



REPUBLIC OF KENYA

High Court at Meru

Civil Appeal 20 of 2009

M'ARITHI M'ATHARA.....1ST APPELLANT

RAPHAEL MWEBIA.....2ND APPELLANT

PHINEAS KIMATHI ARITHI.....3RD APPELLANT

SILAS MURIUNGI.....4TH APPELLANT

VERSUS

SALESIO M'ITONGA.....RESPONDENT

R U L I N G

1. The Application is dated 14th May, 2012. It is brought under Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules. It seeks the following orders:

1. **That this honourable court do stay the judgment/decree of this honourable court in Appeal No. 20 of 2009 until the hearing and final disposal of the intended appeal to the Kenya Court of Kenya.**
2. **That the costs for and incidental to this application be costs in the cause.**

It is supported by the following grounds:

- (i) **That the court judgment dated 3/5/2012 ordered the respondent to vacate the suit Land L.R. no. ABOTETA/U-KITHANGARI/28 without giving the respondent time within which to vacate.**
- (ii) **That the said parcel of land is the respondent's whole source of livelihood.**
- (iii) **That the proposed appeal is arguable and if the respondent is evicted, the appeal will be rendered nugatory.**
- (iv) **That the respondent has brought this application without undue delay.**
- (v) **That the respondent is prepared to offer reasonable security in the circumstances.**
- (vi) **That the appellants will not be prejudiced in any way.**

1. It is also supported by an affidavit sworn by the Applicant of even date. In brief the Applicant

states that in the judgment of this court delivered against him on 3rd May, 2012 ordered that he should be evicted from the suit property. The applicant contends that he was dissatisfied with the ruling of the court and consequently has preferred an appeal against the court's decision and that he is convinced that the appeal has high chances of success. The applicant also offers to give reasonable security if his application is allowed. He concludes by saying that if the stay of the judgment and decree applied for is not granted he will suffer irreparable damages and that his appeal will be rendered nugatory.

2. The Application is opposed. The 1st Respondent has sworn an affidavit in reply to the application on his behalf and on behalf of the 2nd, 3rd and 4th Respondents who are his sons. The Replying Affidavit is dated 17th September 2012. The gist of that affidavit is that immediately after the judgment of the court was delivered in the Respondent's favour on the 3rd, May 2012, in presence of all the parties the Respondent proceeded to the suit property and took full occupation of the same in the presence of the Applicant who did not resist. The 1st Respondent deposes that the Respondents have been in peaceful occupation of the suit property and without any interference from the Applicant since May 2012. The 1st Respondent deposes further that the Applicant has two other parcels of land **LR Nos. ABOGETA/U-KITHANGARI/193 and 219**. He deposes that it is therefore not true what the applicant alleges that he has no other source of livelihood except the suit land. The grounds that the Applicant should satisfy the court in order to obtain a stay of judgment and decree pending appeal has set out under Order 42 Rule 6 (2) gives the following conditions in the following terms.

“(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 the due performance of such decree or order as may ultimately be binding on him has been given by the applicant”

Mr. B. G. Kariuki argued the application on behalf of the Applicant. He also relied on filed submissions. It was Mr. Kariuki's submission that the application was brought without undue delay and that a notice of appeal has already been filed. The purpose of the application or the stay was to preserve the subject matter pending the appeal. He started in passing in the written submissions that if the application is not granted the applicant stands to suffer substantial loss. He also submitted that the Applicant is willing to offer security for the stay. Counsel relied on two authorities **ISAYA THEURI M'LINTARI AND ANOTHER VERSUS GERORGE MBITI KIEBIA AND ANOTHER meruu HCCA 127/1997** where this same court relied on the case of **JETHWA VS SHAH T/A SUPREME STYLES (1989)KLR 198** the court of appeal held.

“The purpose of an application for stay is to preserve the subject matter in dispute so that the rights of an appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory.”

Black's law dictionary 6th Edition explains at page 1413

“A stay does not reverse, annul or suspend what already has been done or what is not specifically stayed nor pass on the merits of orders of the trial court, but merely suspends the time required for performance of the particular mandates stayed, to preserve a status quo pending appeal.”

The Respondents were represented in this application by Mr. Muthomi from M/S Kiutha Arithi. Mr. Muthomi in his oral submission urged that the application has been overtaken by events for the reason that after the judgment was delivered by the court in the presence of all the parties of 3rd May, 2012 the Respondent proceeded to the suit land and took occupation of that land from that date up to the time the

application was heard. Mr. Muthomi urged that to allow this application would be tantamount to acting in vain since there was nothing to stay. Mr. Muthomi also urged that the applicant had not satisfied the conditions of Order 42 (6) (2) because he had not demonstrated how he will suffer substantial loss. Mr. Muthomi distinguished the case cited by Mr. Kariuki from the facts in the instant case. Counsel urged that in the cited case the Applicant's sought to stop the Respondent from excising 3 acres from the suit property while in the instant case the respondent has already taken possession of the land.

I have considered the application, together with the affidavits by the parties and the submissions by counsel. The Applicant is seeking stay of the execution of the judgment of this court in order to go for a second appeal. The judgment of this court sought to be appealed against was delivered on the 3rd May, 2012. The said judgment ordered for the eviction of the Applicant from the suit land and issued a permanent injunction against him. The Respondents have, in their replying affidavit averred that the position on the ground is that the Respondents executed the judgment of this court and took possession of the suit land on the 3rd May, 2012; one day after the judgment was delivered. That averment has not been denied. The Applicant did not file a response to the replying affidavit. It is trite law that any statement in a disposition that remains uncontroverted by the opponent should be regarded as undisputed.

The final position on the ground is that the whole judgment sought to be stayed has already been executed. There is nothing to be stayed. The case cited by the Applicant does not apply to the circumstances of this case. The purpose of an application for stay is to preserve the subject matter. The subject matter in this case is land. If the Applicant succeeds in his appeal he can always get it back and any damages suffered can easily be assessed and compensated by an award in damages.

In the result:

- 1. The application dated 4th May, 2012 be and is hereby dismissed.**
- 2. The Respondents will have the costs of this application.**

DATED SIGNED AND DELIVERED THIS 24TH DAY OF JANUARY 2013

LESIT, J.

JUDGE.