay of execution of that judgment pending appeal. In the said application, it is averred inter alia that the defendant has been in occupation of the said land and has developed it. It is stated that the defendant will suffer substantial loss if the appeal succeeds. In the supporting affidavit, the defendant has further stated that the disinterment will affect his family members psychologically and socially.

The plaintiff has opposed the application. Inter alia, she has stated that it is not true that the defendant has been occupying the suit land. She has also deponed that the nature of security to be offered has not been supplied.

I have considered the application. The principles to be followed in an application for stay pending appeal are contained in Order 42 Rule 6 (2) which provides as follows :-

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(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.

I will quickly dispense with the issue of delay. The application was filed on 5 August 2014 before the 15 days given in the judgment had lapsed. I do not think that it can be argued that there has been unreasonable delay.

The second element is substantial loss, which is the cornerstone, upon which every application for stay pending appeal is founded. Determining substantial loss is not an easy task. This is so because the court has to balance the interests of the successful litigant who is entitled to enjoy the fruits of his judgment, yet at the same time, the court ought to be alive to the danger of having the appellant ending up with a paper judgment if he succeeds on appeal. As was stated in the case of ***Reliance Bank vs Norlake Investments Ltd (2002) 1 EA 227***, the claims of both parties must be balanced.

The difficulty in this case is that the subject matter may end up not being there for exhumation if the appeal takes too long. This will make the plaintiff suffer irreparably, for she may not feel comfortable in using that part of the land ever. The difficulty with the defendant is that if I deny stay, and he has to exhume the body, then he either has to bury it elsewhere or incur enormous costs for preserving the body in the mortuary. If he ends up succeeding on appeal, he will now have to rebury the body a third time on the suit land, or pay a huge bill at the mortuary.

To strike a balance, I can grant a stay of execution subject to the defendant making a deposit of Kshs. 150,000/= within 15 days from today either in court or in a joint interest earning account held by both counsel for the plaintiff and defendant. This is to compensate the plaintiff for the fact that she will not use that part of the land for the duration of the appeal in the event that the appeal fails. In arriving at this amount of Kshs. 150,000/= I have considered the nature of the land, the user of it and the attachment by both parties to the subject land. If the plaintiff succeeds in the appeal, the money deposited and interest should be released to her. If the defendant succeeds, this money to be released to him. The costs of this application will abide the costs of the appeal. If the money is not deposited as directed, the stay automatically lapses and the plaintiff may execute the decree.

Given the nature of the suit, I also advise the parties to fast-track the appeal and further direct the deputy registrar to provide the proceedings forthwith to the parties so that the record of appeal may be compiled.

Orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 8TH DAY OF OCTOBER 2014

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Delivered in the presence of:

Delivered in the presence of:

Mr. W. Kigamwa holding brief for Mr. Omusundi for the defendant/applicant.

Mr. J.M. Onkoba holding brief for Mr. Omboto for plaintiff/respondent.