



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MALINDI**  
**ENVIRONMENT AND LAND COURT**  
**CIVIL APPEAL NO. 7 OF 2013**

**FESTUS NGUMA.....APPELLANT**

**=VERSUS=**

**WALTER MBUGUA.....RESPONDENT**

**RULING**

1. The application before me is dated 4<sup>th</sup> February, 2013. It is seeking for the following orders;
  - (a) **That an order of stay of execution be issued in regard to the Judgment delivered on 30<sup>th</sup> January, 2013 in Malindi SRMCC No.292 of 2003 pending the hearing and determination of the appeal.**
  - (b) **Costs be provided for.**
2. The Application is supported by the affidavit of the Appellant who has deponed that he is a purchaser for value without notice of plot number 10719/359 and that after the purchase of the said plot, he proceeded to establish a matrimonial home for his family on the suit property.
3. The Appellant further deponed that if he is evicted from the suit property pursuant to the Judgment of the lower court, he will suffer substantial loss and he, together with his entire family will not have a home.
4. The Appellant finally deponed that the Respondent will not be prejudiced in any manner if the orders sought are not granted since he occupies plot number 1734/214; that though the issue of jurisdiction was never raised at the trial, the lower court lacked jurisdiction to make the orders that it made and that he is willing to comply with any reasonable terms that the court may impose for the due performance of the decree.
5. The Respondent filed his Replying Affidavit in 13<sup>th</sup> May, 2013 and deponed that the Appellant's application is frivolous, vexatious and an abuse of the court process; that the Appellant never produced any indenture dated 9<sup>th</sup> July, 2008; that the indenture referred to in the application was doctored and the same was prepared on 9/7/08 when his case was still pending and that the aim of the indenture is meant to abuse justice because it does not reflect plot number 213 and 215.
6. The Respondent finally deponed that he is the lawful owner of plot number 213 and 215 and that this court should evaluate, assess and consider the evidence produced in the lower court and disregard the Application before it.
7. Mr. Mouko, counsel for the Appellant/Applicant and the Respondent made oral submissions before me on 15<sup>th</sup> May, 2013.
8. Mr. Mouko, counsel for the Appellant/Applicant submitted that the current application has been

- filed because the Appellant will suffer substantial damage and the Appeal shall be rendered nugatory if the execution of the lower court's Judgment was to be executed.
9. Counsel submitted that the Appellant/Applicant has established a home on the suit property. Counsel referred the court to the photographs showing the houses on the suit property some of which are occupied by tenants. The houses also form part of the Appellant's/Applicant's matrimonial home.
  10. On the issue of the Appellant furnishing security, counsel submitted that the suit property is worth millions of shillings and that if the Appellant was to lose the Appeal, the Respondent will benefit from the suit property.
  11. Counsel referred to the Ruling of this court in Malindi HCA No. 45 of 2012 and argued that the court is not supposed to look into the merit of the appeal at this stage. All the Appellant needs to show, it was submitted, is that he will suffer substantial loss unless a stay of execution is granted.
  12. The Respondent appeared in person and submitted that in the lower court, Mr. Mouko, counsel for the Appellant, appeared for defendants number 2 and 6 and Mr. Muranje represented the 1<sup>st</sup> Defendant who is the Appellant herein. The Respondent wondered aloud why the 1<sup>st</sup> Defendant had now opted to be represented by Mr. Mouko and not Mr. Muranje.
  13. The Respondent further submitted that the Application has been filed late considering that the Judgment in the lower court was delivered on 30<sup>th</sup> January 2013; that he never informed the lower court that he had filed the current application and that the lower court had ordered the Appellant to vacate the suit property within 14 days.
  14. The Respondent submitted that he was informed about this application on the eve of the day he was going to argue his application for eviction in the lower court; that the indenture now exhibited was never introduced in the lower court; that Muranje Advocate was a witness of the indenture and he would not have produced it as an exhibit in the lower court and that the building plan annexed on the Appellant's affidavit is not relevant in this Application.
  15. According to the Respondent, the house on plot number 213 is a mud walled structure and that the Appellant constructed the photographed house on the suit property when the suit in the lower court was on-going and in spite of the the injunctive orders. The Respondent submitted that the lower court had made a determination that he was the lawful owner of the suit property and the Application should be dismissed with costs.
  16. The grounds on which an applicant must satisfy the court for the grant of a stay of execution of the lower court's decision pending the hearing of an appeal are provided for under Order 42 Rules 6 (2) of the Civil Procedure Rules 2010.
  17. An order for stay of execution cannot be granted unless, firstly, the court is satisfied that substantial loss may result to the applicant unless the order is made, secondly, that the application has been made without unreasonable delay and finally, an order for security for the due performance of the decree is given by the Applicant.
  18. The Applicant has deponed that he has established a matrimonial home for his family on the suit premises. The Applicant is also renting some of the rooms on the suit property and generating an income. An eviction pursuant to the Judgment appealed against will definitely subject the applicant to substantial loss because he will be left homeless.
  19. The Applicant filed the current Application on 5<sup>th</sup> February 2013, the same day that he filed his Memorandum of Appeal. The Application was filed within five days after the delivery of the judgment. There was therefore no delay in the filing of the Application notwithstanding the fact that the Application was not prosecuted until 15<sup>th</sup> May, 2013. What matters is the date that the application was filed in court and not when the same was prosecuted.
  20. On whether the Applicant is willing to deposit security for fulfillment of the decree, the Applicant has deponed that he is willing to comply with the terms that this court may impose.
  21. The suit property has been developed by the Applicant and the same can only appreciate in value with time. In the circumstances, the suit property itself is security for the due performance of the decree. However and for the purpose of ensuring that the property will still be available for execution purpose after the hearing and determination of the Appeal, I direct that an inhibition should be registered against the suit property by the Applicant.

22. In the circumstances, and for the reasons given above I allow the applicant's application dated 4<sup>th</sup> February, 2013 in the following terms;

**(a) An order of stay of execution in respect to the Judgment delivered on 30<sup>th</sup> January 2013 in Malindi SRMCC No. 292 of 2003 be and is hereby issued pending the hearing and determination of the appeal herein.**

**(b) An inhibition or restriction be registered against parcel of land known as sub-division number 10719/359 otherwise known as plot number 213 and 215 by the Appellant within 30 days from the date of this Ruling.**

**(c) The Applicant to deposit in this court the original title documents in respect to subdivision number 10719/359 otherwise known as plot numbers 213 and 215 within 30 days pending the hearing and determination of the appeal herein.**

**(d) Each part to bear his own costs for the Application.**

Dated and delivered in Malindi this 27<sup>th</sup> day of **June**, 2013.

**O. A. Angote**

**Judge**