



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 427 OF 1974

WAITHIRA GICHINO.....PLAINTIFF

VERSUS

KAMAU KABURU.....1ST DEFENDANT

NG'ANG'A KABURU.....2ND DEFENDANT

RULING

Before the court is a Notice of Motion application dated 1st December 2011. It seeks a stay of execution of the Ruling/Order of this court issued on 4th November 2011 until the hearing and determination of the intended appeal to the court of appeal against the said Ruling.

The application is supported by the grounds stated therein among them that if the stay is not granted as prayed it will negate the whole intention of the appeal, which, is alleged to have good chances of success.

The application is supported by affidavit of the Plaintiff dated 1st December 2011. The main argument in the affidavit is that the suit relates to a parcel of land and if the stay is not granted, the Respondents shall

subdivide the land and obtain new Title Deed and hence render the appeal nugatory.

The application is opposed. Grounds of opposition were filed in court on 14th March 2012. Among the grounds are that the appeal has no chances of success and that the present application is meant merely to further delay the matter, which has been outstanding since 1974.

I have looked at the application and also at the history of the matter. This matter has been in court since 1974 and it is understandable that the Plaintiff may want to see it end.

Order 42 Rule 6 of the Civil Procedure Rules 2010 gives the court the discretion to grant the orders sought. Order 42 6 (2) states:-

“No order for stay of execution shall be made under sub rule (1) unless –

(a) The court is satisfied that substantial loss may result to the Applicant unless the order of stay is made and that the application has been made without unreasonable delay; and

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

I am aware of the pain of litigants, and especially that of the Plaintiff, as this matter has taken far too long to be concluded. The Respondent has said that the appeal has no chances of success as the Ruling merely enforces previous orders of this court and which orders the Appellant has never appealed against. That may be so. However, at this stage, I am not duly concerned with the merits of the case for appeal. I am more concerned with the Appellant's right to appeal. In this regard I have noted that the Ruling of this court of 4th November 2011 provided a formula to apply in dividing the property among all the beneficiaries. That formula is used to adjust rights to the property. The formula is capable of injuring rights of other parties, and, although this matter has been litigated upon, the formula for subdivision has never been agreed upon. The Applicant has a right to appeal against the said formula. That is not to say that I agree with the Applicant. In fact, I do not. The peculiar nature of this case however, demands that a stay be granted to the Applicant to enable the Applicant to appeal. I say this because the parties have been litigating over the issue since 1974 and a light is now at the end of the tunnel. The intended appeal will once and for all determine the issue. Although I find it unfair to prolong this matter any further, the Applicant is entitled to appeal, and denying the Applicant the stay sought would mean that the Respondents would subdivide the land, and have new titles issued thereby divesting the Applicant of the substratum of her appeal. In the interest of justice which must operate both ways, I allow the application and grant an unconditional stay of execution of the Ruling/Order of this court issued on 4th November 2011 until the hearing and determination of the intended appeal to the Court of Appeal. I make no orders on costs.

It is so ordered.

DATED, READ AND DELIVERED AT NAIROBI

THIS 8TH DAY OF MAY 2012.

E. K. O. OGOLA

JUDGE

PRESENT:

Muriithi for the Plaintiff

Thuo H/B Nyaga for the Defendants

Teresia – Court clerk