

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL CASE NO. 157 OF 1995

IBRAHIM NYONGESA HUSSEIN.....PLAINTIFF

VERSUS

ALI BOYI WASHIYAMBI.....DEFENDANT

RULING

This is an application for stay pending appeal under Order 42 Rule 6 (1) & (2) of the Civil Procedure Rules. The application is supported by the affidavit of the defendant/applicant and the grounds on the body of it. The plaintiff/Respondent has filed a replying affidavit to oppose the application.

I have read through both the application and the replying affidavit. The applicant has filed a notice of appeal marked as “**ABW 1**”. He has also applied and obtained copies of typed proceedings. He prays for the status quo to be maintained pending the hearing and determination of the intended appeal. The Respondent on his part wants to be allowed to enjoy the fruits of his judgment and that the applicant shall not suffer any substantial loss.

Order 42 Rule 6 (1) allows the court appealed from to grant stay of execution on sufficient cause being shown. Rule 6 (2) provides the stay should be granted if the court is satisfied that substantial loss may result to the applicant and order stay upon such terms as it may deem fit.

The Respondent was awarded 6 acres of land comprised in L.R. N. Wanga/Matungu/1391. In paragraph 6 of the replying affidavit states the decree involves paying costs and transferring 6 acres of land which according to the respondent can be recovered by the applicant if the appeal succeeds. In my view, six acres cannot be under rated to be of little value. The respondent has not asked the applicant to provide security. However I am alive to the fact that the law permits it to grant stay upon such terms as it deems just in the circumstances, including ordering for security to be provided.

The applicant has referred this court to case law of **Muga Vs. Kunga [1988] KLR 748** in holding 1 the Court of Appeal had this to say.

“The practice of the Court of Appeal in the case of land which is a sensitive issue is that parties should be allowed to come to court to have the issues involved in their dispute determined by a court of a last resort”.

In this instant, if the stay of execution is not granted, it will amount to closing the door of opportunity on the appellant to ventilate his case to a court of last resort. The court of appeal in case law *supra* held that the status quo should be maintained until the appeal was heard and determined. I find no harm if the same scenario is replicated in this case so as not to render the appeal nugatory.

This is a land case and as submitted by both parties it is emotive. It is important therefore that status quo is maintained pending determination of the appeal. There is no need for providing security since the status quo maintaining, the subject matter will have been preserved thus protecting the interest of both parties. Consequently I allow the application dated 12th June 2013 with additional clause that the status

quo be maintained pending hearing and determination of the intended appeal. Each party to bear their respective costs.

RULING DATED, SIGNED, READ AND DELIVERED in open court this 25th day of September 2013.

A. OMOLLO

JUDGE