REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL CASE NO. 139 OF 2009

FLORENCE NYABOKE MACHANI Suing as personal representative of the late

NAFTAL MAKHANI AMOSI (Deceased)..PLAINTIFF

-VERSUS-

MOGERE AMOS OMBUI..1st DEFENDANT

SIMON TENGERI MOGERE ....2nd DEFENDANT

NELSON OMWENGA NYAKUNDI ....3rd DEFENDANT

RULING

Vide a Notice of Motion dated 2nd November, 2010 and filed in court on the following day, **Florence Nyaboke Machani**, **(*"the applicant"*)** sought as against, **Mogere Amos Ombui, Simon Tengeri Mogere and Nelson Omwenga Nyakundi**, **(*"the respondents"*)** interlia an order of stay of execution of the judgment and decree of this court dated 29th October, 2010 pending the hearing and determination of the intended appeal. The applicant also prayed that the costs of the application be provided for.

The application was expressed to be brought pursuant to orders XLI rule 4, L rule 1 of the **Civil Procedure Rules** as they were then and section 63(e) of the **Civil Procedure Act** and **all other enabling provisions of law.**

The grounds in support of the application were that the intended appeal was arguable with high probability of success, the 1st respondent and 3rd respondent transferred the entire suit land to the 2nd respondent while the suit was pending and the applicant is apprehensive that the 2nd respondent now intends to sale a further portion of the same land to another 3rd party which act will further complicate the matter and put the suit land beyond the reach of the applicant, that the appeal would be rendered nugatory

in the event that stay of execution is not granted, the application had been made without unreasonable or inordinate delay, substantial loss will definitely result to the applicant unless the order of stay of execution or status quo is granted and that the application ought to be granted in the interest of equity and substantive justice.

In support of the application, the applicant swore that on 29th October, 2010, judgment herein was delivered in favour of the respondents when her claim was dismissed. Being aggrieved and dissatisfied with the judgment, she instructed her lawyers to mount an appeal. They have commenced the process by filing Notice of Appeal and have applied for certified copies of the judgment and proceedings. She is convinced that the intended appeal has overwhelming chances of success. The 1st respondent transferred the entire suit land to the 2nd and 3rd respondents during the pending of the suit in this court. The 2nd respondent is now bent on disposing of a bigger portion thereof putting it beyond her reach in the event that her appeal succeeds hence she stands to suffer irreparable loss and damage unless an order of status quo is given. She is further apprehensive that the respondents may change the nature and character of the suit land in effect rendering the appeal nugatory. She was ready and willing to comply with any order of the court regarding security including giving a written undertaking as to damages.

The application was opposed. In a replying affidavit dated and filed in court on 14th January, 2011, the 2nd respondent on his own behalf and on behalf of the other respondents deponed where relevant that the Order of dismissal of the suit was incapable of execution, the intended appeal had no overwhelming chances of success, the proposition that they intended to dispose off the property was neither here or there and finally that the application was anchored on non-existent provisions of law.

On 17th January, 2011, when the application came before me for interpartes hearing, **Mr. Bosire** and **Mr. Okenye** respectively, learned counsels for the applicant and respondent agreed to canvass the application by way of written submissions. Those submissions were subsequently filed and exchanged. I have carefully read and considered them.

Having carefully considered the application, rival affidavits and the annextures thereto, written submissions and the law, I wish to observe that in this kind of application, it is trite law that the applicant must fulfill the following conditions as now set out in order 42 rule 6 of the **Civil Procedure Rules**. Actually, the applicant ought to have made the application under these provisions of the law and not under Order XLI rule 4 which is no longer in existence. I believe this is what the respondents are referring to when they state that the application was grounded on non-existent provisions of the law. However it is procedural irregularity which can be ignored pursuant to the overriding objective captured in sections 1A and B of the **Civil procedure Act**. Anyhow, in order to succeed in this sort of application;

- **The applicant must establish a sufficient cause;**
- **The court must be satisfied that substantial loss would ensue from a refusal to grant a stay;**
- **The need for the applicant to furnish security and that;**
- **The application must be made without unreasonable delay.**

It is not therefore that the applicant must show that the intended appeal is arguable with high chances of success or that the appeal will be rendered nugatory if stay is refused as the applicant has argued in this

application. Those considerations lie with the Court of Appeal when pondering over similar application under rule 5 (2) (b) of the **Court of Appeal rules**. This comes out clearly in the case of **Mukuna –vs- Abuoga (1988) KLR 645**. To the extent therefore that the applicant buttressed her application with authorities of the Court of Appeal under the aforesaid rule, they are irrelevant.

However, it is acknowledged that substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo when a party is exercising her undoubted right of appeal.

The applicant has evidenced her intention to appeal by filing a Notice of Appeal in the Court of Appeal. This is as good as having lodged the appeal itself. Thus she has established sufficient cause why the application should be granted. However can it be said that the applicant shall suffer substantial loss if the application is refused? I do not think so. Her fear or apprehension is that the 2nd respondent intents to sell further a portion of the suit premises to a 3rd party which act will complicate the matter in the event that she succeeds in the appeal. The suit premises too will have gone beyond her reach in those circumstances. To my mind, this is pure speculation. There is no credible evidence tendered by the applicant to show that the 2nd respondent is bent on doing what she alleges or claims. Courts of law do not act on speculation. This court cannot be bound by the previous acts of the 1st respondent to condemn the 2nd respondent.

The applicant's other apprehension is that unless the order of stay is granted, the respondents may change the nature and character of the land by disposing it off. This is again pure speculation. There is no evidence to buttress such unfounded fear. That being the case no substantial loss has been demonstrated by the applicant to my satisfaction to warrant the grant of stay.

Above all, the applicant's suit ended up in a dismissal. A negative order of dismissal of a suit cannot be the subject of an order for stay. It is trite law. 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. The refusal simply means that the applicant stays in the situation she was in before coming to court. See for instance **Venture Capital and Credit Ltd –vs- Consolidated Bank of Kenya Ltd**; **Civil Application No. Nai 349 of 2003 (UR)**, **Francis Kabaa –vs- Nancy Wambui & Anor**, **Civil Application Number Nai 298 of 1996 (UR)** and **Bavaria Hotel Management Ltd –vs- Gidoomal & Others**, **Nai HCCC No. 1736 of 1998 (UR)**.

Having arrived at the above conclusions in respect of the first two conditions for granting stay of execution pending appeal, I do not think that I need to consider the need for the applicant to furnish security or that the application has been made without undue and unreasonable delay. The upshot of all the foregoing is that the application lacks merit and is accordingly dismissed with costs to the respondents.

Ruling dated, signed and **delivered** at Kisii this 8th day of April, 2011.

ASIKE-MAKHANDIA

JUDGE