



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA

CIVIL APPEAL NO. 61 OF 2011

RAJAB MAKOKHA SAKWA.....APPELLANT

V E R S U S

ADAMS KWEYO CHEKUNI.....RESPONDENT

R U L I N G

Before me is a notice of motion filed by the appellant pursuant to the provisions of **Order 42 Rule 6** of the **Civil Procedure Rules** seeking orders of this court to stay further proceedings, execution and implementation of the award made by the South Wanga Land Disputes Tribunal and affirmed by the Provincial Land Disputes Appeals Committee pending the hearing and determination of the Appeal filed in this court. The grounds in support of the application are stated on the face of the application. The application is supported by the annexed affidavit of the appellant. The application is opposed. The respondent filed a replying affidavit in opposition to the application.

At the hearing of the application, this court heard oral rival submissions made by Mr. Nandwa for the appellant and by the respondent who was acting in person. This court has carefully considered the said arguments. It has also read the pleadings filed by the parties herein in support of their respective opposition positions. The issue for determination by this court is whether the appellant established a case to enable this court grant stay of the adoption of the award made by the South Wanga Land Disputes Tribunal pending the hearing and determination of the appeal. Under **Order 42 Rule 6(2)** of the **Civil Procedure Rules**:

“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;*
- (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.”*

In **Butt v Rent Restriction Tribunal [1982]KLR 417** at page 419, Madan JA held as follows:

“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in Wilson v Church (NO.2) 12 Ch D (1879)454 at p 459. In the same case Cutton LJ said at p 458.

“ I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.” ”

In the present application, the appellant was aggrieved by the decision of the Provincial Land Disputes Appeals Committee. The appellant wants to exercise his undoubted right of final appeal to this court. The subject of appeal is land. This court is of the considered opinion that having perused the proceedings before the South Wanga Land Disputes Tribunal and the Provincial Land Disputes Appeals Committee, it is apparent that the appellant will suffer substantial loss if stay of execution is not granted. This is because the subject of the appeal would have been transferred thus rendering the intended appeal nugatory. This court is not oblivious of the fact that land is an emotive issue in Kenya. This court therefore allows the appellant’s application for stay of execution or implementation of the decision of the South Wanga Land Disputes Tribunal and that of the Provincial Land Disputes Appeals Committee pending the hearing and determination of the appeal before this court.

As regards security, the appellant shall deposit in court the sum of KShs.50,000/= within thirty (30) days of today’s date. In default of such deposit, the order granting stay herein shall stand automatically vacated. The costs of the application shall abide the outcome of the appeal.

DATED AT KAKAMEGA THIS 22ND DAY OF JUNE 2011

L. KIMARU

J U D G E