REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL CASE NO. 31 OF 2002

LAWRENCE SESE MOSIGISI ……..……. PLAINTIFF

-VERSUS-

SETTLEMENT FUND TRUSTEES ……..…..1st DEFENDANT
DANIEL NYANGOKA MOTURI ……..……..……2nd DEFENDANT

RULING

By a further amended plaint filed in court on 25th May, 2009, the plaintiff prayed for judgment against the defendants jointly and severally for:-

"a. An order declaring the temporarily (sic) registry Map index No. 4/13/6 drawn in the year 1985 is wrongful and/or unjustified or erroneous and the same be rectified and/or corrected to represent the true boundary marks on the ground between the plaintiff's parcels of Land Nos. Kisii/Gesima Settlement Scheme/362, 363 and 364 and the 2nd defendants (sic) parcel of land No. Kisii/Gesima Settlement Scheme/362, 363 and 364 and the 2nd defendants (sic) parcel of land No. Kisii/Gesima Settlement Scheme/61 as per the registry Index map No. TPA/77/168 dated 22/12/1964 by the director of survey.

b. The transfer of 4.5 acres Tea Plantation from the plaintiff to the second defendant by the first defendant is unjustified, unlawful, erroneous and by mistake and the same should be transferred back to the plaintiff the lawful owner.

c. The 2nd defendant be restrained by way of a permanent injunction by himself, his agents, servants and/or employees from interfering with the suit land in otherwise howsoever manner.

d. The second defendant be compelled to sign all the necessary (sic) document to effect transfer to the plaintiff and in default the executive officer of this Honourable court do sign all the relevant documents and do all manner of things to effect transfer.

e. General damages.

f. Costs.

h. Any other relief this court may deem fit and just to grant".

The suit was informed by the fact that in or about 1965, the plaintiff purchased from the 1st defendant

land parcel measuring 187 acres being **Kisii/Gesima Settlement/60** and took possession of the same immediately thereafter. On the other hand the 2nd defendant similarly purchased from the 1st defendant an adjoining parcel of land which comprised 5 acres of tea plantation bordering his own tea plantation. Apparently the two parcels of land were captured in the registry index map dated 22nd December, 1964. However the 1st defendant purported to amend the said map later by drawing another registry index map in or about 1985 which erroneously appropriated part of the plaintiff's land to appear as though it belonged to the 2nd defendant. In or about 1996, the plaintiff caused his said parcel of land to be subdivided into three portions. In the course of the exercise he discovered that the registry index map drawn in 1985 had erroneously appropriated his 4.5 acres of his land to the 2nd defendant who had proceeded to obtain a title deed and was now laying claim over the same, hence the suit.

The 1st defendant in its defence denied that the 2nd defendant had only purchased from it 5 acres. Instead it averred that infact the 2nd defendant had actually purchased 7.5 hectares. It also denied that the two parcels of land had ever been represented in the registry index map. What the plaintiff had referred to as registry index map was a mere sketch map and it was not intended to show boundaries and even if it was so intended, it clearly showed that the disputed land parcel belonged to the 2nd defendant. Finally it averred that the true position was that the registry index map of 1985 was the final map drawn after all factors had been taken into account, all of which indicated that the disputed parcel of land was part of the 2nd defendant's land and not the plaintiff's.

In his defence and counterclaim, the 2nd defendant admitted that the plaintiff was a neighbour but denied that he had purchased only 5 acres. He stated that his land measured 18.75 acres by virtue of the title deed in his possession. He added that the plaintiff, who was the area chief, had severally trespassed upon his land hence his counterclaim for a permanent injunction against him.

Musinga J. heard the suit and by a judgment dated and delivered on 16th September, 2010 dismissed the plaintiff's suit with costs but entered judgment for the 2nd defendant on the counterclaim with costs as well.

The plaintiff is apparently unhappy with the judgment and decree aforesaid. He is intent on moving to the highest court in the land, the Court of Appeal to challenge the said decision. He has evidenced such desire by filing a Notice of appeal on 16th September, 2010 and on the same day, applying for certified typed copies of the judgment and proceedings. The plaintiff is however apprehensive that his effort might come to nought or may be derailed if an order of stay of execution of the said judgment and decree issued on 16th September, 2010 pending the hearing and final determination of the intended appeal to the Court of Appeal is not made. He feels strongly that the 2nd defendant may dispose off the suit premises, transfer it to another person and thereby render the entire appeal nugatory. Such an action too, may result into substantial loss, as the plaintiff is not a person of any known means to adequately compensate the plaintiff in the event that the suit premises is disposed of, and his intended appeal succeeds.

On 24th September, 2010, the plaintiff lodged an application to this court seeking to stay the execution of the judgment and decree aforesaid pending the hearing and final determination of the intended appeal to the Court of Appeal. The grounds he advanced in support of the application are as already set out herein above. Suffice to add that he was ready, willing and able to comply with any directive that this court may issue as regards security and that he had made the application without unreasonable delay.

The affidavit in support of the application was more or less along the same lines as the grounds advanced by the plaintiff in support of his application. The only addition being that he had been plucking the green tea leaves from the entire suit premises since 1964 and now was apprehensive that the 2nd defendant may proceed to take out contempt proceedings if he proceeded to pick his tea before the intended appeal is heard and determined. He also deponed that he had an arguable appeal with overwhelming chances of success and that since he wished to exercise his undoubted right of appeal, the

appeal would be rendered nugatory in the event that orders preserving the ***status quo*** are not granted pending the hearing and determination of the appeal.

The application as expected was opposed. The 2nd defendant deponed that the decree had long been executed and therefore there was nothing to stay, the parcel of land in dispute was registered in his name, the allegation by the plaintiff that the intended appeal was arguable was neither here or there, the application was an abuse of the process of the court and merely intended to delay justice. The appeal if successful would not be rendered nugatory as he had no intention of selling the suit premises or at all nor did he intent to transfer the same to any other person. He had sufficient land registered in his name including the one in dispute which if the appellant succeeds in his appeal he can surrender it to him or its equivalent. Thus he had enough resources to compensate the plaintiff if he succeeded in his appeal. No substantial loss therefore would be caused to the plaintiff if stay sought was denied.

When the application came up for interpartes hearing before me on 16th November, 2010, counsel for both the plaintiff and defendants opted to canvass the same by way of written submissions. Subsequently they filed and exchanged the written submissions which I have carefully read and considered.

Granting of stay of execution pending appeal is governed by order 42 rule 6 (2) of the **Civil Procedure Rules** and the questions to be interrogated are whether substantial loss may result unless the stay is granted, whether the application is made without undue delay and whether the applicant has given security. See **Mukuma –vs- Abuoga (1988) KLR 645**. It is thus clear that the issue of the appeal being rendered nugatory is not a consideration in an application for stay of execution under Order 42 rule 6 (2) of the **Civil Procedure Rules**. It is however a consideration by the Court of Appeal when considering a similar application under rule 5 (2) (b) of the Court of Appeal rules. But at the end of the day whether or not to grant a stay of execution of a court decree is an exercise in discretion and such discretion of course being judicial must not be exercised whimsically or capriciously but on facts and sound legal principles.

The 2nd defendant has deponed in his replying affidavit that the decree has been executed and he has already appropriated the disputed parcel of land to himself by fencing it off. He reiterated the same position in his written submissions. The plaintiff has not rebutted that contention either by any affidavit or in his submissions. That being the case, the contention by the 2nd defendant must then be taken to be true having not been countered by the plaintiff in any manner. If the decree has been executed, then there is nothing to stay. To issue an order of stay in the circumstances will be acting in vain, and court orders are never made or issued in vain.

Further, the plaintiff's suit was after full hearing dismissed. The suit having been dismissed what is left to be stayed. A dismissal order cannot be the subject of a stay. In other words where a suit is dismissed there is no order capable of being stayed because there is nothing that the applicant has lost as the order of dismissal simply means that the applicant stays in the situation he was in before coming to court. There can therefore be no loss whether substantial or not on the part of such an applicant. That is the situation that obtains here.

The plaintiff however appears to have anchored his application mainly on the judgment of the court over the counterclaim. He claims that the disputed suit premises measures 4.5acres of tea plantation which he has always picked since 1965 and injuncting him from such use which is the effect of the judgment of the court on the counterclaim means that the 2nd defendant may enter the same and damage the crop or leave it to go to waste, may change the nature and character of the suit premises, or sell and transfer it to another person hence put it beyond his reach, or even evict him therefrom. Finally he contends that he will loose the source of income from picking and selling the green tea leaves which will acutely affect his children and grand children that depend on it.

To my mind the above reasons are purely speculative. There is no evidence or basis tendered for such speculation. There is no evidence that the plaintiff planted the tea bushes he now claims to have been picking since 1965. If anything it would appear both the plaintiff and 2nd defendant bought, if at all, the

disputed suit premises with the tea bushes thereon. Therefore the plaintiff cannot claim superior right to the same as opposed to the 2nd defendant. It is conceded by the plaintiff that the 2nd defendant is at the moment the registered owner of the suit premises. That being the case, I cannot see why he should be denied the use of his suit premises and the benefits accruing therefrom. In any event, he has already appropriated the parcel of the land to himself in execution of the decree. Ordinarily, tea leaves once plucked are taken to the tea factory for processing. The tea factory keeps records of such deliveries. Therefore it will not be difficult for the plaintiff in the event of his appeal succeeding to demand from the 2nd defendant the amount equivalent to what he had received in payments from the tea factory for the green tea leaves delivered from the disputed portion using such records.

The 2nd defendant has deponed and which fact has again not been discounted by the plaintiff that he has sufficient land registered in his name including the one in dispute which he can surrender to the plaintiff in the event that he succeeds in the appeal. He has also deponed that he has enough resources to compensate the plaintiff for his loss if at all. These depositions have not been challenged and or controverted by the plaintiff. These depositions clearly answers the plaintiff's assertion that the 2nd defendant is not a person of any known means to adequately compensate him in the event that the appeal succeeds.

On the whole I am not satisfied that substantial loss may result to the plaintiff unless the order of stay of execution is not granted. The land is currently registered in the name of the 2nd defendant and should the plaintiff succeed in the appeal, it will simply revert to him with the tea bushes. The land having been registered in the name of the 2nd defendant, he is entitled to use it and enjoy the benefits accruing therefrom including the tea bushes. Having reached the above conclusion, I do not think that other issues such as unreasonable delay is mounting the application, security and or sufficient cause falls for determination for as stated in the case of **Mukuma** (supra), ***"…but the issue of substantial loss is the cornerstone of both jurisdictions …".***

The application lacks merit and is accordingly dismissed with costs to the 2nd defendant.

Ruling dated, signed and **delivered** at Kisii this 31st day of March, 2011.

ASIKE-MAKHANDIA
JUDGE