



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC NO. 136 OF 2006

VICTORIA MASINDE (Suing through her Attorney ROSE N. MASINDE.....PLAINTIFF

VERSUS

LOIS CHESIRIKEN PSENJEN (Legal personal representative of

ENOCK MOKOIT PSENJEN (deceased).....1ST DEFENDANT

STEPHEN KIPLANGAT PSENJEN (Legal personal representative of

ENOCK MOKOIT PSENJEN (deceased).....2ND DEFENDANT

AMY CHELAGAT KIPTUI.....3RD DEFENDANT

RULING

The Application

1. The application dated **26/10/2020** and filed in court on **13/11/2020** has been bought under **Section 3A** of the **Civil Procedure Act** and **Order 42 Rule 6** of the **Civil Procedure Rules**. The 1st and 2nd defendants seek the following orders:-

a. ...spent

b. ...spent

c. That at the *inter partes* hearing of this application there be stay of execution and/or further execution of the decree in this suit till the hearing and determination of the intended appeal to the Court of Appeal

d. Costs be provided for.

2. The application is supported by the affidavit of the 2nd defendant sworn on **6/10/2020** with authority by the 1st defendant. The grounds upon which the said application is made are that the applicants have preferred an appeal to the court of appeal against the judgment of this court in the instant suit and that they have an arguable appeal which shall be rendered nugatory if no stay order issues.

The Response

3. I have perused the court record and I have found no reply filed by the plaintiff to the instant application.

Submissions

4. The defendants filed their written submissions on **2/12/2020**. I have also perused the court record and found no submissions filed on behalf of the plaintiff in respect of the instant application. The application is therefore unopposed, but do the applicants merit the orders sought.

Determination

5. The conditions for the grant of a stay of execution are contained in **Order 42 Rule 6** of the **Civil procedure Rules** which provides as follows:

“6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under sub-rule (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.

(3) Notwithstanding anything contained in sub-rule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) 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.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in sub-rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

6. In seeking to discover if the instant application meets the provisions of the above set out order, this court must therefore consider whether:

(i) there is an appeal in place;

(ii) the application was made without unreasonable delay;

(iii) substantial loss may result unless the order is made; and

(iii) the Applicant is prepared to offer security.

7. There is a copy of a notice of appeal attached to the application showing that it was date stamped on **2/10/2020** by the court

registry. The original is in the court record also. For the purposes of the instant application there is therefore deemed to be an appeal in place.

8. As regards delay the impugned judgment was delivered on **30/9/2020** and the instant application was lodged on **13/11/2020** after a period of about **1 month** and **13 days**. I find that to be quite expeditious action on the part of the applicant.

9. Regarding whether substantial loss may result unless the order of stay is granted, I note that the court ordered a transfer of the suit land to the plaintiff. The applicant states that the suit land is now worth in excess of **Kshs. 10,000,000** in value and is located in Milimani Estate in Kitale. No doubt if that land is transferred to the plaintiff without any attendant inhibition to further transfers, it may be removed from the reach of the applicants before the appeal is determined, and the land is located in a unique location and the applicants may incur more costs in recovering the same if it is further transferred. I am therefore persuaded that the applicants may suffer substantial loss if the order of stay is not granted.

10. The final issue is in respect of security. This court has power to order security even where none has been offered and append conditions to such order.

11. In the final analysis I find that the application by the 1st and 2nd defendants is merited and I grant it in terms of **prayer no. (c)** thereof subject to the following conditions:

a. The applicants shall file and serve their record of appeal within 45 days of this order.

b. The applicants shall within 60 days of this order deposit Kshs. 400,000/= being security for costs in the suit and appeal in an interest earning account held jointly between the applicants' advocate and the respondent's advocate.

c. In default of compliance with the above conditions (a) and (b) either singly or cumulatively the order of stay granted herein shall stand automatically vacated and the judgment creditor shall be at liberty to execute the judgment in the suit.

It is so ordered.

Dated, signed and delivered at Kitale via electronic mail on this 17th day of December, 2020.

MWANGI NJOROGI

JUDGE, ELC, KITALE.



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