



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL NO. 219 OF 2010

PETER LAWRENCE KINYUA
MWAI.....APPELLANT/PLAINTIFF

VERSUS

CHRISTOPHER MURIUKI MWAI.....1ST
RESPONDENT/DEFENDANT

MARGARET MUCHIRU MWAI.....2ND
RESPONDENT/DEFENDANT

RULING

In the Notice of Motion dated 18th February 2011, **Peter Lawrence Kinyua Mwai**, the Appellant herein, applied for an order of stay of execution of the judgment delivered on 3rd December 2000 vide **NYERI C.M.C.C.C. NO. 564 'B' of 2009** plus costs. The Motion is supported by the affidavit of the Appellant. **CHRISTOPHER MURIUKI MWAI**, the 1st respondent herein, opposed the Motion by filing grounds of opposition plus a replying affidavit he swore on 14th March 2011.

The history leading to this Appeal began when the Appellant herein, filed the plaint dated 16th October 1997 vide **Meru C.M.C.C.C. NO. 1103 of 1997** whereof he prayed for judgment in the following terms *inter alia*:

- (i) ***A declaration that his name is Peter Kinyua and not the 1st Defendant.***
- (ii) ***That he be issued with K.P.E. Certificate No. 000956.***
- (iii) ***That the 2nd Defendant be ordered to stop referring Christopher Muriuki by the name Peter Kinyua.***
- (iv) ***The Defendants to return to the Plaintiff, the Plaintiff's scout whistle, scout scarf and student companion text book.***
- (v) ***Costs of the suit.***

It would appear the aforesaid suit was transferred from Meru Chief Magistrate's Court to Nanyuki Principal magistrate's Court pursuant to the Notice of Motion dated 21st November 2007 as Nanyuki **S.P.M.C.C. No. 14 of 2009**. The Applicant took out the Notice of Motion dated 18th March 2009 vide **Nyeri H.C. MISC. Application No. 99 of 2009** in which he successfully caused **Nanyuki S.P.M.C.C.C. No. 14 of 2009** to be transferred to Nyeri as **Nyeri C.M.C.C.C. No. 564 'B' of 2009**. The record shows that the suit has had a plethora of Applications filed thus causing a delay in finalizing the hearing of the case. The case was finally fixed for hearing on 15th December 2010. On the aforesaid date the Appellant sought for an adjournment. The application for adjournment was refused. When the appellant was called

upon to prove his case, the record indicates that the Appellant stated he had no evidence to tender. The trial magistrate proceeded to dismiss the case for lack of evidence. The Appellant being unhappy has filed this appeal to challenge the order.

Having given the brief history of the facts leading to the filing of this appeal and the subsequent motion let me now consider the merits of the Motion. It is the submission of the Applicant that he has an appeal with high chances of success. He claimed that he will be able to show that the trial magistrate was biased and that he did not get a fair trial before that court. The 1st respondent is of the view that the Motion lacks merit. He also pointed out that an order on costs cannot be stayed. Under *Order 42 rule 6* of the Civil Procedure Rules, it is clearly stated that no order for stay of execution shall be made unless the applicant shows the substantial loss he or she may suffer if the order is denied. The applicant must also show that the application for stay was made without an unreasonable delay. If the Court is of the view that an order for stay should be given, then it is enjoined to consider the form of security to be given for the due performance of the decree. The Appellant has simply stated that he has an appeal with overwhelming chances of success. He has not shown the substantial loss he would suffer if the order for stay is denied. Consequently he has failed to discharge the burden imposed upon him by the rules. It is clear in my mind that if the order for stay is not given, the Appellant will be required to pay costs of the suit. There is no evidence to show that by so doing, the Appellant will suffer any prejudice leave alone substantial loss. The Appellant has not fulfilled the requirements for the grant of stay orders. I hereby dismiss the Motion dated 18th February 2011 with costs to the respondents.

Dated and delivered at Nyeri this 23rd day of September 2011.

J. K. SERGON
JUDGE

In open court in the absence of parties with Notice.