



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CIVIL CASE NO. 97 OF 2005

MOTOKAA NTHAUTHO & 19 OTHERS..... PLAINTIFFS

VERSUS

ATTORNEY GENERAL (*Sued on behalf of*

District Land Adjudication Officer Mbeere District

***and District Land Registrar Embu District*)..... DEFENDANT**

MUCHIRI KOMBO & 19 OTHERS INTERESTED PARTIES

R U L I N G

This is the application by way of Notice of Motion dated 13/2/2013 brought under Order 22 rule 22 & Order 42 rule 6 Civil Procedure Rules. Seeking an order of stay of execution of the Decree issued herein on 19th December 2012 pending the filing, hearing and determination of the intended appeal against the said Judgment/decree. Its based on the main ground that the Interested Parties/Applicants were dissatisfied with the said Judgment and have lodged a Notice of Appeal in the Court of Appeal. They fear that if the decree is not stayed the Plaintiffs could transfer the affected lands to their names and even to the names of 3rd parties to their detriment. The same is supported by an affidavit of one Joseph Njeru Kombo the 11th Interested party/Applicant.

Upon perusal of the record I do not see any replying affidavit by the Plaintiffs/Respondents . Instead I see preliminary objection dated 8/5/2013. The preliminary objection states that the Interested Party does not qualify under Order 41 Civil Procedure Rules on appeals, as they are only observers.

Both Counsels agreed to file written submissions which they did. Mr. Okwaro confirmed that a Notice of Appeal to the Court of Appeal had already been filed. They say they are waiting for proceedings which are being typed. Mr. Mungai in his submissions has questioned the Interested Parties *locus standi* in filing this application and even the appeal.

The authorities availed to this Court have been very helpful. In as much as an Interested Party may be a voiceless bystander I think each case must be considered by its own peculiar circumstances. In this present case the Interested Parties were enjoined by orders of this Court and they even filed a statement of defence dated 3/11/2005. They have fully participated in these proceedings. They also gave evidence at the close of the Plaintiff's case, Judgment having been entered against the Defendants.

And the main reason why they participated is that they are the current registered owners of the lands in question and are also in possession. In the case of **BOBBIE J. RICKS, Guardian of the person and**

Designee or payee of any benefits check, on behalf of SYLVESTER DAVID JN the Court discussed the issue of who may appeal from an order or Judgment of a trial Court. The Court said that only;

“a party aggrieved may appeal from an order or Judgment of the trial division. An aggrieved party is one whose rights have been directly or injuriously affected by the action of the Court.”

I am of the view that the Interested Parties herein are directly affected by the Judgment/decree herein and they also participated in the entire proceedings. They cannot therefore be said to be voiceless bystanders. They are very active parties in this suit, and I therefore find that they have the *locus standi* to file this application and even the Appeal. Ref: **CITY COUNCIL OF NAIROBI -VS- SATO PROPERTIES LTD & 3 OTHERS [2009]4 KLR (NAIROBI HCA NO.72/08).**

Under Order 42 rule 6(2) Civil Procedure Rules the Court may order for stay of execution in the following situations;

1. ***That substantial loss may result to the Applicant if the Order is not made.***
2. ***Application must have been made without unreasonable delay.***
3. ***Security for due performance of the decree should be considered.***

Another element that has evolved is the one to do with chances of success of the appeal.

Having partly heard this matter alive to the fact that it involves rights to land. It has also taken quite a long time in this Court. However considering that the Interested Parties were registered as owners by the 2nd Defendant and have lived on the land believing that they are the true owners, execution of the decree would mean them being de-registered and even evicted. The chances of 3rd parties moving in are also high. It is their right to appeal and get the opinion of a higher Court. My view is that the circumstances of this case dictate that the lands be preserved in the state they are in now. Execution of the decree would affect and render the appeal nugatory in the event of a successful appeal. Ref. **BLACK & BEAUTY PRODUCTS LTD -VS- STRIPES INDUSTRIES LTD CIVIL APPLICATION NAIROBI NO.303/04 (U/R).**

If stay of execution is not granted the Plaintiffs/Respondents would be registered as the owners and be at liberty to sell the lands. And in the event of a successful appeal the land would again be de-registered for registration in the names of the Interested Parties. This would be a cumbersome exercise, which can be avoided at this stage. The parties have been patient for the last eight (8) or so years and can wait a little longer as the Interested Parties process their appeal in the Court of Appeal, which should be expedited by them.

I will therefore grant the stay of execution sought. The Interested Parties are barred from transferring and/disposing of any of the affected lands. Costs to the Plaintiffs/Respondents in any event.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 25TH DAY OF JUNE 2013.

H.I. ONG'UDI

J U D G E

In the presence of;

Mr. Mungai for Plaintiffs/Respondents

Njue – C/c