



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KISII**

**CIVIL APPEAL NO. 44 OF 2010**

<b>MORAA MASARE</b>	)	
<b>JEMIMAH MASARE</b>	)	
<b>BWARI MASARE</b>		)
..... <b>APPELLANTS</b>		
<b>EVANS SAMWEL MOCHACHE MASARE</b>	)	
<b>PETER MOKEBO MIENCHA</b>	)	

-VERSUS-

**GEOFFREY MATOKE....**  
.....**RESPONDENT**

**RULING**

On 15<sup>th</sup> March, 2010, **Moraa Masare, Jemimah Masare, Bwari Masare, Evans Masare and Peter Masare** herein after **“the appellants”** filed this appeal. The appeal is from the ruling and order of **Hon. Gicheru**, Chief Magistrate delivered on 4<sup>th</sup> March, 2010 in Kisii CMCCC No. 19 of 1989. Having filed the appeal the appellant followed it up with an application by way of the Notice of Motion dated 17<sup>th</sup> March, 2010 which is the subject of this ruling. That application was expressed to be brought under Oder XLI rule 4(1) & (2) of the **Civil Procedure rules**, Section 3, 3A and 63(e) of the **Civil Procedure Act** and all other enabling provisions of the law. In the main the appellants sought that this court do grant an order of stay of execution and or enforcement of the order dated 4<sup>th</sup> March, 2010 issued in Kisii CMCCC No 19 of 1989, together with all consequential orders arising therefrom pending, the hearing and determination of the instant appeal. As for costs of the application they asked that the same do abide the outcome of the appeal.

The grounds in support of the application were that the 3<sup>rd</sup> appellant was the original registered owner of **LR No. Isoge Kineni/Block 1/49**. Subsequently the said parcel of land was subdivided culminating in **LR Nos Isoge Kineni/Block 1/260,261,296 and 301** respectively. Previously, the 3<sup>rd</sup> appellant and 3 others had been sued by **Geoffrey Matoke**, hereafter **“the respondent”** in respect of Plot number 38, Kineni in Kisii, HCCC No. 19 of 1989 which suit was subsequently dismissed. The respondent later filed an appeal being Kisii HCCA No 33 of 1999 which was heard and disposed of vide judgment delivered on 26<sup>th</sup> July, 2005 wherein it was decreed that the respondent do get 25 acres out of **plot number 38, Kineni**. The respondent is now attempting to execute the said decree against **LR No. Isoge Kineni/Block 1/49 “the suit premises”** which is a separate and distinct parcel of land from plot number 38 Kineni. That the ruling and order of the Chief Magistrate is in respect of non-existent parcel of land and if execution is not stayed, the respondent is bound to defraud the appellants. The appeal as far filed according to the appellants, raises salient and pertinent issues and has overwhelming chances of

success. Further the appellants are bound to suffer substantial loss, unless the orders sought are granted. On the other hand, the respondent shall not suffer any prejudice if the orders sought are granted. The final ground urged by the appellants in support of the application was that the application had been filed without unreasonable delay and was in the interest of justice that it be allowed.

In support of the application, the appellants through the 2<sup>nd</sup> appellant swore an affidavit. That affidavit merely clarified, expounded and amplified the grounds in support of the application aforesaid. Suffice to add that on 16<sup>th</sup> January, 2009, the respondent filed successfully an application for execution seeking a declaration that the suit premises was the same as Plot Number 38 Kineni and for attachment of 25 acres thereof. Subsequently, the appellant's successfully filed an application seeking a review and or discharge of the orders aforesaid. When the appellant's application was allowed, the court made a categorical finding that Plot Number 38 Kineni and the suit premises were separate and distinct. Aggrieved by the said ruling, the respondent filed an appeal. The respondent once again filed a similar application as the one earlier dismissed. Nevertheless, the magistrate proceeded to grant the said application and thereby created a conflict in court orders. In any event those orders concern the suit premises which are no longer in existence, same having been subdivided and the title closed on 16<sup>th</sup> October 2009. The orders of the Chief Magistrate are therefore likely to affect the subdivision arising from the suit premises which will exact undue prejudice and loss to the appellants. The appellants felt that the appeal had overwhelming chances of success and stay of execution therefore ought to be granted. They were ready and willing to comply with such reasonable conditions including provision of security as this court may deem fit and expedient to order. Finally they deponed that the application had been made timeously, in good faith and with due promptitude.

On being served with the application the respondent reacted by filing a replying affidavit. In a nutshell he deponed that Kisii CMCCC No 19 of 1989 went all the way to this Court then to the court of appeal which ordered a retrial and the subject matter was plot no. 38 Kineni Ranch which by then was unregistered. There were orders by way of temporary injunction as well as stay of execution of the decree as the aforesaid proceedings went on. However the 2<sup>nd</sup> appellant proceeded clandestinely to cause Plot No. 38 Kineni Ranch to be registered in her names as the administratrix and widow of the estate of the late **Simeon Masare** who was a member of Kineni Ranch Farmers society giving rise to the suit premises. Sometime in mid November, 2009, the 2<sup>nd</sup> appellant proceeded wrongfully and illegally to subdivide the suit premises into 8 portions in outright disobedience of the court orders in force aforesaid. The subdivisions were made with intent to obstruct, resist and or deny the respondent the enjoyment of the fruits of the judgment. According to the respondent, the parcel of land previously known as **Plot no. 38 Kineni** is one and the same as the suit premises a portion whereof has been in his continuous occupation to date. Finally he deponed that the appellants will not suffer any substantial loss in the event that stay of execution is not granted.

When the application came up for interpartes hearing before me on 20<sup>th</sup> April, 2010, **Mr. Oguttu** for the appellants and **Mr. Bosire** for the respondent agreed to canvass the same by way of written submissions. The same were subsequently filed and exchanged. I have since had the benefit of reading and considering them alongside cited authorities.

It is settled law that for an applicant to succeed on application for stay of execution pending appeal under order XLI rule 4(1) and (2) of the **Civil Procedure rules** he has to satisfy the court to which the application has been made that:-

- i) ***Sufficient cause for the grant of the order exists.***
- ii) ***Substantial loss that he is likely to suffer unless the order sought is granted.***
- iii) ***The application has been made without undue delay.***
- iv) ***Such security as the court may order for the due performance of the decree or order is given.***

The above notwithstanding, the court of appeal in the case of **Butt V Rent Restriction Tribunal (1982) KLR 417** considered at length grounds for granting stay of execution and or factors to be taken into consideration when granting stay of execution. It held that the power of the court to grant or refuse an application for stay of execution is a discretionary one. The discretion should be exercised not capriciously but in such a way as not to prevent an appeal. The general principle in granting or refusing stay is; if there is no other overwhelming hindrance a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judges' discretion. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and unique requirements and finally that the court in exercising its powers under order XLI rule (2) (b) of the **Civil Procedure rules**, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.

It is also necessary to bear in mind that it is not in the interest of justice to deny a successful litigant the fruits of his litigation and appeal involving a monetary decree would generally not be rendered nugatory if stay is not ordered. Finally it is rare that stay would be ordered in suits involving costs.

From all the foregoing the law on stay of execution pending appeal may be summarized as follows; In order for the court to issue an order of stay of execution, there must be

**a) i. Sufficient cause**

**ii. Substantial loss**

**iii. No unreasonable delay in filing the application; and**

**iv. Security**

**b) The grant of stay of execution is discretionary**

**c) It is not just to deny a successful party the benefit of judgment and or fruits of his litigation.**

**d) Money decree cannot be the subject of stay and finally,**

**e) Stay cannot be granted in respect of costs.**

Applying all the above considerations in the circumstances of this case, I would say that the appellants have filed an appeal, which appeal is not frivolous but arguable. They have raised substantial grounds of appeal, to wit, the issue of **Res judicata**, whether the Notice to show cause was necessary before execution of the decree could issue, whether the learned magistrate appropriated the jurisdiction of the court of appeal by reviewing, rescinding and amending the judgment of the High Court. In a nut shell did the trial magistrate sit on appeal on the decision of the High Court. That being the case sufficient cause has also been shown for the grant of the order of stay.

The suit premises stand subdivided into 8 various portions. In view of the subdivision, the order, the subject of the appeal seem to suggest that Plot 38, Kineni Ranch is the same as the suit premises . If executed it is bound to negate or affect the subdivisions aforesaid and the resultant loss will be incapable of being redressed. No doubt therefore the appellants will suffer substantial loss. The appeal was filed on 15<sup>th</sup> March, 2010 against the decision of the learned magistrate made on 4<sup>th</sup> March, 2010. The instant application was filed 3 days later. It is apparent therefore that the application was made with promptitude, timeously and without undue delay. As for security, the appellants have indicated their willingness to submit the titles in respect of the resultant parcels of land after the subdivision of the suit premises to this court pending the hearing and final determination of the appeal. I find this proposal reasonable and I accept it. The grant of stay being discretionary and in the special circumstances of this case I have no difficulties in exercising it in favour of the appellants. In any event the respondent will suffer no prejudice at all if stay is granted as he will continue in occupation of the suit premises currently in his possession. I am also not oblivious to the fact that it is not just to deny a successful litigant the benefits and fruits of his

judgment and or litigation.

For all the foregoing reasons, I find the application merited and accordingly allow the same in terms of prayers 3 and 4 and on condition that the appellants shall within seven (7) days from the date of this ruling deposit with the court all the 8 titles resulting from the subdivision of **Isoge/Kineni/ Block 1/49** failing which this application shall stand dismissed with costs to the respondent.

**Ruling dated, signed and delivered** at Kisii this 17<sup>th</sup> day of June 2010.

**ASIKE-MAKHANDIA**  
**JUDGE**