



WALTER EDWIN OMINDE OGUTUAPPELLANT

VERSUS

DANIEL OTIENO AOYIRESPONDENT

RULING

The applicant by his notice of motion dated 20th September 2010 seeks the following reliefs:-

- 1. That the application be heard exparte in the first instance in respect of prayer 2 below.**
- 2. That the honourable court be pleased to grant stay of execution of the decree in Kisumu CMCC No. 628 of 2006 pending hearing and determination of this application.**
- 3. That the honourable court be pleased to grant stay of execution of the decree in the above suit pending the hearing and determination of the appeal herein.**
- 4. That this application be heard interparties on the 2nd day of September 2010.**
- 5. That cost of this application be provided for.**

It has been argued by the applicant in his supporting affidavit dated 20th September 2010 that he stands to suffer substantial loss if the application is not granted. It was his case that the respondent is a person of straw and if the decretal amount is paid to him he may not be in a position to pay back in the event that his appeal succeeds.

The respondent has filed his response vide the replying affidavit dated 6th October 2010. From the said affidavit it appears that the applicant had been granted orders by the lower court to deposit 2/3 of the decretal sum in a joint account and the rest to be paid to the respondent.

Order 42 Rule 6 (2) of the Civil Procedure Rules is very explicit. Stay pending appeal can only be granted if:-

- (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.**
- (b) Such security as the court orders for due performance of such decree or order as may ultimately be binding on him has been given by the applicant.**

I agree with the respondent that the applicant has had orders demanding that he pays as earlier on stated. I have also noticed that the applicant has offered his title as a security.

I don't have the benefit of the facts from the lower court for now. However, taking guidance from the provisions of Order 42 Rule 6 of the Civil Procedure Rules, I shall order that

- (a) The applicant do pay the 1/3 of the decreatal sum to the respondent within thirty (30) days from the date herein.
- (b) The applicant shall deposit the title deed for land parcel number East Gem / Jina / 1284 Yala Township with the Deputy Registrar within seven (7) days from the date herein.
- (c) A restriction is placed in the Register at Lands Office stopping the applicant from selling, charging or in any other way dealing with land parcel number East Gem / Jina / 1284 pending the hearing and determination of the appeal.
- (d) In default of orders (a), (b) and (c) above execution shall issue forthwith.
- (e) Cost of this application to the respondent.

Dated, signed and delivered at Kisumu this 29th of February 2012

H. K. CHEMITEI
JUDGE

In the presence of:

.....Advocate for Applicant

..... for Respondent

HKC/aao