



REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CIVIL CASE NO. 79 OF 2006

STEPHEN RAPHAEL GARAMA PLAINTIFF

VERSUS

ROBERT BAYA MRAMBA & OTHERSDEFENDANTS

RULING

1. Judgment giving vacant possession in respect of land parcel No. KILIFI/JIMBA/85 (the suit land) was given in the plaintiff's favor, against the defendants on 15th April, 2013. On 31st July, 2013 the defendants filed the present application for stay of execution pending appeal under certificate of urgency. The application is expressed to be brought under Order 42 (6) of the Civil Procedure Rules, primarily, and is based on the key ground that the applicants risk eviction from the suit land upon which they have lived since 1990, and further that such eviction would render their appeal nugatory.
2. The application is supported by the affidavit of the advocate to the applicants, Omagwa Angima, which basically expands upon the grounds on the face of the application. The plaintiff swore an affidavit in opposition to the application. He contends that the existence of a pending appeal is not enough reason to deny him of the fruits of his judgment as the registered owner of the suit property. The parties agreed to dispose of the application by way of written submissions which I have considered alongside the respective affidavits.
3. The instant application is brought under Order 42 rule (6) of the Civil Procedure Rules and although the parties canvassed the question of the merit of the intended appeal, such question is irrelevant before this court. Secondly, an appeal does not operate as a stay of execution except as may be ordered by the court under Order 42 rule 6(1) of the Civil Procedure Rules. Order 42 rule 6(2) states:

“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 the due performance of such decree or order as may ultimately be binding on him has been given by the applicant”**
4. In light of the above provision, the successful applicant for stay must therefore:

- a. Apply without unreasonable delay
- b. Satisfy the court that he will suffer substantial loss if stay is denied
- c. Provide any security ordered by the court.

The application before me was filed almost three months after the judgment of this court, and was possibly prompted by the plaintiff's impugned attempts at execution vide the warrant to the court bailiff issued on 1st July, 2013. Notably the applicants had on 18th April, 2014 given notice of appeal but not taken any other step.

5. This delay even though perhaps not unreasonable is not explained by the applicants. Principally because, the applicants have not sworn an affidavit in support of this application. The affidavit on record is that of counsel Mr. Angima. The same raises matters that are contentious in nature as to the propriety of the eviction or execution process and other factual matters which are not suited to an affidavit by counsel. This is unprocedural and undesirable. Suits belong to the litigants and counsel should not descend into the arena of disputants. At paragraph 15 of the supporting affidavit counsel for the applicants purports to adduce evidence as to the number of families, and the members thereof, likely to be adversely affected by the imminent eviction which "would expose them to untold suffering and irreparable loss".
6. Why did the affected parties not swear to these facts? The depositions of counsel in this regard will not and cannot be a substitute for the applicants' affidavit in support of their application. Hence no evidence has been placed before this court to demonstrate that the applicants are likely to suffer substantial loss unless the order sought is made. No offer of security has been made by the applicants. Legal quibbles regarding the extraction of the decree or execution process are matters that are not appeal-related. They can be canvassed before the executing court by the proper parties but cannot be the basis of an application for stay of execution of a decree pending appeal.
7. For the foregoing reasons I find no merit in the application filed on 31st July, 2013 and will dismiss it with costs.

Delivered and signed at Malindi this 25th day of March, 2014 in the presence of Mr. Ole Kina holding brief for Mr. Lughanje for plaintiff, Mr. Angima for defendants – not present.

Court clerk - Samwel

C. W. Meoli

JUDGE