Case Number:	Civil Case 76 of 1991
Date Delivered:	10 May 2018
Case Class:	Civil
Court:	High Court at Eldoret
Case Action:	Ruling
Judge:	Jeanne Wanjiku Gacheche
Citation:	Henry Kipkemei Tuwei v William Kipkosgei Bitok [2006] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL CASE 76 OF 1991

HENRY KIPKEMEI TUWEI …….....……. PLAINTIFF

VERSUS

WILLIAM KIPKOSGEI BITOK …….... DEFENDANT

R U L I N G

Henry Kipkemei Tuwei's claim against William Kipkosgei Bitok for adverse possession of land parcel Number UASIN GISHU/SOSIANI/62 (hereinafter referred to as 'the subject land'), was dismissed on 17/5/2004.

Tuwei was also ordered to renegotiate the purchase of Bitok's land or to vacate the same within 6 months, otherwise he be evicted therefrom.

Tuwei who felt aggrieved by the said judgment, filed his Notice of Appeal on 28/5/2004, and on 23/5/2005, he moved this court by way of Notice of Motion, and in which he seeks an order for stay of execution of the aforementioned decree pending the hearing and determination of his appeal. He also prays for costs.

Tuwei who pleads Order XLI rule 4 of the Civil Procedure Rules, bases his application on a total of ten grounds, but mainly that he has filed his appeal, which will be rendered nugatory if the order of stay of execution is not granted. He is willing to give security for the performance of the decree.

The application is opposed by Bitok, who I shall now refer to as 'the respondent', on the grounds that the same cannot lie as Tuwei has not annexed a copy of the Memorandum of Appeal to enable the court determine whether the intended appeal would be successful. It is also his ground that Tuwei has failed to comply with the orders of 17/5/2005 and hence the application is meant to deny him (the respondent) the use and enjoyment of his land. It is therefore his contention that the application is frivolous, vexatious and that it ought to be dismissed with costs.

Order XLI rule 4 of the Civil Procedure Rules stipulates that:

"(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 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 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 due performance of such decree or order as may ultimately be binding on him has been

given by the applicant.

(3) ……

(4) ……

(5) ……

(6) Notwithstanding anything contained in subrule (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."

It is clear from the above provisions of the law that at this stage, the court need not delve into the issue of whether or not the applicant's appeal has high chances of success. What the applicant needs to meet, is the criteria, which is well laid down herein-above, and it is for him to show to the satisfaction of the court that:

- *He stands to loose substantially unless the order which he seeks is granted;*

- *That he has filed his application without unreasonable delay, and*

- *He is willing to abide with such security as the court may order for the due performance of the decree.*

I have taken into account the pleadings filed herein, the submissions of both counsel. The applicant's counsel also relied on the cases of Mugah v. Kinga [1988] KLR 748 and Mukuma v. Abuoga [1988] KLR 645, in support of this application. Having perused the same, I find would none would readily apply in his favour as the rules governing applications for stay before at the Court of Appeal level are different from those that apply to this court, which is governed by the aforementioned Order XLI of the Civil Procedure Rules.

Despite the fact that the applicant has made it very clear that he is willing to abide with whatever terms are laid down by this court, he however has to satisfy the other two limbs of Order XLI rule 4, as in my humble opinion, the three conditions apply in conjunction and not individually.

The order against which he has filed a Notice of Appeal was delivered on 17/5/2004. It is on record that despite the fact that he was given a period of six months within which to comply with the order, he did not take any positive steps. Secondly, no reasons have been advanced for the delay in filing this particular application, neither did his counsel make any attempt to try and convince this court that he had a reasonable excuse for the delay of over 12 months.

In the circumstances, I have no option but to find that there was no reasonable explanation for the delay, which can only be described as inordinate, and on that account alone the application is bound to fail.

Be that as it may, this applicant was awarded 10 acres ex-gratia in the contentious decree. Should execution issue, his right to own the same will not be affected, and he will still retain the same. Save for stating that he will be rendered destitute if the order that he seeks is not granted, the applicant has not been able to convince me that he stands to suffer substantial loss, for in my mind, a party who was awarded 10 acres of land ex-gratia cannot claim that his appeal would be rendered nugatory and that he would be rendered a destitute, should I not grant him the order which he now seeks.

The upshot of this is that the applicant has failed to meet the requirement of order XLI rule 4 and his application is dismissed with costs.

Dated and delivered at Eldoret this 24th day of February 2006.

JEANNE GACHECHE

JUDGE

Delivered in the presence of:

Mr. Momanyi for the plaintiff/applicant

Mr. Shivaji for the defendant/respondent