

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL CASE NO. 44 OF 2012

LAWRENCE MMWATA CHORE PLAINTIFF

V E R S U S

DICKSON TEYIE MUTOKA DEFENDANT

R U L I N G

In his application dated 23.1.2013 the applicant herein seeks an order of stay of execution of the orders issued by this court on the 15.1.2013 pending the hearing and determination of his appeal before the Court of appeal at Kisumu. The application is supported by the applicant's affidavit. Mr. Wekesa, counsel for the applicant submitted that the applicant has filed an appeal which is still pending before the Court of appeal. The judgment herein was obtained ex-parte and set aside conditionally whereby the applicant was to deposit a sum of KShs.9 million in court. This is a huge amount and therefore seeks a stay of execution pending the hearing and determination of the appeal.

Mr. Osango, counsel for the respondent relied on the replying affidavit sworn on the 30.1.2013 and submitted that the applicant has failed to deposit the amount of KShs.9 million within the 45 days period given by the court. The firm of Kiveu & Company Advocates is irregularly on record as there is a judgment and the applicant was initially represented by a different firm of advocates. This is contrary to Order 9 rule 9. Order 42 rule 7 requires security for costs and the applicant has not provided or offered that.

The background to this matter is that the plaintiff bought from the defendant plot number **KAKAMEGA MUNICIPALITY/BLOCK II/295** and 296 measuring 0.066 Hectares each. The consideration was KShs.9 million. The entire purchase price was paid to the defendant/applicant. The defendant does acknowledge that indeed there was such a sale agreement and acknowledges receipt of KShs.9 million. The transaction appeared to have been interfered with as the defendant was not able to effect the transfer of the property in favour of the plaintiff leading to the filing of this suit. The applicant did file his defence on time and interlocutory judgment was entered. The defendant filed an application seeking to set aside the ex-parte judgment and that application was fully heard and a ruling delivered on the 14.11.2012. The defendant was allowed to defend this suit on condition that he deposits the sum of KShs.9 million either in court or in the joint account of both counsels within 45 days. In his earlier application the defendant annexed his proposed statement of defence and his main ground is that he was not able to effect the transfer because the Kakamega Land District Registrar had revoked his title and this made him to file before the Kakamega High Court Judicial Review application number 20 of 2012. In that application it was contended that the failure to file the defence within time was because Mr. Ondieki Advocate who was acting for the defendant had been taken ill.

From the time the initial ruling that required the applicant to deposit the sum of Kshs.9 million in court up to this moment it is a period of over 7 months. In the application before the Court of Appeal dated 15.1.2013 the applicant seems to indicate that the 45 days period was quite short taking into account the fact that there was Christmas holidays. Mr. Kiveu advocate even annexed a document from his firm indicating that the Christmas Vacation for his staff was to start from 21.12.2012 to 7.1.2013. That document was written on 20.12.2012 yet Mr. Kiveu was appointed on the 15.1.2013. Even if the vacation period is to be taken into account still the time that has lapsed is quite long. The applicant is not even making any proposal as to how much he is able to deposit while he seeks the balance. The contention that the amount is colossal cannot hold. This is the same amount the applicant received from the plaintiff. The applicant's defence even if he were to be allowed to defend the suit is also based on the success of his

Judicial Review application which is entered reversing the decision of the Land Registrar to cancel his title deed. The plaintiff cannot be held in abeyance while the defendant tries to keep his house in order. The Sale agreement was signed in May 2011 and by the time the initial ruling was delivered a period of over one year had lapsed. The applicant is not stating what he did with the money and why is it not possible for him to refund it. Once he sorts out issues dealing with his title deed he will be able to sell either to the plaintiff or to a third party.

Given the circumstances of the dispute I do find that it will not be prudent to grant the orders of stay of execution pending the hearing and determination of the appeal. In the end, I do find that the application dated 23.1.2013 lacks merit and same is hereby dismissed with no orders as to costs.

Delivered, dated and signed at Kakamega this 26th day of June 2013

SAID J. CHITEMBWE

J U D G E