



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET

Civil Appeal 53 of 2010

SHADRACK K. KIPTUGEN.....APPLICANT

VERSUS

PIUS FRANCIS OMWERI NYABERI.....RESPONDENT

(An Appeal from the decision of the Senior Resident Magistrate, Hon. N. Shiundu
in the Chief Magistrate's Court at Eldoret – Eldoret CMCC NO. 855 of 2009)

RULING

I. Background

1. The original court case in the subordinate courts concerned land. A sale agreement had been entered between the original defendant/applicant/appellant (herein referred to as the seller,) and the original plaintiff/respondent, respondent (herein referred to as the buyer) to purchase two parcels of land LR 9930/8 and LR 9930/10 LR 62722 comprising of 22 acres each, entered into on 29/5/06 the consideration being Kshs. 4,180,000/-
2. The buyer paid over only 665,000/- the seller is alleged to have sold the two parcels of land to third parties. Instead of filing a claim for specific performance case the buyer filed a suit in the magistrate's court for the refund of the said sum of Kshs. 665,000/-.
3. The seller failed to enter appearance and file defence. Interlocutory judgment by the magistrates court was entered into. Thereafter execution took place. The seller was arrested as part of the execution proceeds and detained. Through his advocate he filed an application dated 22nd February 2010 seeking stay of execution. The courts after

interparties hearing granted the prayer of stay of execution but a condition that the decretal sum he deposited in court.

4. Being aggrieved with the said condition exposed the seller/ applicant filed an appeal to this court seeking stay of execution against the orders of depositing the decretal sum to court. On the main case he alleged that he was never served nor was aware of the case before the subordinate court.
5. The advocate for the respondent buyer stated that no proof was provided that the seller had never been served with summons to enter appearance.

II. Opinion

6. The prayer sought in the application before court is one of stay of execution against the “ruling” of the trial magistrate namely that the whole of the decretal sum of Kshs.665,000/- he deposited in court. The applicant seller appears not to have this sum of money. The condition imposed by the trial court is punitive.
7. Where a buyer fails to fulfill a contract of sale of land the sums of money are normally forfeited for failure to complete a contract. That issue has not been and or addressed by parties.
8. Whilst the stay of execution had been granted on condition it is unclear whether the said leave to file defence and counter - claim had been granted.
9. I would hold that the condition to “deposit” the “decretal” sum be not made part of the condition for stay of execution. There be a stay of the magistrate court case to read stay of execution with no conditions. Costs to the applicant.

Dated this 5th day of May 2010 at Eldoret.

**M. A. ANG’AWA
JUDGE**

Advocate

Mr. Andambi Advocate instructed by the Firm of M/s Andambi & Company Advocate
for the Appellant/Applicant

D.K. Gichana Advocate instructed by the Firm of M/s. Omwenga & Company Advocate
for the Respondent

5th May, 2010

Coram - Hon. Lady Justice M.A. Ang'awa
Court Clerk - Oscar Limisi/ Betsy Chelangat

Andambi A.A. an Advocate from the firm of Ms. Andambi & Company Advocate for the Applicant
present

Applicant in person present

Gichan D.K. an Advocate from the Firm of Ms. Omwenga & Company advocate for the Respondent
Interpretation English

Court:-

Ruling signed, read and delivered in Open Court.

M. A. ANG'AWA
JUDGE

5/5/2010

Court as before:

Position of file:

- 1) The application is grant. The request of depositing 665,00/- to court is stayed.
- 2) Next step:
Appeal proceeds under section 79,
- 3) Next under Order 41 r 8(b)
- 4) Lower Court Proceedings.

M. A. ANG'AWA
JUDGE

4/5/2010

Order: Lower court file as order. CMCC 855/09 be urgently brought up to court.

M. A. ANG'AWA
JUDGE

4/5/2010

06/05/2010

Judge seen CMCC 855/09

M. A. ANG'AWA
JUDGE

6/5/2010