



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 10 OF 2008

BETWEEN

CLEMENT ARAP RONO }
NYOKOSEI TARUS }APPELLANTS
MISS LUCY }
P.A.G CHURCH KAPSARET }

AND

ELISHA CHUMO }
DAVID RONO }RESPONDENTS
JOSEPH METTO }

*(Being an appeal from the decision of the resident Magistrate Hon. A. B. Mong'are
dated 28th January, 2008 in Eldoret CMCC No. 516 of 2005)*

RULING

Before me is an application by way of Chamber Summons dated 13th October, 2009, by the respondents who seek the following main orders of the court that:

(a) ***The appellants be ordered to deposit the sum of Kshs. 660,000/- in a joint interest earning account as security for both costs of the appeal and the purchase price in respect of the suit land.***

(b) ***The appellants be restrained from undertaking any permanent developments, construction, selling, alienating or in any other manner interfering with the status of the suit land.***

(c) ***In default of the appellant depositing such security as per clause (a) above the appeal herein be struck out with costs to the respondents.***

(d) ***The court be pleased to order that the parent suit, Eldoret CMCC NO. 516 of 2005, be set down for defence hearing on priority basis.***

The respondents have invoked the provisions of Order XLI Rules 9 and 32 of the Civil Procedure Rules and sections 3 and 3A of the Civil Procedure Act (Cap 21 Laws of Kenya.) The reasons for the application are, *inter alia*, that the respondents are the registered owners of the suit title but are unable to occupy the same owing to the trespass thereon by the appellants; that the appellants are laying water pipes and putting up electricity poles on the suit title; that the respondents are plaintiffs in Eldoret CMCC NO. 516 of 2005 in which their case was fully heard when the appellants unsuccessfully applied for stay of proceedings; that interim orders of stay granted in this appeal have lapsed and that it is fair in the circumstances to order the said deposit and the hearing of said suit.

The application is supported by an affidavit sworn by **Elisha Chumo** and **David Rono** for and on behalf of the respondents which affidavit merely elaborates the grounds of the application.

The application is opposed on the basis of Grounds of Opposition filed by the advocates of the appellants. The gist of the opposition is that no case has been demonstrated for ordering security for costs or for any of the reliefs sought.

The application was canvassed before me on 22nd March, 2001, by Ms. Karuga, Learned Counsel for the respondents and Mr. Ngetich, Learned Counsel for the appellants. Counsel reiterated the stand-points taken by their clients in their respective papers.

I have considered the application, the supporting affidavit and the Grounds of Opposition. I have also given due consideration to the submissions of counsel. Having done so, I take the following view of the matter. It is unfortunate that none of the parties have exhibited the proceedings from which the appeal has been lodged. It is apparent however, that the appeal is from an interlocutory ruling during the proceedings of the Lower Court. The appeal is therefore not from a decision conclusively determining the rights of the parties on the dispute between them. It cannot therefore be said that the respondent has a decree in his favour capable of being executed. Under Order XLI Rule 9, of the Civil Procedure Rules, an order for security for the costs of a respondent is in the discretion of the court. The discretion is unfettered. However, the discretion should be exercised considering all the circumstances of the case. In this case the respondent has not alleged in the grounds of the application and in the supporting affidavit that the appellants have no means to pay the costs of the appeal in the event the appeal is dismissed. The respondents allege that the appeal was lodged merely to frustrate the conclusion of the lower court case. The appellants on the other hand allege that there are parallel proceedings pending in the High Court (HCCC NO. 83 of 2003) which triggered the application for stay. In view of those allegations I cannot say that the appeal herein has no prospect of success. The respondent has sought a deposit of Kshs. 660,000/- to secure both costs and purchase price. They have made no distinction between what should be secured for costs and for purchase price. In my view a distinction should have been made as Order XLI rule 9 only deals with security for costs of the appeal. To order the furnishing of security in the said sum would, in the premises, be oppressive. In any event the lower court did not order the payment of any sums.

I have also noted that there is a pending application for stay of the same proceedings pending the hearing

and determination of the appeal, herein. That application was lodged on 28th April, 2008. The present application was lodged on 18th February, 2010 and has in effect stalled other proceedings. In my view the application has been lodged rather late in the proceedings.

In all those circumstances, it is my view that the respondents have not demonstrated that I should order security for costs.

The respondents have also sought an injunction in the same application. The court indeed has the jurisdiction to grant an injunction on appeal. However, the respondents have not demonstrated any of the conditions for the grant of such an injunction. The respondents have also sought an order that the parent suit be set down for defence hearing on priority basis. If this order is granted, what would be the fate of the appellant's appeal? With all due respect to the respondents, the procedure for considering appeals is settled and the present application is not one of them.

In the end I find and hold that this application has no merit and is dismissed with costs.

To expedite the hearing of this appeal, I order that the Deputy Registrar, avails the Lower Court file forthwith for further orders and/or directions. This appeal will be mentioned on 24th may, 2011 to ascertain the status of the appeal.

Orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 10TH DAY OF MAY, 2011

F. AZANGALALA

JUDGE

Read in the presence of:-
Ngetich for the Respondents

F. AZANGALALA

JUDGE

10TH MAY, 2011