



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI Civil Appeal 30 of 2009

**ANTHONY KIBERENGE
 KAMAU.....APPELLANT/APPLICANT**

VERSUS

**KIBUCHI WAMUNYI.....1ST
 RESPONDENT**
**J. MAINA.....2ND
 RESPONDENT**
**BEN MUCHWA.....3RD
 RESPONDENT**
**KIRINYAGA COUNTY COUNCIL.....4TH
 RESPONDENT**

RULING

Pursuant to the provisions of *Order XLI rule 4* of the Civil Procedure Rules, ANTHONY KIBERENGE KAMAU, the appellant herein, took out the Motion dated 18th January 2010 in which he applied for an order of stay of execution pending Appeal. The Appellant swore an affidavit in support of the Motion. KIBUCHI WAMUNYI, J. MAINA, BEN MUCHWA and KIRINYAGA COUNTY COUNCIL, being the 1st, 2nd, 3rd and 4th Respondents herein, filed the Replying Affidavit of Hiram Gachugi Nderitu to oppose the Motion.

The background leading to the filing of the aforesaid Motion is short and straightforward. The Appellant sued the Respondents vide Kerugoya P.M.C.C.C. No. 180 of 1997 in which he sought for the following orders *inter alia*:

- (i) *An order of injunction to restrain the defendants (appellants) their agents and or servants from subdividing the parcel of land known as plot No. A 123 Sagana.*
- (ii) *An order that any steps taken to subdivide or partition the aforesaid plot, into 2 or other portions be cancelled and or nullified.*
- (iii) *A permanent injunction to restrain the defendant, their agents and or servants from subdividing, building, entering, trespassing or in any other manner whatsoever interfering with the said plot.*
- (iv) *Costs of the suit.*

The suit was heard before the Honourable Mr. S. N. Mbungi, learned Principal Magistrate. The learned Principal Magistrate, in the end dismissed the suit on 5th March 2009. The Appellant, being aggrieved filed this appeal to challenge the decision. He has now come before

this Court beseeching it to issue orders to maintain the status quo obtaining as of now on the suit land known as PLOT NO. A 123-SAGANA pending the hearing and the determination of the appeal.

It is the argument of the Appellant that if the order is denied his appeal will be rendered nugatory in that the Respondents will have entered the aforesaid plot to carry out developments which they were barred from doing so pending the trial of the case before the trial court. In fact the Appellant deponed that the Respondents visited the plot in dispute on 13th January 2010 with the intention of subdividing the same into two portions but they stopped when he raised an objection.

The Respondents urged this Court to dismiss the Motion on the basis that the Appellant is not keen to pursue the appeal. They averred that the Appellant had filed a similar application before the trial court on 15th June 2009 which application was heard and dismissed on merits. The Respondents aver that they have taxed their bills of costs and that they have even applied for execution. The Respondents stated that they have no intention of moving into the plot to subdivide.

I have considered the oral arguments of learned counsels from both sides. I have also considered the material placed before me. There is no doubt that the Respondents have taxed the bill of costs. They have expressly stated that they intend to execute the decree for purposes of recovering the costs. The Appellant on the other hand has alleged that the Respondents visited the suit premises on 13th January 2010 for purposes of causing it to be subdivided. I have looked at the replying affidavit and I find that there is no averment made to deny that the allegation that the Respondents visited the plot on the aforesaid date. In dealing with an application for stay of execution and or an injunction pending appeal under *Order XLI rule 4* of Civil Procedure Rules the principles to be considered are well settled. First, an applicant must show the substantial loss he would suffer if the order is denied. In this case the Applicant has said that the Respondents are intending to move into the plot and cause it to be subdivided. I think I am convinced that the Applicant is likely to suffer substantially in that if the Respondents are allowed to move into the plot they are likely to alter the status of the plot. It may also become very difficult for the Applicant to have them removed should the appeal turn out to be successful. It is also possible that the Respondent may transfer the plot to third parties thus complicating the case further.

The second principle to be considered is that the application for stay must be made without an unreasonable delay. The decision sought to be challenged on appeal was pronounced on 5th March 2009. The Motion before this Court was filed on 18th January 2010. In the Supporting Affidavit, the Applicant does not state the reasons why it took him nearly a whole year to take out the Motion. There is an explanation offered by the Respondents vide the Replying Affidavit of Hiram Gachugu Nderitu that the bill of costs was taxed at Ksh.243,378 on 11th June 2009. On 15th June 2009, it is said that the Applicant rushed to the trial court whereupon he applied for *inter alia* an order of review of the *ex parte* assessment of costs and for a further order of stay of the decree delivered on 5th March 2009. It is said the application was dismissed on 14th October 2009. Thereafter a notice to show cause why execution should issue was fixed for 3rd December 2009. It is said the Appellant did not show up before the trial court but he instead opted to file this Motion. When the Appellant filed the Motion dated 18th January 2010, he was duty bound to explain the delay in taking out the Motion late. Even assuming that the application for stay before the trial court was dismissed on 14th October 2009, there is no explanation as to why the Appellant failed to move with haste to file the Motion. He waited for another three months before lodging a new application without disclosing what he has been doing. I am convinced the Appellant is guilty of unreasonable delay in filing the Motion dated 18th January 2010. He is therefore in breach of the provisions of *Order XLI rule 4* of the Civil Procedure Rules. I will therefore deny him the order of stay on account of laches on his part.

The third principle is that the court must make an order for security for the due performance of the decree. Since I have denied the Appellant the order of stay, I do not think it is worthwhile to consider this principle. This principle is dependant on whether or not the order

of stay of execution is given.

In the end, I dismiss the Motion dated 18th January 2010 with costs to the Respondents.

Dated and delivered at Nyeri this 5th day of March 2010.

J. K. SERGON

JUDGE

In open court in the presence of Mr. Mugo holding brief Gachuhi for Respondent. No appearance R. M. Kimani for Appellant.