



CIVIL PRACTICE AND PROCEDURE

Ø Stay pending appeal

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCC. CAUSE NO. 298 OF 1996

IN THE MATTER OF THE ESTATE OF M'NJAU NTIMBU (DECEASED)

STANLEY M'MUGIKA M'BAICHU.....APPLICANT

VERSUS

JOHN GITONGA M'KIRERA.....RESPONDENT

RULING

This court by its judgment dated 28th May 2010 made a finding that the deceased had died testate leaving behind a written Will. That written Will provided that parcel number *Kibirichia/Ntumburi/270* would be inherited by John Gitonga M'Kirera (Gitonga). Stanley M'Mugwika M'Mbaichu filed a Notice of Appeal against that judgment on 2nd June 2010. Stanley has filed a Chamber Summons dated 4th June 2010 seeking stay of execution of the judgment dated 28th May 2010. Stanley deponed in support of that application that he was dissatisfied with the judgment of the court and hence why he filed his appeal. He further deponed that Gitonga had started to fell trees and other permanent crops which he had planted decades before. He stated that he has been in occupation of the suit land. He therefore stated that if execution proceeded he would suffer substantial loss. Gitonga through his counsel filed grounds of opposition in response to that application as follows:-

1. *The application for stay of execution is not well grounded and no sufficient reasons in support are set out therein.*
2. *That the application is based on falsehoods and misrepresentations as the petitioner has never occupied any part of the land let alone developing the same.*
3. *The application is legally untenable and the prayers sought cannot be granted.*

In submissions, Gitonga's counsel stated that the application must fail because Stanley would not suffer substantial loss. Further, that Stanley had failed to provide security for the due performance of the decree. Further that Stanley had deponed falsehoods by stating that he had been in occupation of the suit land which deposition was not supported by the evidence tendered at the hearing of the objection proceedings.

The effect of the judgment of 28th May 2010 is to allow the suit property to be registered in the name of Gitonga. If stay as sought is not granted, it is possible that Gitonga having the suit property registered in his name could if he so wish transfer it to a third party. If that occurred and Stanley was successful in his appeal, he would be faced with difficulty of enforcing the Court of Appeal's judgment in the light of such transfer. For that reason, I find that Stanley would suffer substantial loss if stay is not granted. Indeed, I find that more hardship would be suffered by Stanley than the cause of justice would be served. Those words were made in a ruling of the Court of Appeal case **The Hon. Attorney General & Ano. Vs. African Commuter Services Ltd** Civil Application No. NAI No. 53 of 2009 (UR 29/2009). In that

case, the High Court had given judgment to African Commuter Services Ltd against the Attorney General of Kshs. 928,412,068.50/=. The Court of Appeal in citing another decided case stated thus:-

“In Attorney General Vs. Equip. Agencies – Civil Application No. Nai. 432 of 2001 (unreported) where the decretal sum against the Government was Kshs. 186,230,092/50 this Court said:-

“We think therefore, that it would cripple the operations of the Ministry of Health, if we were to refuse to grant a stay of execution of the order of the superior court A situation that could cause more hardship than would serve the cause of justice.”

The same principle with respect applies in this case.

In respect of the allegations that Stanley swore falsehoods in his affidavit, I find that at this stage I cannot make a categorical finding to that effect. Stanley in evidence stated that when the deceased died he was in Nyandarua and he was called to bury the deceased. No evidence was offered during the objection proceedings in respect of who planted the trees and other plants on the suit property. It is for that reason that I decline to make a finding on the submissions made by Gitonga’s counsel. In the end I find the prayers of the Chamber Summons dated 4th June 2010 are merited and I grant the following orders:-

1. There shall be a stay of execution of the judgment delivered on 28th May 2010 pending the hearing and determination of the appeal filed by Stanley M’Mugwika M’Baichu.

2. The court does order that the status quo in respect of parcel number Kibirichia/Ntumburi/270 be maintained pending the hearing and determination of that appeal.

3. The costs of the Chamber Summons dated 4th June 2010 shall abide with the outcome of the appeal.

Dated and delivered at Meru this 22nd day of October 2010.

MARY KASANGO

JUDGE