



**O. XLI r.4 (2) (a) & (b) Application for Stay of Order of the Lower Court Principles applicable.**

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**H.C.C.A NO. 102 OF 2010**

***LESIT J.***

**SALIM BENSON KAIBIRIA .....1<sup>ST</sup>  
APPELLANT**

**FRANCIS KAIBIRIA .....2<sup>ND</sup>  
APPELLANT**

**VERSUS**

**KENNETH GITONGA**

**MBITI.....RESPONDENT.**

**RULING**

The application is one dated 24<sup>th</sup> September 2010 brought under O.XLIV r.1 of the Civil Procedure Rules, Section 1A, 1B, 3 and 3A of the Civil Procedure Act. It seeks orders as follows:

- 1) That this honourable court do issue an order staying the order dated 1<sup>st</sup> September 2010 in Maua PMCC No. 138 of 2010 until this application is heard and decided.
- 2) That the honourable court do issue any other or further order as would meet the interests of justice in the circumstances of this case.
- 3) That the costs for and incidental to this application be provided for.

It is supported by grounds on the face of the application

- (i) That the effect of the order dated 1/9/2010 is to evict the appellants from the suit land where they have occupied all through.
- (ii) That the order was issued without hearing the case and without the appellants being heard by way of oral evidence and calling their witnesses.
- (iii) That the appellants will suffer irreparable damages if the order herein is not set aside.

It is further supported by affidavit sworn by Benson Kaibiria of even date and annexures thereto. In brief the application contents that Maua PM'S court Civil Case No. 138 of 2010 issued an order of injunction temporarily restraining the deponent and his co-appellant from interfering with respondent's parcel of land No.7400 AMWATHI/MAUA Adjudication section. The ruling sought to be stayed is annexed. The deponent has annexed the pleadings in the Maua Court. The substantive order in the plaint is a declaration that the Respondent is the rightful owner of the suit property.

The application is opposed. The respondent has filed a replying affidavit. In that affidavit the respondent deposes that he is the rightful owner of the suit property. The respondent deposes that he annexed documents of ownership before the lower court in support of this application and that the applicants annexed nothing. He opposes stay of the lower court's order on grounds no prejudice will be suffered by the applicants if the same was declined.

I have considered the application and affidavits by both parties. I have also considered the submissions by Mr. B. G. Kariuki for the applicants. In Mr. Kariuki's submissions he contends that the matter before the lower court was concluded before the appellants were heard and that its effect was to evict the appellants from their ancestral land where they have lived all their lives.

Mr. Kirima in his submissions urged that no eviction order was made but that the appellants were restrained from trespassing into the respondents land. Mr. Kirima urged that the court order was made after both parties were heard. Mr. Kirima urged that if stay was granted his client would undergo untold suffering which may lead to violence.

OXLIVI Stipulates as follows:-

The applicant has to show. I have considered the annexed plaint filed by the Respondent before Maua P.M.'s court. In that plaint, the respondent seeks a declaratory order that he is the rightful owner of the suit property. The applicant then filed an application for a temporary injunction to restrain the applicant from entering or interfering with the suit property.

The learned magistrate granted the injunction sought. The order of injunction was based on consent letter from the Land Adjudication Officer addressed to the Magistrate consenting to the institution of the suit. It was also based on a letter from the Land Adjudication Officer in which the learned trial magistrate observed as follows:-

“He annexed as KGMI a confirmation of land ownership letter written in his name.”

The injunction granted by the learned trial magistrate has been challenged in the appeal filed by the applicant herein. I am of the view that the appeal filed by the applicant herein is arguable. I do not wish to preempt the appeal. Suffice it to say that the stay sought herein should be granted for reason

1. “The Registration process over the suit property is incomplete and .....
2. The order of injunction granted by the trial magistrate at the interlocutory stage had the effect, inter alia of determining the entire suit.
3. There is a need to stay the order of the trial magistrate in order not to render the intended appeal nugatory.

Having come to this conclusion. I will allow the application dated 24<sup>th</sup> September 2010 as follows.

- 1. An order be and is hereby issued staying the order of the Maua P.M.'s Court Case No. 138/10 dated 1<sup>st</sup> September 2010 pending the hearing and determination of the intended appeal.**
- 2. The applicant should file and serve his record of appeal within 60 days from the date herein.**
- 3. Costs of the application abide the final conclusion of the intended appeal.**

