



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CIVIL APPEAL NO. 145 OF 2009**

**CHRISTOPHER KIPKERICH SAINA.....APPLICANT**

**VERSUS**

**JACKSON KIPKERICH SAMBU.....RESPONDENT**

**RULING**

Before me is an application by way of a Notice of Motion brought under the provisions of sections 3 and 3A of the Civil Procedure Act and Order XLI Rules 4 and 5 of the Civil Procedure Rules and all other enabling provisions of the law. It seeks stay of execution of the order dated 6/8/2008 until the hearing and determination of the appeal, on the grounds that the applicant being dissatisfied by such order has preferred an appeal which has great chances of success and further the applicant has been in occupation of the suit land and should enjoy the use of the same until the appeal is heard and determined so as not to render it nugatory. The application is supported by the sworn affidavit of the Appellant/Applicant who depones that he stands to suffer great loss and damage if the orders sought are not granted and the Respondent who has never been in occupation of the suit land stands to suffer nothing.

The Respondent filed grounds of objection that the application is an abuse of the court process and that the Respondent is the registered owner of the suit land. That the applicant has not shown that he would suffer any loss and damage if the orders sought are not granted and it is unfair to deny the Respondent use and enjoyment of his plot. That the application is only meant to derail justice.

For the applicant it was submitted that the orders sought ought to be granted as the suit land is the Applicant's who has been in occupation and use of the same with his tenants.

For the Respondent submission was that he was the registered owner and the Appellant was a stranger and trespasser who cannot suffer by being removed from someone's land.

Order XLI rule 4(2)(a) provides that no order for stay of execution shall be made under the rule unless the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay. In the instant application the applicant states that he has been in occupation and use of the land and has developed the same and rented part of it to tenants who are innocent parties and should not be made to suffer. That was not denied by the Respondent. The letter of allotment of the suit land to the applicant was annexed to the application and he stated that he has been in occupation and has developed the land since being allocated the same. The court was not shown that the suit land is registered as stated by the Respondent, in his name and I accept that the applicant would suffer substantial loss as he states unless this order is granted. The appeal would be rendered nugatory if stay was not granted. Although the point was not taken by the Respondent I find that the application under consideration was brought without unreasonable delay. Accordingly I allow the application and order that there will be stay of execution of the orders of 6.8.2009 until the appeal herein is heard and determined.

**DATED SIGNED AND DELIVERED AT ELDORET THIS 28<sup>TH</sup> DAY OF JULY, 2010.**

**P.M. MWILU**

**JUDGE**

**In the presence of;**

**Mr. Kiboi Advocate for Applicant**

**No appearance for Advocate for Respondent**

**Andrew Omwenga – Court Clerk**

**P.M. MWILU**

**JUDGE**