



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MALINDI**  
**CIVIL APPEAL NO. 40 OF 2009**

1. **KARISA NGALA**
2. **ABDALLA NGUSU**
3. **JOSEPH KRISA**
4. **SAMMY KARISA.....APPELLANTS**

**-VERSUS-**

1. **AZIZA SAOUD HAMISI**
2. **ALI HAMISI MOHAMED**
3. **MISHI HAMISI.....RESPONDENTS**

**RULING**

By a Notice of motion dated 28/09/09 made under section 3A and section 65 (a) Civil Procedure Act and Order XLI Rule 4 (1) Civil Procedure Rule, the applicant seeks that there be a stay of execution of the judgement in Kilifi SRMCC No. 763 of 2007 which was delivered on 30<sup>th</sup> July 2009, pending hearing and determination of the appeal.

It is based on grounds that;-

1. The appellants are dissatisfied wholly with the judgement delivered by the lower on 30/07/09.
2. The appellants have since applied for certified copies of the proceedings and judgement of the lower court matter, but have to-date not been supplied with the same.
3. The appellants lodged their appeal on 21<sup>st</sup> August 2009, which is within the time prescribed by law but have been prevented from taking any substantive step due to the failure by the lower court to furnish them with certified copies of the proceedings and judgement
4. The intended appeal has high chances of success

5. In the absence of an Order for stay, the appellants structures are liable to being demolished thus causing them substantial loss and damage

6. The appellants are likely to be evicted from their residences and be rendered homeless together with their families unless stay orders are issued

The application is supported by the affidavit sworn by the 1<sup>st</sup> appellant who also has authority to swear the same on behalf of the other appellants. They refer to a letter dated 10h August 2009, the appellants requested to be supplied with the certified copies of the proceedings and judgement from the lower court. They eventually obtained on uncertified copy of the judgement from the court file. That judgement required them to deliver vacant possession to the Respondents by 30<sup>th</sup> September 2009 and this is what gives rise to their fears they shall be rendered homeless together with their family members in the event that they are evicted from the houses they presently occupy.

They believe their appeal has high chances of success given that the Respondents do not have Title or any proprietary content known in law with regard to the property in issue.

The application is opposed and in the replying affidavit sworn by the 1<sup>st</sup> Respondent in behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, it is described as premature and offends the provisions of Order XLI Civil Procedure Rule as no decree has been issued yet to warrant issuance of stay orders.

Further that applicants have failed to meet the basic requirements set out under Order XLI Civil Procedure Rule and the applicant is guilty of inordinate delay because judgement was delivered on 30<sup>th</sup> July 2009 yet the present application was made on 8<sup>th</sup> September 2009. In any event applicant has failed to offer security for due performance of the decree and applicant has failed to show that it will suffer substantial loss if stay orders are not granted. It is the Respondent`s contention that the applicants are only being asked to confine themselves to plot No.48, so they are not being evicted into homelessness and that in fact only parts of some houses are required to be removed( I suppose removed has the same meaning as demolished). Respondents say one house has been rented out to some tenants and the other is being used by 1<sup>st</sup> appellant`s grandchildren as he has opted to reside in another house which is situated on plot NO.48. It is the Respondents contention that appellants have alternative houses which they can move to.

Alternatively 1<sup>st</sup> and 2<sup>nd</sup> Respondents say in plot No.49,3<sup>rd</sup> Respondent has had to stay in a rented house in Mtwapa Town as she has been prevented form building her own house on the eastern portion by the appellants trespass. They maintain that they have a Title to the land and a valid survey report puts the appellants in the Respondent`s land, and infact the appellants admitted being on the Respondent`s land. Appellants filed a further affidavit introducing a search carried out on 21<sup>st</sup> June 2010 saying the same confirms their fears that the Title is a forgery.

The certificate of Postal search in respect of plot No.49/111/MN shows that on 21<sup>st</sup> June 2010 shows the registered owner of the plot as Ali Khamis Mohamed and Mishi Khamis. To this the respondents have filed a further reply insisting that the suit land was transferred and registered in the names of;-

Sidi Khamis Tabibu

Ali Khamisi Mohamed

Mzee Khamisi

Mishi Khamisi

And a provisional certificate issued to them was produced as evidence during the trial in the lower court. On 13/05/04, the share belonging to Sidi Khamis Tabibu and Mzee Khamisi were transferred to the 1<sup>st</sup> respondent, and that was the state of affairs as of December 2007 when the case was

filed. Respondents depone that applicants intend to reargue their case and no fresh evidence is admissible at this stage.

Both counsel agreed to dispose of the application by way of written submissions. The applicant`s counsel, Mr Maosa submitted that the appeal has high chances of success as the applicants intend to demonstrate that Respondents have no Title to the suit property by introducing evidence regarding a search carried out and which showed who the registered owners of the property are and that what the Respondent produced in court during trial was a forgery. It is his argument that by virtue of this evidence, then the suit which proceeded before the lower court was a nullity.

Secondly is that applicants will suffer substantial loss because the lower court has ordered them to vacate the suit land and demolish structures they erected thereon. Mr Maosa submits that applicants have no other place to move to and from that as soon as they move them Respondents will take possession of the disputed property and possibly alienate it to a Third party, thus making it impossible for applicants to resume possession in the event that the appeal succeeds. The suggestion that there has been inordinate delaying filing this application is denied, as Mr Maosa submits that judgement was delivered on 30<sup>th</sup> July and by 21<sup>st</sup> August the appeal was lodged and by 28<sup>th</sup> September this application was made.

It is also his contention that failure to offer security should not be considered as reluctance saying applicants are willing to offer security and should the court so direct. In opposing the application the Respondent`s counsel submitted that applicant has not demonstrated sufficient cause as to why the legally registered owners of the property should be stopped from enjoying their rights over the land – the decision in **M/s Portreitz V James Karanga Kabia HCCA No. 63 of 1997** is cited.

It is also argued that substantial loss which would render the appeal nugatory has not been shown and counsel draws this court`s attention to the case of **O.M. Coasta Lovis V Nova Chemicals Ltd Milimani Com. No. 31 of 2001** which recognized that substantial loss is the cornerstone for granting stay – the question for prime consideration being – what has to be prevented. The Respondent`s counsel argues that applicants cannot purport to lose what they do not own.

Respondents now concede that applicant have satisfied that there wasn`t inordinate delay in filing this application but they hold the view that the application is premature as there is no decree issued yet.

Order XLI Rule 4 (2) is clear as regards what considerations the court ought to bear in mind when dealing with an application for stay of execution to this effect.

***“No order for stay of execution shall be made under subrule (1) unless;-***

***(a) The court is satisfied that substantial loss may result to the applicant unless the order is made and the application has been made without reasonable delay.***

The applicants are apprehensive that following the judgement of the lower court, they will be evicted and then structures demolished. The Respondents do not deny that this is the content of the judgement – they use a more gentle word that is some of the houses are to be removed – the difference is the same – they will be demolished. The applicants also indicate that they occupy those premises with their families – respondents stay in one of the houses, it is not the 1<sup>st</sup> applicant who is in physical occupation, rather it is the grandchildren – surely aren`t grandchildren family members? Even if they were to find alternative accommodation, my perception is that the moment demolition is carried out, the applicants will suffer substantial loss – that is adequately demonstrated and the intended action is confirmed by both the judgement and the Respondents in their affidavit. I do not think the application is premature – what is sought is stay of execution of the judgement not stay of execution of decree.

Another limb to be considered by court is;-

***“Such security as the court orders for the due performance of such decree an order as my ultimately be binding on him has been given by the applicant”***

It is true that applicants have not offered any security for due performance, but should that be a reason to decline the prayers when the cornerstone of the application has already been taken care of? I think it would be unjust and unfair – in my view this omission is not fatal and is easily curable by requirement, which I hereby do, that applicants must deposit the sum of Kshs.300,000/- as security for due performance which sum must be deposited within the next 21 (Twenty – one days from today`s date. For clarity of purpose – this deposit is a condition to the grant of the stay in default of which the order lapses at the expiry of the stated period. The application is allowed – costs shall be borne by Respondents.

*Delivered and dated this 29<sup>th</sup> day of November 2010 at Malindi*

**H A OMONDI**  
**JUDGE**

Mr Kilonzo holding brief for Maosa for applicant  
Mr Jiwaji holding brief for Kanyi for Respondent