



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**MISCELLANEOUS CIVIL APPLICATION NO. 48 'A' OF 2003**

**REPUBLIC.....A**  
**APPLICANT**

**VERSUS**

**THE CHAIRMAN LAND DISPUTES TRIBUNAL UASIN GISHU  
DIVISION.....RESPONDENT**

**AND**

**JOHN KEAH**  
**CHERWON.....INTERESTED PARTY**

**MONICA MALEL AND HEZRON**  
**KOSGEL.....EX-PARTE**

**RULING**

This Notice of Motion has been brought under order XLI Rule 4 of the Civil Procedure Rules and Sections 3 and 3A of the Civil Procedure Act for primarily stay of execution pending the hearing and

determination of an intended appeal against a decision of this court delivered on 17<sup>th</sup> March 2007. The application is based on the following grounds:

- 1) ***That a ruling was delivered on 23<sup>rd</sup> October, 2009 dismissing the applicant's application for leave to file an appeal out of time.***
- 2) ***That the stay which was granted by this court on 6<sup>th</sup> July, 2009 has now lapsed in view of the ruling of the Court of Appeal.***
- 3) ***That in view of ground 2 above, the applicant has filed a reference to the full court which is now due for hearing.***
- 4) ***That currently there is no stay in force and the respondent has commenced the process of subdividing the suit land pursuant to an award made in Eldoret Chief Magistrate's Court CMCC Award No. 66 of 2002.***
- 5) ***That the applicant is in possession, occupation and or control of the entire suit land.***
- 6) ***That the applicant is willing to comply with the conditions set by the court for granting of stay pending the determination of the intended appeal.***
- 7) ***That in view of the foregoing, the applicant had earlier deposited costs of Kshs. 65,000/- in a joint interest earning account as ordered on 6<sup>th</sup> July, 2007.***
- 8) ***That the said costs are still in the said account.***
- 9) ***That this application has been made promptly, in good faith and in the interest of justice.***

The applicant further relies on her affidavit sworn on 14<sup>th</sup> December, 2009 and 22<sup>nd</sup> January, 2010. The same is an elaboration of the above grounds. Annexed to the affidavit are several exhibits including the judgment intended to be appealed against, a Notice of Appeal, a ruling on an earlier application for stay and a ruling by a single judge of appeal delivered on 23<sup>rd</sup> October, 2009.

The application is opposed on the basis of a replying affidavit sworn by the interested party. It is deponed in the said affidavit, among other things, that the interested party is in possession of the portion awarded him by the tribunal and he should be allowed to enjoy the same. That position is denied by the applicant in her supplementary affidavit sworn on 22<sup>nd</sup> January, 2010.

The application was canvassed before me on 1<sup>st</sup> March, 2011 when counsel reiterated the averments in their respective clients' affidavits.

There are two important considerations in an application for stay of execution. The first one is that a litigant if successful should not be deprived of the fruits of a judgment in his favour without just cause and the second is that if a party is exercising his undoubted right of appeal, the court should ensure that the appeal if successful is not rendered nugatory. These two considerations are implied in order XLI rule

4 of the Civil Procedure Rules. Under the rule, the court may order a stay for a sufficient cause but no order for stay may be made unless the court is satisfied that substantial loss may result to the applicant and the application has been made without unreasonable delay, and, such security as the court may order for the due performance of the ultimate decree or order has been given by the applicant.

The decision intended to be appealed against was delivered by Ibrahim J, on 12<sup>th</sup> March, 2007. The Learned Judge dismissed the applicant's Notice of Motion which sought orders of judicial review. The intended appeal is therefore against the said dismissal.

Strictly speaking such an order is not capable of being stayed. There is however more than meets the eye in this application. The dismissal of the motion seemed to pave way for execution of an award which was being challenged in the judicial review proceedings. This court is mandated to apply the overriding objective of the Civil Procedure Act which is to facilitate the just expeditious proportionate, and affordable resolution of Civil disputes. Applying the said overriding objective, I am entitled to go beyond the applicant's application and determine the mischief intended to be prevented by the judicial review proceedings. I think, the late Bauni J. granted a stay of execution on terms in his ruling dated 6<sup>th</sup> July 2007.

This application was lodged on 14<sup>th</sup> December, 2010, which was less than two months after the dismissal of the applicant's application for leave to appeal out of time by a single judge of the court of appeal. The delay in filing this application is in my view therefore not prolonged or unreasonable.

The applicant had also to establish that substantial loss may result to her unless the stay is granted. Bauni J, found that the applicant had demonstrated substantial loss. That position has not changed. With regard to security the Learned Judge ordered the same and counsel for the applicant submitted that the applicant complied and the sum ordered to be deposited is still held as ordered.

In those premises, the applicant has satisfied the requirements of order XLI Rule 4 of the Civil Procedure Rules.

In the result I allow the application in the terms ordered by Bauni J. The stay will be in effect for a further 90 days from the date hereof. Each party has liberty to apply.

Costs of this application will be borne by the applicant.

Orders accordingly.

**DATED AND DELIVERED AT ELDORET THIS 22<sup>ND</sup> DAY OF MARCH 2011.**

**F. AZANGALALA**

**JUDGE**

**22/3/2011**

Read in the presence of Mr. Okoth for the applicant, Mr. Barasa H/B for Mr. Omwenga and Mr. Ombima H/B for Mr. Chemitei.

**F. AZANGALALA**

**JUDGE**

22/3/2011