



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 48 OF 2010

MPENZWE NGOBA MTANA

BIJUMA NGOBA MTANA (*suing as the administrators/legal representatives of the Estate of the late*

DON MAURICE

MUTANA)APPELLANTS

**VERSUS
ZUHURA**

**SHABANRESPONDE
NT**

RULING

The Notice of Motion dated 1st November 2010 is made under Order XLI Rule 4(1) and 5 and Order L Rule 1 Civil procedure Rules and section 3A of the Civil Procedure Act, seeking that pending the hearing and determination of the appeal, this court do issue orders of stay of execution of the orders made on 21st September 2010 by the Provincial Lands Appeals Tribunal at Mombasa. It is premised on grounds that:

- (1) The appellants have timeously appealed against the decision
- (2) The appellants have an arguable appeal which raises serious points of law with a likelihood of success.
- (3) Unless stay of execution is granted then;

- (a) The deceased's family shall be evicted from the land in issue and the title deed in favour of the deceased can be cancelled further to the demolition of the building thereat.
- (b) Respondent will be at liberty to dispose, alienate and/or sell the suit property any time before determination of this appeal
- (c) In the event that execution is allowed to proceed and the appeal ultimately succeeds, restitution of the suit premises by the appellants shall not be possible so appellants will suffer irreparable loss and damage.
- (4) Appellants are willing to provide such security as this court may deem just to order. The application is supported by the affidavit sworn by Mpenzwe Ngoba Mtana (1st appellant) who is one of the legal representatives of the estate of Don Maurice Mutana in which she depones that before his death, the deceased had a pending land dispute at the Provincial Land Appeals Tribunal, Mombasa which was pending the decision before the tribunal.

On 21st September 2010, the tribunal delivered its decision dismissing the deceased's appeal. The deceased was dissatisfied with that decision and filed an appeal before the High Court. The decision effectively conferred ownership of parcel TEZO/ROKA/977 to the respondent despite the same being a registered land. The deceased and his family had all along lived on that land, developed it fully and now they face eviction and the buildings are likely to be pulled down. Once that happens then the appeal would be rendered nugatory as the respondent will proceed, to exercise ownership over the said land and may even dispose, alienate and/or sell the property, and the deceased's lawful title shall be overtaken by events so it is necessary that the status quo be maintained pending hearing and determination of the appeal, otherwise there will be tremendous damage.

The respondent has filed a replying affidavit in opposition to the application. Basically her contention is that there have been previous attempts by appellants to stay the orders in vain, and that appellants are simply buying time so that respondent does not enjoy fruits of the orders. She gives a history of the life of this matter, right from the District Land Disputes Tribunal, to the Provincial Land Appeals Tribunal to demonstrate that appellant has been on a losing trend and is an indicator that the application is unmerited. Under Order XLI rule 4 (2);

“No order of stay of execution shall be made unless

(a) The court is satisfied that substantial loss may result to the applicant unless the order is made, and the application has been made without unreasonable delay.”

The orders sought to be stayed were made on 21st September 2010, and on 1st November 2010, this application was made.

That was just a lapse of two months and I wouldn't consider that to be an inordinately long period. Appellant has annexed a certificate of title to demonstrate that he is the registered owner of the property and that he and his family have lived on the land and developed, yet if stay is not granted then they will be thrown out of the property and demolition may most likely follow.

The contested decision stated as follows;

“...in accordance to customary laws has awarded the Disputed Land TEZO/ROKA/977 to the Respondent ZUHURA SHABAN, the rightful heir and owner of the plot”

It then follows that the appellant's fears about the irreparable loss being suffered is real and in fact were

the appeal to succeed then that execution will place appellant at a disadvantage of having to undergo fresh expenses to reconstruct and it may not be economically fair and appellant shall suffer irreparably to allow such a scenario. I am persuaded that it is desirable that status quo be maintained by issuing orders of stay of execution to remain in force until the appeal is heard and determined.

Delivered and dated this **24th** day of **March 2011** at Malindi.

H. A. Omondi
JUDGE

Mr. Mrima present for applicant
No appearance for respondent