



No. 217

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL APPEAL NO. 44 OF 2010

**MORAA MASARE1st
APPELLANT**

**JEMIMA MASARE2nd
APPELLANT**

BWARI MASARE..... 3rd APPELLANT

EVANS SAMWEL MOCHACHE MASARE4th APPELLANT

PETER MOKEBO MIENCHA 5th APPELLANT

VERSUS

**GEOFFREY MATOKE
RESPONDENT**

RULING

1. What I have before me is the appellant’s application dated 25th June, 2013 in which the Appellants are seeking a stay of execution of this court’s judgment and decree delivered on 21st June, 2013 pending the hearing and determination of the appellant’s intended appeal to the Court of Appeal. The Appellants application is supported by the grounds set out on the face thereof and on the affidavit of one of the Appellants one, Jemimah Masare sworn on 25th June, 2013.
2. In summary, the appellants’ application is brought on the grounds that the Appellants are dissatisfied with this court’s judgment and/or decree of 21st June, 2013 and intend to appeal against the same to the Court of Appeal. The Appellants have already lodged a notice of appeal and have also applied to be supplied with typed copies of the proceedings and judgment sought to be appealed against. The Appellants have contended that their intended appeal raises serious issues of law which require investigation and determination by the Court of Appeal and that unless the stay sought is granted, the appellants would suffer substantial loss and the intended appeal would be rendered nugatory. The Appellants have contended further that they are ready and willing to abide by any order of security that the court may impose as a condition for granting the stay sought. Finally, the Appellants have contended that the application herein has been brought without unreasonable delay. The Appellants have annexed to their affidavit in support of the application among other documents, a copy of the Notice of Appeal dated 25th June, 2013 and a copy of the decree sought to be appealed.

3. The Appellants application was opposed by the Respondent. The Respondent filed a replying affidavit sworn on 26th July, 2013 in opposition to the application. In his opposition to the appellants' application, the Respondent contended among others that the judgment and decree of this court sought to be stayed are in negative terms and as such are not capable of being stayed. The Respondent contended further that the application herein is a mere tactic on the part of the Appellants to continue benefiting from their wrongful and illegal acts. The Respondent contended that it would be unjust to continue preventing him from enjoying the fruits of judgment that was made in his favour on 26th July, 2005 by denying him the opportunity to take possession and make use of 25 acres of land that was awarded to him by the court. The Respondent contended further that the Appellants have not met the conditions for granting a stay of execution.
4. On 30th July, 2013 the court directed that the Appellants application be argued by way of written submissions. The Appellants filed their submissions on 16th October, 2013 while the Respondent filed his submissions on 30th October, 2013. I have considered the appellants' application together with the affidavit filed in support thereof. I have also considered the Respondent's affidavit filed in opposition to the application and the written submissions filed by the advocates for both parties. As was held in the case of **Halai & Another –vs- Thornton & Turpin (1963) Ltd [1990] KLR 365** that was cited by the Respondent, this court's discretion to order stay of execution of its order or decree is fettered by three conditions. The first condition is that the applicant must establish a sufficient cause to warrant the granting of the stay sought. Secondly, the applicant must satisfy the court that substantial loss would ensue if the stay sought is not granted and lastly, the application must be brought without unreasonable delay and the applicant must furnish security. In their submission the Appellants have argued that the dispute that gave rise to the appeal whose judgment the Appellants intend to appeal to the Court of Appeal concerned a parcel of land known as plot no. 38 Kineni Ranch ("plot no. 38") and that in this court's judgment which is sought to be stayed, the court held that the said plot no. 38 is the same as the parcel of land known as **LR No. Isoge/Kineni/Block I/49** (plot no. 49) which has been subdivided and portions thereof registered in the names of the Appellants. It is the Appellants contention that plot no. 38 is not the same as plot no. 49 and that this court's decision to that effect was made in vacuum as it lacked any basis on the pleadings filed by the parties and as such was made without jurisdiction. The Appellants have argued further that in the said judgment the court has granted to the Respondent a parcel of land which was not the subject of the dispute between the parties. It is the appellants' contention therefore that the intended appeal raises weighty issues of law which should be interrogated and determined by the Court of Appeal and as such there exists sufficient cause to grant the stay order sought.
5. On the issue of substantial loss, the Appellants submitted that this court in the judgment sought to be stayed ordered the nullification of all the titles that were created from plot no. 49 and directed that the Appellants do transfer to the Respondent a portion plot 49 measuring 25 acres. The Appellants have submitted that the Respondent is not entitled to a portion of plot no. 49 as it is not the same as plot no. 38 which was in dispute between the parties and that if the said portion measuring 25 acres thereof is transferred to the Respondent, the same would be at the disposal of the Respondent who would be at liberty to deal with the same as he wishes which includes disposing of the same. The Appellants have submitted therefore that if the decree of this court is not stayed they stand to suffer substantial loss as their titles would be cancelled and nullified and the portion of plot no. 49 transferred to the Respondent may be put beyond their reach in the event that they are successful in the intended appeal.
6. On the issue of security, the Appellants submitted that they are willing to deposit in court the titles of the parcels of land that arose from the subdivision of plot no. 49. They submitted further that they are prepared to have the status quo in relation to the Respondent's occupation of the disputed parcel of land maintained pending the hearing and determination of the intended appeal to the Court of Appeal. On the filing of the application, the Appellants submitted that the same was filed without unreasonable delay since the judgment sought to be stayed was delivered on 21st June, 2013 and the present application was filed on 25th June, 2013.
7. In conclusion, the Appellants submitted that they have satisfied the conditions for granting the stay sought and that the right of appeal being a constitutional right the Appellants should not be unduly fettered in their pursuit of the same. In his submissions in reply, the Respondent submitted that

- the Appellants have not shown any sufficient cause to warrant the granting of the stay sought. The Respondent's submitted that if the Appellants succeed in their intended appeal, they can apply for an order of restitution under Order 42 rule 7 of the Civil Procedure Rules, 2010.
8. The Respondent submitted therefore that there is no chance that the Appellants appeal if successful would be rendered nugatory. On the issue of substantial loss, the Respondent submitted that the Appellants did not tender any evidence to show that they would suffer substantial loss unless the stay is granted. The Respondent submitted that in fact, it is the Respondent who stands to suffer severe hardship if the stay sought is granted since the disputed property is now in the names of the 2nd, 4th and 5th Appellants who may dispose of the same and also restrict the use of the same by the Respondent. On the issue of security, the Respondent submitted that the Respondent does not require any security as he will be contented with having 25 acres of plot no. 49 transferred to his name and he is prepared to have an inhibition registered against his title to the said 25 acres pending the hearing and determination of the intended appeal.
 9. I have considered the rival submissions by both parties. I am persuaded that the Appellants have shown sufficient cause to warrant the granting of the stay order sought. As I have stated above, the Appellants contention is that plot no. 49 a portion of which the court ordered to be transferred to the Respondent is not the same as plot no. 38 which was in contention between the parties and that they intend to urge the Court of Appeal to find that this court did not have the jurisdiction and acted in vacuum in holding that the two parcels of land are one and the same. On the issue of substantial loss, I am equally satisfied that the Appellants have established that they stand to suffer substantial loss unless the stay sought is granted. This is because, if 25 acres of plot no. 49 is transferred to the Respondent who then proceeds to dispose of the same and the Court of Appeal holds that plot no. 49 was not the same as plot no. 38 as this court had held, the portion that was transferred to the Respondent pursuant to this court's judgment would be beyond the reach of the Appellants who would be subjected to substantial loss. On the issue of security, I am not satisfied with the security offered by the Appellants. I have noted from the record that the Appellants had been ordered at one time to deposit in court within a specified time the titles of sub-divisions of plot no. 49 and they failed to do so.
 10. In view of the fact that the Appellants are in occupation of a substantial portion of the land that has been decreed to belong to the Respondent by this court, the Appellants will have to deposit some money in court as a security for loss of user which the Respondents would be subjected to if the stay sought is granted. This would be in addition to other conditions that the court would impose as the justice of the case may demand pending the hearing and determination of the intended appeal.
 11. Due to the foregoing, it is my finding that the Appellants application dated 25th June 2013 has merit. The same is allowed in terms of prayer 3 thereof on condition that first, the Appellants shall deposit in court within 30 days from the date hereof a sum Kenya shillings Five Hundred Thousand (Kshs. 500,000/=) as a security, secondly, there shall be an inhibition inhibiting any dealing with **LR Nos. Isoge/Kineni/Block I/260, 261, 296, 297, 298, 299, 300 and 301** pending the hearing and determination of the intended appeal by the Appellants, thirdly, the status quo as concerns the Respondent's occupation of the disputed parcels of land as of the date hereof shall be maintained pending the hearing and determination of the intended appeal and lastly, in the event of default on the part of the Appellants to deposit the said sum of kshs. 500,000/= in court as a security on the due date, the stay granted herein shall stand discharged without any further reference to the court. The costs of the application herein shall be in the cause.

Delivered, dated and signed at KISII this 19th day of February 2014.

S. OKONG'O

JUDGE

In the presence of:

Mr. Ochwang'i for the Appellants

Mr. Bosire for the Respondent

Mr. Mobisa Court clerk

S. OKONG'O

JUDGE