



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KISII**  
**CIVIL SUIT NO. 211 OF 2002 (OS)**

**MORAA NDEGE.....APPLICANT**

**-VERSUS-**

**MOENGE MOENGE.....RESPONDENT**

**RULING**

Vide a Notice of Motion dated 14<sup>th</sup> October, 2010 and filed in court in the even date, **Moraa Ndege, “the applicant”** sought as against, **Moenge Moenge, “the respondent”** interlia an order of stay of execution of the judgment and decree of this court dated 30<sup>th</sup> September, 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, section 3A 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 applicant stood to suffer substantial loss unless the stay is granted, 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 and that the applicant had already filed a Notice of Appeal.

In support of the application, the applicant swore that on 30<sup>th</sup> September, 2010, judgment was delivered in favour of the respondent when her claim was dismissed. On 2<sup>nd</sup> October, 2010 at about 9.00a.m O'clock the respondent's sons in the company of other people whilst armed with pangas and rungu descended on the suit premises and destroyed the boundary features which had been in existence for a period in excess of more than 40 years. They had now threatened to evict her immediately and forcefully from the suit premises. Unless therefore a stay of execution of the decree is granted the respondent was bound to carry through her threats. The applicant was aggrieved by the judgment and decree of the court and wishes to appeal against the same. Indeed she had already lodged a Notice of Appeal to that effect. She was convinced that the intended appeal had overwhelming chances of success. She was however apprehensive that the respondent could change the nature and character of the suit premises in

the event that the judgment and decree is enforced. She may dispose off the suit premises, hence putting it beyond her reach thereby rendering the intended appeal nugatory. She was ready and willing to comply with any order of the court regarding security including an undertaking as to damages.

The application was opposed. In a replying affidavit dated and filed in court on 29<sup>th</sup> November, 2010, the respondent deponed where relevant that the intended appeal had no chances of success given the evidence on record. She denied that her sons or any other persons had destroyed the boundary as alleged by the applicant.

On 30<sup>th</sup> November, 2010, when the application came before me for interpartes hearing, **Mr. Bosire** and **Mr. Momanyi** 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 annexures thereto, written submissions and the law, I wish to make the following observations; 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**:-

- **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 urged. Those considerations lie in the Court of Appeal when considering a 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. From the proceedings and judgment of this court which I have read and considered and which sparked this application, the dispute really is one of a boundary. The applicant claims to be entitled by way of adverse possession to a portion of undivided share measuring 0.7 hectares out of land parcel **Mugirango/Bonyamatuta/525** registered in the name of the respondent. That parcel of land measures 5.8 hectares. Essentially her claim was that the respondent

annexed into her parcel of land aforesaid 0.7 hectares of her land. The error was reported to the surveyor but has never been corrected. On the other hand, the respondent's case is that the issue had been the subject of several court proceedings and was thus *res judicata*. This court upheld the position advanced by the respondent as aforesaid. In these set of circumstances, I do not see the substantial loss that the applicant will suffer if the application is denied. All that the applicant complains of is that the respondent is bent on evicting her from the suit premises. However, from her supporting affidavit and written submissions it is not clear whether she has put up residential premises in that portion of land. From the look of things though, she has not. All that the respondent is doing is to mark the boundary. In the event that she succeeds in her intended appeal, the boundary will be realigned in accordance with the Court of Appeal orders. Perhaps if she had her house on the portion of the land in dispute and she was being compelled to pull it down the same and relocate elsewhere, I would perhaps have been persuaded that a case of substantial loss would have been made out.

The applicant's apprehension is that unless the order of stay is granted, the respondent may change the nature and character of the land by disposing it off. This is pure speculation. There is no evidence to buttress such unfounded fear. The applicant too states that she has been in occupation and use of the land for more than 40 years and have planted thereon mature trees, maize, napier grass and potatoes. This may well be so. However, it is not the kind of loss that can be termed as substantial. This is a loss that can be computed and the applicant adequately compensated if need be.

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 of 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 because the refusal simply means that the applicant stays in the situation he 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 other conditions such as, the requirement 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 respondent.

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

**ASIKE-MAKHANDIA**

**JUDGE**