



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS) Civil Appeal 285 of 2009

ABDIA NUROW.....APPELLANT

VERSUS

ISSACK ADEN GONJOB.....RESPONDENT

RULING

1. By a notice of motion dated 28th October, 2009, Abdia Nurow (hereinafter referred to as the applicant), seeks an order of stay of execution of the decree in Manderu RMCC No.4 of 2009 pending the hearing and determination of her appeal which she has filed in this court.
2. The application is supported by an affidavit sworn by the applicant in which she deposes, *inter alia*, that if the orders of stay of execution are not granted she will be exposed to substantial loss and her appeal will be rendered nugatory. This is because she has resided in the disputed property since she was born, and it is the only place that she has known as home. She will therefore become destitute if evicted from the premises. The eviction would also affect her aged mother who is also residing in the same plot.
3. The applicant maintains that it is in the interest of justice and fairness for the court to grant the orders sought as the respondent would in any case not suffer any loss which cannot adequately be compensated by an award of damages.
4. Issack Aden Gonjobo, who is the respondent to the application and also the respondent to the appeal, has objected to the application through a replying affidavit sworn on 24th November, 2009. The respondent maintains that the application before the court is an abuse of the court process, as the applicant has not shown the grounds upon which she should be granted the orders sought.
5. The respondent deposes that he is the registered owner of Plot No.315 upon which the applicant has encroached. The respondent further deposes that the applicant has come to court with unclean hands, as she has lied that she does not have land where she resides. The respondent further maintains that the applicant has no arguable appeal as the issue of adverse possession relied upon in the appeal were not applicable in the suit.
6. In support of the application counsel for the applicant relied on the following cases:
 - *HCCC No.2411 of 1990 Indar Singh Gill Ltd vs Njoroge Gichara.*
 - *HCCC No.786 of 2003 La belle International Ltd & another vs Fidelity Commercial Bank Ltd & another.*

7. In response to the application, counsel for the respondent submitted that the applicant has not demonstrated any substantial loss, and that her *locus* was also in question as she claimed that the disputed land belonged to her mother. Relying on *Civil Appeal No.499 of 2009 Charles Muthamia Gikunda & another vs Hellena Wangechi Njoroge*, as well as *Civil Appeal No.33 of 2009 Charity Muthoki Mulei vs William Mutisya Muhindi*, counsel for the respondent urged the court to dismiss the application as it lacked merit, and was an abuse of the court process.

8. I have carefully considered this application. Under Order XLI Rule 4(2) of the Civil Procedure Rules, the factors to be considered in an application for stay of execution are as follows:

(i) The court is satisfied that substantial loss will result to the applicant unless the order of stay of execution is issued, and

(ii) The application has been made without unreasonable delay, and

(iii) The applicant has provided or is ready to provide such security as the court may order for the due performance of the decree.

9. In this case, the applicant maintains that she will suffer substantial loss unless the orders sought are granted, as she will be evicted from the disputed land. From the affidavit in support and in reply it is apparent that the applicant is actually in possession of the disputed portion of the land, hence the order made by the lower court for her eviction. However, the defence which was filed by the applicant in the lower court was to the effect that the disputed land is not Plot No.315 but is actually an extension of Plot No.80 which is actually owned by the applicant's mother Kuttubey Maalim. The applicant's mother was however not sued by the respondent nor was any attempt made by the applicant to enjoin her in the suit. Moreover, this defence was rejected by the lower court hence the orders now sought to be stayed.

10. The question is whether the applicant has demonstrated that she will suffer substantial loss if the order of stay of execution is granted. The applicant has not demonstrated that she has an interest in the disputed land which is capable of protection. The mere fact that she is in possession is not sufficient for the court to grant the orders sought, more so, where the applicant has not demonstrated any right to the disputed property. The applicant's allegation that she will be rendered destitute if evicted from the disputed land is not consistent with the pleadings.

11. The defence filed by the applicant showed that the applicant only claims the disputed land by virtue of it being an extension of Plot No.80 owned by her mother. Moreover, the case of *Indar Singh Gill Ltd* (supra) which was referred to by the applicant is distinguishable as in that case it was clear that the applicant had been in possession of the suit premises which he was using for business as his only source of livelihood. In the case of the applicant herein, she claims to have been residing in the disputed land with her mother, two sons and three daughters. This is contrary to her evidence before the trial magistrate, where the applicant claimed that the disputed land was a verandah and not a plot.

12. For the above reasons, I find that the applicant has not established substantial loss which is the cornerstone of an application for stay of execution. The court has an obligation to protect the interests of both parties. The respondent has a regular judgment and there is no reason to stand in his way if he wishes to execute that judgment. Moreover, what is disputed is merely a small portion of a plot allegedly encroached. Should the applicant succeed on appeal, it would not be difficult for her to recover possession of that portion. For the above reasons, I dismiss the application with costs.

Dated and delivered this 8th day of March, 2010

H. M. OKWENGU

JUDGE

In the presence of: -

Seda H/B for Mugalofor the appellant

Simba H/B for Wasonga for the respondent

Eric - Court clerk