



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
CIVIL APPEAL NO. 248 OF 2010

MARTIN SHIKUKU & OTHERS APPLICANTS

VERSUS

REV. SIMON OBAYO RESPONDENT

RULING

The application dated 20th December 2010 is consensually for an order of stay of execution of the ruling and Order in Award Case No. 18 of 2007 at the Eldoret chief Magistrate's Court delivered on 15th November 2010. The application is made pursuant to the provisions of Order 41 Rule 4 (1) and (2) and Order 50 Rule 1 of the Civil Procedure Rules (As it was then) and S. 3A and 63E of the Civil Procedure Act.

Under the said Order 41 Rule 4 (i) no appeal or second appeal shall operate as a stay of execution or proceedings under a decree or Order appealed from except in so far as the Court appealed from may order but, the Court appealed from may for sufficient cause order stay of execution of such decree or Order.

Rule 4 (2) of the same Order 41 set out the conditions for the grant of stay of execution in that the Court must be satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay. The applicant is also required to give such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him.

With regard to the first condition and the most important, the disputed order was made on 15th November 2010 while the present application was filed on 20th December 2010. Therefore, there was no inordinate delay in making the application.

On substantial loss, the applicants fear that they will be rendered homeless, and destitute on that land if stay is not granted. They say that the subordinate Court issued an eviction order on 15th July 2010 to have them forcefully evicted from the land.

The said order is the applicant's annexure marked "MSW 2". It refers to a land parcel No. **SOY/SOY BLOCK 10 (NAVILLUS) 2182** which according to the applicants does not exist and what exists is parcel No. **SOY/SOY BLOCK 10 (NAVILLUS) 51** occupied by the squatters and workers of E.A.T.E.C.

In a replying affidavit dated 3rd February 2011, the respondent contends that land parcel No. **SOY/SOY BLOCK 10 (NAVILLUS) 2182** is indeed in existent. Annexure marked "RVS.1" is the title deed in respect thereof. The respondent also contends that the applicants were successfully evicted on 24th August 2010 but rushed to Curt to obtain a temporary stay of execution Order on 20th August 2010. The stay order was dismissed on 15th November 2010 and on the 14th December 2010, the applicants were re-evicted.

It is the respondent's contention that there is nothing to stay as the decree was fully executed but the applicants misled this Court and were granted a stay order after which they returned to the disputed land and stated constructing structures.

From all the foregoing, the Court may decipher that there is a serious dispute as to the identity of the disputed land and that prior to the first eviction of the applicants on 24th August 2010 there was already a stay order graced by the subordinate Court on 20th May 2010.

Nonetheless, the stay order was dismissed on 15th November 2010 and as a result, the applicants lodged an appeal and obtained a second order of stay from this Court. Although the respondent says that there is nothing to stay, he says that the applicants have since returned to the disputed land and commenced the construction of structures thereon.

The respondent says that the applicants are in abuse of the Court process as they used the second stay order to return to the land. If that is so, then the respondent also abused the Court process by evicting the applicants from the land on the 24th August 2010 despite the existence of a valid Court order issued on 20/8/10 staying the eviction. Further, according to the applicants, the respondent evicted them again on 29th December 2010 when he knew that there was a second stay order issued by this Court.

The long and short of all these is that there is something to be stayed and that is the imminent eviction of the applicants from the disputed.

If the applicants are evicted from the disputed land and at the end of the day it is determined on appeal that the subordinate Court was wrong in arriving at its decision and that the eviction was wrongful, the applicants would have suffered substantial loss including loss of property and habitat.

In that regard, this Court, even without going into the issue of security, is satisfied that there is good cause to grant stay pending appeal.

This application is therefore granted in terms of prayer (d) with costs to the applicants.

Ordered accordingly.

J. R. KARANJA
JUDGE

[Read and signed this 14th day of April 2011 in the presence of applicants and Mr. Songok holding brief for Respondent]