



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

(Coram: Ojwang, J.)

CIVIL CASE NO. 168 OF 2008

ALI MOHAMED MWINZANGU

[Suing as the administrator of the estate of the late]

**ABDULRAHMAN NASSIB ALI (Deceased).....PLAINTIFF/
RESPONDENT**

-VERSUS-

1. DAVID KARISA TSUI

**2. MAHINDI KARISA TSUI.....DEFENDANTS/
APPLICANTS**

3. KALUMA CHARO KARISA

RULING

The main suit, based on the plaint of **3rd July, 2008** was concluded by the Judgment, delivered by **Mr. Justice Ibrahim**, on **30th October, 2009**, and since then, the defendants have lodged an appeal. In the meantime, the defendants/appellants have moved this Court by Notice of Motion dated **8th December, 2009** and brought under order **XLI**, rule 4 (i) of the Civil Procedure Rules, and s.3A of the Civil Procedure Act (Cap. 21, Laws of Kenya). The application carries one substantive prayer:

“THAT pending the hearing and determination of the appeal filed by the defendants....there be a stay of execution and [of] further proceedings in this suit.”

The grounds for the application are thus stated: (i) a notice of appeal has already been lodged and served, with the leave of this Court; (ii) the appellants have an arguable appeal with high chances of success; (iii) the appeal raises various points of law which the appellants seek to pursue; (iv) if a stay of execution is not granted, the appeal would be rendered nugatory and the appellants would suffer substantial and/or irreparable loss and damage.

The 1st applicant states in the supporting affidavit, and on behalf of the other applicants, that the defendants are aggrieved by the Judgment of **30th October, 2009** and they wish to appeal against the decision; that the execution of the decree will greatly prejudice them as it will defeat their right of appeal; that it is in the interest of justice that orders of stay of execution be granted, pending the hearing and determination of the appeal; that the defendants have an arguable appeal with good chances of success.

To this application, the plaintiffs/respondents filed grounds of opposition, contending, firstly, that the defendants' application lacks merit, and secondly, that the defendants have not complied with the conditions specified in Order **XLI**, rule 4 (2) (b) of the Civil Procedure Rules.

Learned counsel **Mr. Kateteh**, for the respondent, urged that the applicants had not satisfied the conditions upon which a stay of execution pending appeal can be granted to a party who has filed a notice of appeal. The basic rule is set out in Order **XLI**, rule 4(1) which states that –

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order”;

but it carries the proviso that:

“A court appealed from may for sufficient cause order a stay of execution”.

And rule 4(2) of the same Order sets out the circumstances in which the Court may grant orders of stay:

“(2) No order for stay of execution shall be made under sub-rule (1) unless:

(a) the court is satisfied that substantial loss may result to the applicant.....and that the application has been made without unreasonable delay.....

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

Counsel urged that in the instant application, the applicants had not demonstrated to the Court, whether by affidavit evidence or by submissions, that a substantial loss may result to the applicants. Counsel submitted that the applicants, though claiming they would be prejudiced if their application for stay of execution was not granted, had shown no “substantial loss” which they stood to suffer; and besides, it was urged, the applicants had provided no security for the due performance of the decree of the Court.

Counsel urged that the application was for dismissal.

After the suit was filed on **7th July, 2008** the defendants entered appearance on **26th August, 2008** and filed their defence on **2nd November, 2008**; but they called no evidence before the trial Court and were absent (though represented by counsel) during trial.

The applicant's statement of defence, which was largely focused on denial, was thus dismissed by the Judge:

“Upon considering the pleadings and evidence, I do find that the plaintiff is the lawful and legally registered owner of the suit property. The defendants trespassed on the land and are in illegal occupation of the said property. They have not claimed any legal or equitable right or interest. They did not file any counterclaim and were not in Court when the case was called out for hearing. I do find that the defendants' defence in general is a mere sham”.

The applicants have given no indication that they are contesting those clear findings, by their intended appeal, even though they state that there are proper legal issues which they are taking up on appeal; and

consequently, it is not at all apparent that they indeed have an arguable case and, less still, a case with high chances of success.

I have to come to the conclusion, in agreement with the respondent's position, that the applicants have not satisfied the terms of Order **XLI**, rules 4(1) and (2) regarding the grant of stay orders pending appeal. It is the case, too, that the applicants made no offer of any security for due compliance with the orders of the Court made on **30th October, 2009** in the event their appeal did not succeed.

The inevitable consequence is that the defendants' application by Notice of Motion, dated **8th October, 2009**, must be, and is hereby, dismissed, with costs to the plaintiff/respondent.

Orders accordingly.

DATED and DELIVERED at MOMBASA this 24th day of September, 2010.

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J. B. OJWANG

JUDGE