



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT ELDORET

(Coram : F. Azangalala, J.)

CIVIL APPEAL NO. 17 OF 2011

BETWEEN

**GILBERT KIBICHY MAIYO:.....APPELLANT
AND**

KENNETH KIPTOO ACHIKWA:.....RESPONDENT

(Being an appeal from the decision of the Senior Resident Magistrate, dated 17th January, 2011 in Eldoret Chief Magistrate's Court Civil Case No. 255 of 2010)

RULING

This application seeks an order staying proceedings in Eldoret Chief Magistrate's Court Civil Case No. 225 of 2010 pending the hearing and determination of the appeal filed herein. The application is by **Gilbert Kibichy Maiyo** who is the defendant in the case in the Lower Court. He has not invoked any provision of the Law but the jurisdiction of this court is not challenged. The main reasons for the application are that the order of stay will preserve the subject matter and unless the stay is ordered, the respondent, who is the plaintiff in the Lower Court case, will proceed to obtain an order evicting him from LR NO Uasin Gishu/ Ilula/Settlement Scheme/869 (hereinafter "the suit land".)

The application is supported by an affidavit sworn by the applicant in which it is deponed, *inter alia*, that the applicant purchased 1/8 of the suit land from one **Henry Muchina Lulamba** in the year 2005 and took possession thereof; that in the lower court case, the respondent seeks to evict him from the suit land yet he has lodged an objection to the grant of representation issued to **Henry Muchina Lulamba** in respect of the estate of **Sarina Khadenge** (deceased). His primary contention therefore is that unless the stay sought is granted, the suit in the lower court will proceed and he stands to be evicted.

The application is opposed and there is a replying affidavit sworn by the respondent in which it is deponed, *inter alia*, that the respondent is not a party in the succession case; that he is registered as proprietor of Land Reference No. Uasin Gishu/Ilula Settlement Scheme/864 which is not even the subject of the High Court Succession Cause; that he has closed his case in the Lower Court and that the applicant is delaying conclusion of the same.

On 24th May, 2011, Counsel agreed to file written submissions which were duly in place by 25th October, 2011. The submissions maintain the stand-points taken by the parties in their respective affidavits.

I have considered the application, the affidavits filed both for the applicant and for the respondent. I have further given due consideration to the submissions of counsel. Having done so, I take the following position of the matter. The jurisdiction of an appellate court to stay proceedings of a lower court is unfettered. The main concern of the court is the interests of justice. In that regard, the court will consider such matters as the expeditious proportionate and just determination of proceedings and the efficient disposal of the business of the court. (see Sections 1A and 1B of the Civil Procedure Act.)

The respondent has averred herein that, he is not a party to the succession cause; that his title is not the subject of those succession proceedings and that he closed his case in the lower court and the applicant was to open his case when he lodged this appeal and application. The applicant has not challenged those averments in a further or subsequent affidavit. He must therefore be taken to have accepted the factual position as given by the respondent. In the event, an order staying proceedings of the lower court will not advance any of the objectives stated above.

Besides, the applicant has not attempted to demonstrate the nexus between LR NO. Uasin Gishu/Ilula Settlement Scheme/869 a portion of which he said he purchased and LR NO. Uasin Gishu/Ilula Settlement Scheme/864, which is in the respondent's name.

In the premises, the applicant has not demonstrated sufficient cause to order a stay of proceedings of the lower court. Accordingly the application dated 17th February, 2011 is without merit and is dismissed with costs.

It is so ordered

DATED AND DELIVERED AT ELDORET

THIS 6TH DAY OF DECEMBER, 2011

F. AZANGALALA

JUDGE

Read in the presence of: -

Mr. Okoth H/B for Mr. Kiboi for the Respondent and

Mr. Chepkwony H/B for Mr. Okara for the applicant

F. AZANGALALA

JUDGE

6TH DECEMBER, 2011