



CIVIL PRACTICE PROCEDURE

Stay pending appeal.

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HIGH COURT CIVIL APPEAL CASE NO. 37 OF 2011

DORIS KAMAMI.....APPELLANT

VERSUS

PETER KIMANI M'NDAKA.....RESPONDENT

RULING

The appellant was the 2nd defendant in Maua Civil Case No. 77 of 2005. Her husband and her brother in law were the 1st and 3rd defendants respectively. The appellant has however failed to join them in this appeal. That is an error that needs to be corrected. She has approached this court by Notice of Motion dated 30th March 2011. She seeks by that application stay of execution of the decree and all subsequent orders in Maua Civil Case No. 77 of 2005. The lower court by its judgment dated 30th March 2011 ordered the appellant to vacate parcel number 5416 Athiru/Gaiti Adjudication Section. The appellant has deposed in her supporting affidavit that that parcel of land was family land which her husband sold secretly to the respondent in this appeal. She stated that she had lived on that land with her three children of the marriage since 1990. According to her, there is no other family land where she and the three children can occupy and to evict her from the suit land will render her destitute. She stated that she is prepared to provide any security that this court orders. The person who purchased the land, that is the respondent, opposed the application. He opposed on the basis that the appellant does not reside on the suit property. That there is no dwelling house constructed on that land. He said that he had suffered since he had paid the full purchase price but had been prevented by the appellant from utilizing it. He was of the opinion that the appellant's appeal does not have high chances of success because she had brought up an issue of trust of which the Principal Magistrate Court at Maua did not have jurisdiction. In a supplementary affidavit sworn by the appellant, she stated that there is no other piece of land which she can occupy with her family. She further reiterated that the respondent is not in possession of the land. In considering an application such as this one, the appropriate rule is order 42 rule 6 (2) (a) and (b) of the Civil Procedure Rules. That rule provides as follows:-

“(2) No order for stay of execution shall be made under subrule (1) unless –

a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

The issue that will concern this court in considering the application by the appellant is whether she has shown that she will suffer substantial loss if the order of stay is not granted. The appellant has deponed that the suit property is the only land which the family can rely on. She deponed that she has three children who depend on the same land. It does seem as though the respondent is not in possession of that land and has not been since purchasing it. On balancing the two opposing interests, I find that the appellant does show that she will suffer substantial loss if stay is not granted. The suit property is family land. I have considered her appeal and I find that it is not without merit. It should also be noted that the appellant filed her application without unreasonable delay. I therefore grant the following orders:-

- 1. Stay of execution of the decree and any subsequent orders of SPMCC Maua No. 77 of 2005 is hereby granted pending the determination of this appeal.**
- 2. The costs of the Notice of Motion dated 30th March 2011 shall abide with the outcome of this appeal.**
- 3. Leave is hereby granted to the appellant to amend within 14 days from this date hereof her memorandum of appeal to insert the names of William Kalunge M’Mukira and Daudi Kobia Mukiri as the 2nd and 3rd respondents in this appeal respectively. On carrying out that amendment, the appellant shall proceed to serve the same on the additional respondents.**

Dated, signed and delivered at Meru this 30th day of June 2011.

**MARY KASANGO
JUDGE**