



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Appeal 711 of 2009

LANDMARK HOLDINGS LIMITED.....APPLICANT

VERSUS

PETER MWIROTSI SHIKUTWA.....RESPONDENT

RULING

1. The applicant, Landmark Holdings Limited seeks an order for stay of execution of the decree issued against it pending the hearing and determination of an appeal, which it has filed against the judgment of the Resident Magistrate delivered on 8th December, 2009 in CMCC No.13713 of 2006.

2. Pursuant to orders issued by the Hon. Rawal J. on 22nd February, 2010, the applicant deposited a sum of Kshs.416,000/= into court as security. The applicant maintains that unless the order of stay is granted, the respondent is likely to proceed with execution and the applicant's appeal will be rendered nugatory. Mrs. Onyango who appeared for the applicant urged the court to grant the orders sought contending that the respondent is a total stranger to the applicant. Mrs. Onyango maintains that it would be difficult to recover the decretal amount if paid to the respondent because the respondent in his evidence in the lower court stated that he was unemployed and had no means of paying for his hospital bills.

3. In response to the application, the respondent has sworn a replying affidavit in which he contends that the application is no more than an attempt to deny him the fruits of the judgment given in his favour. The respondent maintains that the appeal which has been filed is an afterthought and does not raise any arguable issues. The respondent contends that he is a small scale farmer cum business person and that he has in possession a huge parcel of ancestral land measuring 20 hectares in Mumias Kenya. He therefore maintains that he will be in a possession to refund the decretal sum if that becomes necessary.

4. Mr. Mutua who appeared for the respondent maintains that the amount deposited in court as security was not accessible to the respondent. Relying on Civil Appeal No.186 of 2007, counsel maintained that the applicant had not established substantial loss.

5. I have given due consideration to this application. It is clear that the respondent's evidence in the lower court shows that his means are limited. In the circumstances, the applicant's apprehension that it may not be able to recover the decretal sum if paid to the respondent is justified. The applicant having deposited the decretal amount as security, I will strike a balance in the interest of both parties by making orders as follows:

6. An order of stay of execution pending appeal shall issue on the following conditions:

- (i) The amount of Kshs.416,000/= deposited in court by the applicant shall be released to the parties' advocates to be deposited into an interest earning account with a reputable financial institution in the joint names of the parties' advocates within 21 days from the date hereof.
- (ii) The applicant shall file and serve a record of appeal within 90 days from the date hereof.
- (iii) The applicant shall take all necessary action to facilitate the speedy disposal of this appeal. In the event that the appeal is not disposed off within 12 months from the date hereof, the order for stay of execution pending appeal shall stand discharged unless otherwise extended by the court.
- (iv) Costs of this application shall be costs in the appeal.

Dated and delivered this 23rd day of April, 2010

H. M. OKWENGU

JUDGE

In the presence of: -

Mrs. Onyango for the applicant

Muhia for the respondent

Eric - Court clerk