



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KITALE

CIVIL APPEAL NO. 10 OF 2014

YWALAITA LIAPONG.....APPELLANT

VERSUS

LONGOROK SIAKIBOI.....RESPONDENT

R U L I N G

1. The applicant brought a notice of motion dated 26/6/2014 seeking stay of execution of an order issued by the lower court in Kitale Chief Magistrate Land Case No. 20 of 2007 pending hearing and determination of the appeal filed herein. The applicant contends that he is aggrieved with with the ruling of 5/3/2014 and that he has preferred an appeal against the said ruling which has high chances of success and that if stay of execution is not granted, the appeal will be rendered nugatory.

2. The applicant contends that the respondent has already extracted an order compelling the District Surveyor to go and fix boundaries. He also contends that his application for stay made to the lower court was dismissed unfairly given the grounds in the memorandum of appeal.

3. The application is opposed through a replying affidavit sworn by the respondent on 27/9/2014. The respondent contends that this is a matter which arose under the Land Disputes Tribunal Act and as such the court has no jurisdiction to grant stay of execution. The respondent further contends that what the applicant is doing now is a back door attempt to set aside a decree which was issued in 2007 and was never appealed against. The respondent therefore argues that the present application has no basis in law as the same is merely seeking to challenge execution of the decree which was properly given.

4. I have carefully considered the applicant's application as well as the opposition by the respondent. The issue which arises for determination is whether stay of execution can be granted in the circumstances. Order 42 of the Civil Procedure Rules gives conditions upon which a court can grant stay pending appeal. Those conditions are as follows:-

(i) The court must be satisfied that substantial loss may result to the applicant unless the order of stay is granted.

(ii) That the application has been brought without unreasonable delay.

(iii) That security for the due performance of the decree as may ultimately be binding on the applicant has been given.

5. In the present case, the ruling from which an appeal has been preferred was delivered on 5/3/2014. The

application for stay was made on 26/6/2014. The application was made after three months. When considering what amounts to unreasonable delay, the court has to consider circumstances of each individual case. In the present case, the applicant had filed an application for stay in the lower court which application was dismissed vide ruling delivered on 11/6/2014. The present application was filed 15 days after the one in the lower court was dismissed. I therefore find that the present application was brought without delay.

6. The next point for consideration is whether the applicant has demonstrated that he will suffer substantial loss if stay is not granted. A look at the memorandum of appeal as well as the order being appealed against shows that the dispute herein arose out of a verdict from the Land Disputes Tribunal under the defunct Land Disputes Tribunal Act. The verdict of the Tribunal was adopted as Judgement of the court on 21/5/2007. The ruling being appeal against was as a result of execution proceedings towards implementation of the decree issued on 21/5/2007. The applicant has not demonstrated what loss he will suffer by the decree of 21/5/2007 being implemented. What in essence the applicant is seeking to achieve through the intended appeal is to stall execution of the decree of 21/5/2007. The applicant's main ground of complaint in the memorandum of appeal is that the decree of 21/5/2007 is incapable of being implemented as the award in favour of the respondent was not precise. If this be the case, then this is not the right forum for the applicant to do that. He should have followed the procedure laid down in the now repealed Land Disputes Tribunal Act. The court's concern at present is whether the applicant has demonstrated that he will suffer substantial loss if stay is not granted. The applicant has failed to demonstrate any loss which he will suffer if stay is not granted.

7. The issue of security for the due performance is normally considered where there is demonstration that substantial loss will ensue if stay is not granted. I will therefore not consider the issue of security as the applicant has not demonstrated that he will suffer substantial loss. This being the case, I find that the applicant's application lacks merit. The same is hereby dismissed with costs to the respondent. Temporary orders of stay given earlier on are hereby discharged.

It is so ordered.

Dated, signed and delivered at Kitale on this 2nd day of December, 2014.

E. OBAGA

JUDGE

2/12/2014

In the presence of Mr Ingosi for Mr Samba for applicant. Court Clerk – Isabella.

E. OBAGA

JUDGE

2/12/2014