



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**CIVIL CASE 75 OF 2010**

**PHILIP KIRWA LAGAT..... APPELLANT**

**V E R S U S**

**CROMWEL NDIRANGU WAITHIMA.....RESPONDENT**

**R U L I N G**

1. The Appellant's appeal herein is against an order of the lower court made on 25<sup>th</sup> May 2010 by which a preliminary objection to the suit upon the ground of lack of jurisdiction was overruled. The lower court also granted a temporary injunction pending disposal of the suit, which is also appealed against.
2. The point of jurisdiction apparently taken before the lower court (and which will be taken up in this appeal) is that the suit property, **L.R. No. 12715/502 (IR No 40213/3)**, was registered under the **Registration of Titles Act, Cap 281**, and that under **section 2** of that Act, "court" was defined as the **High Court**. The subordinate court therefore had no jurisdiction to deal with the suit before it.
3. The application now before this court is **the chamber summons dated 29<sup>th</sup> June 2010**. By it the Appellant is seeking stay of the lower court proceedings pending disposal of the appeal herein. Stay of the injunctive relief granted by the lower court is also sought.
4. The application is expressed to be brought under **Order XLI, rule 4** of the old **Civil Procedure Rules** (the **Rules**). **Section 3A** of the **Civil Procedure Act, Cap 21** is also cited.
5. The grounds for the application include -
  - (i) That the application has been made without unreasonable delay.
  - (ii) That the Respondent is abusing the temporary injunction granted him by the lower court and has commenced construction upon the suit property.
  - (iii) That the appeal has overwhelming chances of success.
  - (iv) That the Appellant is ready to abide by any condition that the court might impose.
6. There is a supporting affidavit sworn by the Appellant. It elaborates the grounds for the application.
7. The Respondent opposed the application by his replying affidavit filed on 2<sup>nd</sup> July 2010. Grounds of opposition pleaded include -

(i) That the lower court had jurisdiction.

(ii) That the application is misconceived and otherwise an abuse of the process of the court.

8. I have considered the submissions of the learned counsels appearing.

9. Obviously the merits or otherwise of the appeal now before court cannot be determined in the present ruling. But it is proper for the court to observe that the appeal does raise, *prima facie*, a serious issue of jurisdiction. That issue will be properly canvassed at the hearing of the appeal. For now it suffices to say that the appeal is not frivolous.

10. Regarding stay of the lower court proceedings pending disposal of the appeal, it is really a matter of balance of convenience. I note that in his suit the Respondent (as plaintiff) seeks a declaration that he was a “*bona fide* purchaser and owner” of the suit land. He also seeks a permanent injunction to restrain the Appellant (as defendant) from dealing or interfering with the property. On his part the Appellant pleaded that he is the owner of the suit property having duly purchased the same.

11. It would be a pity if the suit proceeded to hearing before the lower court only for it to turn out in the appeal that the court lacked jurisdiction to hear and determine it. The parties would thereby have been involved in unnecessary expense in terms of money and time.

12. The better option would be to stay the lower court proceedings pending disposal of the appeal so that thereafter the parties can proceed one way or the other upon a sure footing of jurisdiction.

13. I will therefore grant the prayer for stay of the lower court proceedings pending disposal of the appeal.

14. Regarding stay of the temporary injunction granted by the lower court, it appears that the application in that regard is made upon the confident expectation that the appeal must be allowed. But then, the appeal cannot be determined upon the present application.

15. The interests of justice dictate that the temporary injunction granted by the lower court do remain in place pending disposal of the appeal. I will therefore refuse the prayer to stay the temporary injunction

16. Costs of the application shall be in the appeal. Those will be the orders of the court.

17. The delay in preparation of this ruling is deeply regretted. The same was caused by my poor state of health the last few years. But I thank God that I am much better now.

**DATED AT NAIROBI THIS 6<sup>TH</sup> DAY OF AUGUST 2012**

**H.P.G. WAWERU**

**JUDGE**

**COUNTERSIGNED AND DELIVERED AT MACHAKOS THIS 28<sup>TH</sup> DAY**

**OF SEPTEMBER 2012**

**ASIKE-MAKHANDIA**

.....

**JUDGE**