

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

Civil Appeal 110 of 2009

MICHAEL NJOGU CHABARI APPELLANT
VERSUS
M'ABURI M'NKABU RESPONDENT
RULING

The Notice of Motion dated 16th October 2009 is brought under Order XLI Rule 4 of the Civil Procedure Rules. It is filed by the appellant who seeks stay pending appeal. The appellant seeks the following prayer: - ***“That this Hon. Court be pleased to order a stay of execution of the decree of the lower court and all other subsequent orders in Meru CMCC No. 182 of 2008 pending the hearing and determination of the appeal filed herein.”*** The appellant did not annexure the pleading of the lower court case but one is able to discern from the lower court's judgment that the dispute relates to parcel number NKUENE/GITHUNGURI/139, the suit property. This property is registered in the joint names of the appellant and the respondent. The respondent claim in the lower court is that the suit property was registered in both of their names fraudulently by the appellant. He stated that he had leased ½ an acre to the appellant for Kshs. 500/= per year. On the other hand, the appellant claims that the respondent sold him the ½ acre in 1996 for Kshs. 10,000/=. That thereafter, he and the respondent went to the Land Control Board and obtained consent transfer. After that, the respondent gave him possession of that ½ acre. On gaining possession, he begun to cultivate the land. That it was the respondent's request that the property be registered in both their names. The lower court entered judgment for the respondent and ordered the name of the appellant be cancelled from the suit property. It is that judgment that the appellant seek stay of execution. The appellant in the affidavit in support of his application stated that he was in actual possession where he has planted crops. This is what he stated in his affidavit:-

“I am in actual occupation of the suit land measuring 0.202 Ha. and the properties thereon. And the same can be verified by a visit to the locus in quo.”

That deposition is in the background of what the learned magistrate stated in his judgment as follows:-

“Finally, in their evidence both the plaintiff (respondent) and the defendant (appellant) were in total agreement that the defendant has never lived on the subject land.It is the plaintiff that lives thereon. The defendant merely tills /farms on the land.”

Bearing in mind that evidence adduced at the lower court, I am unable to appreciate what substantial loss will be suffered by the appellant.

In the case **TERESIA KIMANI VS. GITHERE INVESTMENT LTD** HCC NRB Civil Appeal No. 944 of 2003 Justice Visram, as he then was, stated:-

“In an application for stay under Order 41 Rule 4, the applicant will succeed if he/she demonstrates to the satisfaction of this court that substantial loss will ensue if the order of stay is not granted; that he has filed the application without undue delay; and that he has offered such security as may be ordered. The onus is on the applicant to discharge the above through at their position. A stay order does not lie as a matter of course just because one has filed an appeal. One has to demonstrate the likelihood of suffering substantial loss if the order is refused.”

The appellant, apart from saying that he was in possession of the suit property, which he alleges that the respondent may take it away from him if stay is not granted, also alleges that the respondent is threatening his family. He does not state what form the threat has taken but he has in any case reported the matter at Nkubu Police Station. The threat is denied by the respondent. If indeed there is such a threat, my view is that it ought not to be a basis of granting stay of execution. The Police Force is well capable of maintaining law and order if indeed the respondent is threatening breach of peace. Since the appellant simply cultivates the suit land, I find that he has failed to demonstrate

that he would suffer substantial loss. I find no merit in his application and accordingly, the Notice of Motion dated 16th October 2009 is dismissed with costs to the respondent.

Dated and delivered at Meru this 12th day of March 2010.

MARY KASANGO
JUDGE