



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
CIVIL APPEAL NO. 64 OF 2011

STEPHEN BOIYO MISOI.....APPLICANT

VERSUS

STANLEY WAFULA WECHULI.....RESPONDENT

RULING

The Applicant filed Notice of Motion dated 18th May 2011 under Order 42 Rule 6 of the Civil Procedure Rules seeking for orders for stay of execution from the decree of Eldoret CMCC No. 383 of 2005 pending the hearing and determination of the intended appeal.

The Applicant had initially filed a similar application in the lower court and the same was dismissed.

FACTS

The plaint filed in the subordinate court is premised on Plot No. 350 Ex-Jabali. The Applicant states that Plot No. 350 Ex-Jabali is distinct from Plot No. 281 Ex-Jabali. He avers that the 1st Appellant was in occupation of the same from 1997 to the year 2004 when he bought the same from the said 1st Appellant.

That is the orders were not granted the Respondent will proceed to execute the decree and evict the Applicant the land and he stood to suffer substantial loss due to the developments he had made thereon.

Therefore the Applicant's prayer was that stay of execution pending appeal be granted together with costs.

The Application was strongly opposed by the Respondent who submitted that the application was made in bad faith with the intention of denying the Respondent an opportunity to enjoy the fruits of his judgment.

I have perused the Memorandum of Appeal and have read the submissions of both counsel for the Applicant and Respondent.

It is trite law that the Applicant must show the following;

- (i) There has been no unreasonable delay in bringing the application.
- (ii) The intended appeal has overwhelming chances of succeeding.
- (iii) The intended appeal will be rendered nugatory if the orders sought are not granted.
- (iv) Substantial loss.

These requirements must be met before the orders may be granted.

CONCLUSION

The application in the lower court was dismissed on the 18th May, 2011 and on the same date this application was filed in the High Court.

The judgment in the lower court was made on the 2nd March, 2011 and the Memorandum of Appeal was filed within time.

I am satisfied that the Applicant filed the application timeously and without undue delay.

The appeal involves land which the Applicant avers the 1st Appellant resided thereon from 1997 and he bought the same in 2004 resides thereon and has made substantial developments thereon, and if evicted the Applicant stands to be highly prejudiced and will suffer substantial loss.

I am satisfied that the appeal raises substantial issues for determination on appeal and that if orders for stay of execution are not granted and should the Applicant be evicted from the land the Applicant will suffer substantial loss.

I find that the application has merit and hereby grant an order for stay of execution pending the hearing and determination of the appeal.

The Respondent to be granted costs of this application. This order for stay of execution shall not cover the costs awarded to the Respondent in the lower court.

Dated and delivered at Eldoret this 13Th day of February 2012.

A. MSHILA
JUDGE