

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

Civil Appeal 121 of 2009

DAVID WACHIRA MAINA.....APPELLANT/APPLICANT
VERSUS
FLORENCE TATU AMIMU.....1ST RESPONDENT
PATRICK KITHINJI NGEERA.....2ND RESPONDENT

RULING

The appellant filed the present appeal on 9th November 2009. The appeal is against the lower court decision made on 15th October 2009 in CMCC No. 46 of 2009. In that case, *ex parte* judgment was entered against the appellant. The appellant was unsuccessful in his application for setting aside interlocutory judgment. Being unsuccessful he filed the present appeal. The appellant by Notice of Motion dated 14th November 2009 has sought stay of execution of the lower court judgment pending appeal. The application is brought under Order XLI Rule 4 of the Civil Procedure Rules. The appellant in his affidavit in support of that application stated that he entered into a written sale agreement with Joseph Kaaria now deceased. That he agreed to buy from Kaaria 3 acres of parcel number Ex- Lewa Settlement Scheme/527. The purchase price was Kshs. 270,000/=. Kaaria died before the transaction was completed. The appellant however deponed that before the death of Kaaria, he had paid in full the purchase price. The respondent sued him in CMCC No. 46 of 2009 claiming part of the consideration of that transaction and penalty for non-payment. It seems that the appellant on getting to know of that action went to see the respondent's counsel to prove to him that the purchase price had been paid. The appellant stated that it was agreed that CMCC No. 46 of 2009 would be withdrawn. The appellant said that that did not happen and instead he saw auctioneers descend upon him to attach his property. This execution, he said, was as a consequence of the *ex parte* judgment in default of a defence. The appellant carried out an inquiry and he found that the respondents in suing him in CMCC No. 46 of 2009 had relied on a grant which however was limited to the respondents protecting parcel number *Nyaki/Chugu/504*. The appellant in his further affidavit that he filed stated that he is in occupation of 3 acres of the land he purchased from Kaaria. The respondents in their replying affidavit stated that a lot of what was deponed by the appellant was irrelevant. They however did not refute that the grant issued to them was limited as was stated by the appellant. The respondents also argued that the appellant did not show substantial loss in support of his application. Although the appellant did not specifically indicate what loss he was likely to suffer, in view of the anomaly raised by the appellant in respect of the grant relied on by the respondents and in view of the fact that the appellant stated that there are other beneficiaries who had not been named by the respondent when he obtained the limited the grant can justify the orders sought. The mere fact that the respondents did not give adequate response to those issues is reason enough to justify the orders that are sought. The question that arises in my mind is

when the respondents execute the decree in CMCC No. 46 of 2009 who did they execute as, in respect of the estate of Kaaria, deceased if the grant did not authorize the suit. I find that there are very substantial and serious issues raised by the appellant making it necessary to order the stay of execution of the lower court decree. The appellant may indeed suffer substantial loss which is one of the considerations in an application for stay if other beneficiaries make another claim. The applicant has said that he is in possession of the property he purchased. Any action to deny him that possession would in my view condemning him without hearing him. I find that the orders that are sought by the appellant in the Notice of Motion dated 14th November 2009 are merited. I grant the following orders:-

1. ***An order of stay of execution is hereby issued in respect of CMCC Meru No. 46 of 2009 pending the hearing and the final determination of this appeal.***
2. ***The costs of the Notice of Motion dated 14th November 2009 shall abide by the outcome of this appeal.***

Dated and delivered at Meru this 4th day of June 2010.

MARY KASANGO
JUDGE