



REPUBLIC OF KENYA

IN THE HIGH COURT

AT ELDORET

Civil Appeal 84 of 2009

PAUL KARANI:.....1ST APPELLANT

HILLARY LELEI:.....2ND APPELLANT

AND

EMILY CHEPKEMBOI:.....RESPONDENT

RULING

The respondent, **Emily Chepkemai Samoei**, by her application dated 27th May, 2010, seeks one main order, namely: that the rental income accruing from the suit premises be deposited in court pending the hearing and determination of the appeal herein. The application is expressed to be brought under Order XXXIX Rule 8 (Now Order 40 Rule 8) of the Civil Procedure Rules, section 3A and 63 (e) of the Civil Procedure Act and all enabling provisions of the Law. The application is predicated on the grounds that the 2nd appellant, **Hillary Lelei**, is collecting the rent from the suit property and thereby enriching himself unjustly; that the lower court case is yet to be determined and that she stands to suffer irreparable and/or substantial loss unless the order is made. The application is supported by an affidavit sworn by the applicant. She depones, *inter alia*, that the lower court had ordered such deposit which order triggered this appeal; that such an order will prejudice none of the parties and will be in the interests of justice.

The application is opposed and there is a replying affidavit, in which it is deponed, that the 2nd respondent, **Hillary Lelei**, is the legal owner of the suit premises and has always collected the said rent without interference from anyone.

When the application came up for hearing before me on 13th March, 2012, counsel agreed to file written submissions which were in place by 8th May, 2012. I have considered the application, the affidavits filed by both parties and the submissions of counsel. Having done so, I take the following view of the matter. In an application dated 6th March, 2009, the respondent sought the same order from the lower court and the order allowing that application is the subject of this appeal. The respondents sought stay of that order pending this appeal. The learned Principal Magistrate expressed himself as follows in his ruling delivered on 27th October, 2009.

“The applicants have filed a memo of appeal. At this stage, it is not the role of this court to evaluate or assess the chances of that appeal. Having exercised, the right of appeal, and the Issue at hand being based on ownership of land, which is an emotive issue, I shall allow the application dated 25/6/2009 for stay of execution pending the hearing and determination of the appeal No. 84 of 2009 before the Eldoret High Court. I shall order that the costs of the application to follow the appeal.”

The learned Principal Magistrate therefore stayed the execution of his own order pending this appeal. The applicant would appear to be unhappy with the stay order of the Lower Court. She should therefore have applied to have the lower court order set aside under the provisions of Order XLI Rule 4 (1) of the Civil Procedure Rules then applicable. It was in the premises not open to the respondent to lodge the same application which has given rise to this appeal.

The appeal herein is challenging the decision of the lower court to the effect that rental income be deposited in Court pending hearing and determination of the case before the lower court. Allowing this application would make nonsense of the order of stay made by the lower court and may even render the appeal herein nugatory since it is the same order sought which is the subject of the appeal.

In the premises, I find no basis for allowing the application. The application is without merit and is dismissed with costs.

To expedite speedy disposal of this appeal, I direct that the appellants prepare and serve a record of appeal within thirty (30) days from the date of this ruling and thereafter seek directions of the court with dispatch.

It is so ordered.

DATED AND DELIVERED AT ELDORET

THIS 5TH DAY OF JUNE 2012.

F. AZANGALALA
JUDGE

In the presence of:-

Mr. **Achungo** holding brief for **Ochanda** for the applicant and
Ms. **Chepkurui** holding brief for **Adalo** for the Respondent.

F. AZANGALALA
JUDGE

-

5TH JUNE, 2012