



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: GITHINJI, OKWENGU & J. MOHAMMED, J.J.A)

CIVIL APPEAL NO. 43 OF 2017

BETWEEN

JOSEPH YANO.....APPLICANT

AND

STEPHEN KIBET KIPTUM.....RESPONDENT

(An application for stay of execution pending the hearing and determination of the appeal from the Judgment and decree of the Environment and Land Court of Kenya at Kitale (Obaga, J.) dated 20th January, 2017

in

ELC Case No. 12 of 2012)

RULING OF THE COURT

[1] By a notice of motion dated 14th August, 2018 Joseph Yano the applicant who is the appellant in Civil Appeal No. 43 of 2017 seeks an order of stay of execution of the judgment/decree in Kitale ELC NO. 12 of 2012 delivered on 20th January, 2017 pending the hearing and determination of his appeal. In the judgment the learned judge had ruled against the applicant and ordered that an order of eviction do issue against him removing him and his agents from Plot No. 1431 Milimani Settlement scheme (suit property). It is that order that the applicant seeks to stay. In addition, the applicant seeks leave to amend the memorandum of appeal dated 20th April 2017 in Civil Appeal No 43 of 2018, and further leave to file a supplementary record of appeal to embody it.

[2] Following an agreement between the parties’ advocates, written submissions were duly filed and exchanged. The court is now called upon to determine the application on the basis of those submissions. For the applicant it was submitted that the court has jurisdiction to grant the orders sought; that the applicant’s intended appeal is arguable as it intends to raise matters of law; that the issues intended to be raised include, whether in light of **section 30** of the **Land Adjudication Act** which specifically bars the jurisdiction of the court, to hear disputes involving land subject to adjudication, the court had jurisdiction to hear the dispute between the applicant and the respondent, the respondent having admitted that the process of adjudication involving the land had not been completed; whether the respondent had *locus standi* to bring the suit when no valid disposition of the interest of **William Cheptoo** had been carried out in terms of **section 3(3)** of the Law of Contract Act; whether the learned judge was right in shifting the burden of proof; and whether the learned judge was right in issuing eviction orders.

[3] In arguing that the appeal would be rendered nugatory unless the order of stay of execution was issued, the applicant contended that he was likely to suffer loss of his liberty over a judgment that the court may eventually set aside; and that he also stands to lose possession of the suit property that he has lawfully purchased.

[4] The applicant explains that he was not aware of the dismissal of his application for stay that he had lodged in the Environment and Land Court, and only learnt of it when the police visited his home sometime in August 2018. He took action and engaged his current advocates who took immediate steps to lodge the present application and also lodged an appeal and a record of appeal within **60 days** of the decision. He blamed his former counsel for failing to inform him of the dismissal of his application.

[5] In regard to the application for leave to amend the memorandum of appeal, and to file a supplementary record of appeal, the applicant states that his advocate inadvertently omitted vital legal issues upon which it is important to have the Court pronounce itself at the hearing of the appeal. He contended that he complied with Rule 44(1) of the Court of Appeal Rules 2010 regarding the making of a formal application

for leave to amend, and urged the Court to be guided by the case of *Eastern Bakery vs. Castelino [1958] EA 461* in which it was stated that amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side. The applicant further relied on **sections 3A & 3B** of the Appellate Jurisdiction Act, which enjoined the Court to facilitate the just expeditious proportionate and affordable resolution of matters governed by the Act.

[6] In his submissions the respondent urged the Court to dismiss the application for stay of execution because the applicant's intended appeal did not have a high chance of success. The respondent pointed out that the applicant brought his application for stay of execution after one year and after he had paid part of the costs assessed by the superior court; and that the delay in bringing his application was not fully explained. As regards the application for extension of time the respondent pointed out that there was an inordinate delay of 60 days.

[7] We have considered the motion before and the submissions made before us. With regard to the application for stay of execution, the applicant has already filed a notice of appeal and therefore the jurisdiction of the Court under **Rule 5(2)(b)** of the Court Rules has been properly invoked. The applicant has also demonstrated that his intended appeal raises arguable issues, which issues he has identified. The issues include jurisdiction, locus standi and burden of proof amongst others. These are serious legal issues and it cannot be said that the appeal is frivolous.

[8] With regard to the nugatory aspect it is evident that the subject of the suit is land and that an order for eviction has been issued. Unless an order of stay of execution is issued the order of eviction may be executed and the applicant will thereby be prejudiced by losing possession of the suit property. We are therefore satisfied that the applicant has met the twin requirements for granting an order of stay under Rule 5(2)(b) of the Court Rules. In addition, the applicant has satisfactorily explained the delay in bringing his application. In the circumstances it is only fair and just that an order for stay of execution do issue pending the hearing of the appeal.

[9] As regards the prayer for leave to amend the memorandum of appeal, the case of *Eastern Bakery v Castelino [1958] EA 461* that was cited by the applicant is spot on that:

“Amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side, and there is no injustice if the other side can be compensated by costs”

[10] We are satisfied that there will be no injustice caused by the amendment. The upshot of the above is that we allow the applicant's motion and issue orders as prayed. The applicant shall file and serve the amended memorandum of appeal and supplementary record of appeal within 14 days from the date hereof. The respondent shall have costs of the application in any event.

It is so ordered.

Dated and delivered at Eldoret this 28th day of June, 2019.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR