



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 53 OF 2011

PETER KASONA MUTISYA.....1ST APPELLANT/APPLICANT

JEMIMAH SYOMBUA KASONA2ND APPELLANT /APPLICANT

VERSUS

MICHAEL N. M UTISYARESPONDENT

RULING

1. By a **Notice of Motion** dated **12th April, 2011** brought pursuant to provisions of **Order 42 rules 6 (1) of the Civil Procedure Rules** and **Section 3A of the Civil Procedure Act**, the applicant seeks an order of stay of execution of the judgment delivered on the **4th March, 2011** in **CMCC No. 156 of 2006 (Machakos) Michael N. Mutisya versus Peter Kasone Mutisya and Jemimmah Syombua Kasona** pending hearing and determination of an appeal lodged by the applicant.
2. The application is premised on grounds that if execution of the decree proceeds the intended appeal shall be rendered nugatory which will be prejudicial to the applicant who will in turn suffer substantial loss.
3. The application is supported by an affidavit deposed by **Peter Kasona Mutisya** the 1st Applicant who stated that the respondent, his brother who sued him for trespass and eviction was registered as the proprietor of parcel **Muputi/Kiimakimwe/2921** (*hereinafter the suit premises*) without disclosing that he was to hold the land in trust for himself and the 1st applicant in accordance with the Kamba customary law; the respondents registration should have taken into account his beneficial interest in the suit premises since it is ancestral land; the applicant has children whom he lives with in the suit premises where he has established an ultramodern stone house and if demolished he will suffer irreparable loss. The appeal has high chances of success.
4. In response thereto the respondent stated that the application is bad in law, incompetent, an afterthought and had been overtaken by events; the title deed being in his name was evidence of ownership of the suit premises; after delivery of judgment the applicant vacated the suit premises and particularly demolished the house by removing windows and doors; the applicant having given vacant possession, stay orders would be granted in vain.
5. Rival submissions by both counsels have been considered. A court has discretion of granting stay of execution if the applicant is likely to suffer substantial loss. The applicant also ought to have brought the application without undue delay. In the case of **Rhoda Mukuma versus John Abuoga [1987] KLR**. It was stated thus:-

“...Substantial loss is the cornerstone of both jurisdictions. That is what has to be prevented, because such loss would render the appeal nugatory. Therefore it is necessary to preserve the status quo”.

6. It has been stated that the suit premises is an ancestral land which was held by the respondent in trust for the applicant. It is not in dispute that the applicant had development (*house*) on the suit premises. The respondent on the other hand obtained a title deed for the suit premises and argues that he allowed the applicant to live in his compound temporarily. There is a further allegation that after delivery of judgment of the lower court the applicant vacated the suit premises. No further affidavit was sworn by the applicant to counter the allegation. This would mean that if the order sought is not granted the applicant would not suffer substantial loss.
7. Possession of a title deed would be *prima facie* evidence of ownership of premises. It however, defeats justice to envisage a situation where a brother would allow a sibling to construct a permanent house on his parcel of land. If *status quo* is not maintained pending the main issue in contention being addressed at an appellate level then the applicant would indeed suffer substantial loss. Confronted by a similar situation in *Ngotho Commercial Agencies Ltd versus Gerorge Wanyoki Gethi [2006] eKLR, Waki, J.* stated thus :-

“The subject matter in issue is immovable property although there is an alternative prayer for money. On the facts the applicant occupies the property with his family. After this court’s earlier ruling there is nothing to prevent the respondent from evicting the applicant from that property. If the appeal succeeds on the main prayer, the property may well have disappeared irretrievably although monetary compensation may be available. The respondent may not be capable of restituting the same property. In the circumstances, substantial loss would ensue”.

This reinforced the fact that if execution is effected the applicant will suffer irreparable loss.

8. With regard to whether there was unreasonable delay in filing the application. After delivery of judgment of the lower court, no evidence of Notice of Appeal is exhibited but a Memorandum of Appeal was filed on **4th April, 2011**. This application was filed some **37 days** later. The delay in filing the application was not inordinate.
9. From the foregoing, I do grant the application on condition that the applicants secure the appeal by depositing **Kshs. 100,000/=** in court with the Deputy Registrar as security within **one (1) month**. In default execution to issue. Costs of the application shall be in the appeal.
10. It so ordered.

DATED, DELIVERED and SIGNED this **22nd** day of **JANUARY, 2014**.

L.N. MUTENDE

JUDGE