



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

H.C.C.A. 104 OF 1999

STEPHEN KINGUTIA.....1ST APPELLANT
JAMES MUTURIA.....2ND APPELLANT
NAHSON M'LAIBUTA.....3RD APPELLANT

VERSUS

SEVERINA NCULUBI.....OBJECTOR

LESIT J.

R U L I N G

The application is a Notice of Motion brought under O.Lr.1, O.XLIr.4 (1) of the CPR. It seeks one order:

2. That this Hon. Court be pleased to grant stay of execution herein and by extension in Maua S.R.M.C.C. No. 85 of 1997 pending the hearing and determination of Nyeri Court of Appeal Civil Appeal No. 221 of 2010.

The application is premised on seven grounds on the face of the application namely.

- 1. This appeals judgment was delivered on 2/7/2010.**
- 2. The applicants lost the same.**
- 3. Now there is an appeal No. 221 of 2010 to Nyeri Court of appeal.**
- 4. Now the respondents have gone to the disputed parcel ready to subdivide it.**
- 5. She was at site on 18/11/2010 but was subdued by the provincial administration**
- 6. That now it is just for a stay of execution to be issued to protect the suit land from alienation until this Nyeri Appeal is heard and finalized.**

7. **That the decree is for transfer of land hence no need for security.**

The application is supported by supporting affidavit sworn by the 1st applicant/appellant of even date. In brief the 1st applicant deposes that he has filed an appeal to the court of appeal against the decision of this courts dismissing his appeal delivered on 2nd July 2010. The 1st Applicant deposes further that he and his family lives on the suit land and that if the judgment of this court is not stayed he may be rendered homeless.

The application is opposed. The respondent has filed a replying affidavit dated 1st December 2010. I have considered the contents of that affidavit. I have also considered submissions by Mr. Ogoti for the applicant and Mr. Onjwang for the Respondent. OXLI r 4(1) of CPR gives the conditions an applicant should establish before a stay of execution pending appeal can be granted. The appellant was seeking a stay of execution “**for sufficient cause**” but no order should be made unless the conditions as set out in O.41 r 4(2) are met.

In a discretionary matter like this the court should take into account all the surrounding circumstances including merits of the intended appeal. But I think the position of a judge of the High Court whose order or decree is being appealed against on an application for stay of execution under O.41 r 4 is different from the Court of Appeal dealing with a similar application under Rule 5(2) (b) of the Court of Appeal rules. So far as the High Court is concerned an unsuccessful party has an undoubted right to appeal dealing with a similar application under Rule 5(2) (b) of the Court of Appeal Rules. So far as the High Court is concerned on unsuccessful party has an undoubted right to appeal and Order 41 r 4 assumes that the decree holder must always recognize that decree or order may be reversed. In **Erinford Properties vs Cheshire County Council (1974) 2 E.R 448 Megry J said at p.454.**

No stay because there is a specific finding in the CM’s judgment, which was upheld by the court in its appellant, has never been in occupation or possession of the suit property. The respondent is in occupation and possession. In that regard the applicant has not shown what loss he stands to suffer if the stay sought is not granted. The appellant was seeking stay of execution without specifying the execution of what he wished stayed.

The appellant specifically stated in grounds for the appellant that he was not offering any security for the stay sought. That goes against the very will he cited in support of this application.

I find that the applicant’s application has no merit whatsoever and I consequently dismiss it.

Dated signed and delivered at Meru this 17th Day of February 2011.

LESIT J.
JUDGE

17TH February 2010

Coram:

Lesiit J.....Judge

Kirimi.....Court clerk

Mr.For Petitioner

Mr.....For Objector

Ruling was read, signed and delivered in open court this 17th February 2011.

LESIIT J.
JUDGE

Dated Signed and delivered at Meru this 17th day of February 2011

LESIIT, J
JUDGE