



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO. 218 OF 2009

RAMADHAN JUMA MATATA.....PLAINTIFF

VERSUS

MWANAIIDI MOHAMED MWACHUMBA.....DEFENDANT

R U L I N G

This is a Notice of Motion dated 26th November 2009 under the provisions of Order XLI, Rule 4, of the Civil Procedure Rules. The Applicant is seeking stay of execution of the orders obtained in Kwale Kadhi's Civil suit No. 16 of 2009, Mwanaidi Muhamad Mwachumba versus Ramadhan Juma Matata by the Respondent on 9th November 2009, pending the hearing of the appeal lodged by the Appellant in the High Court.

The application is supported by an affidavit sworn by the Applicant on 27th November 2009. The grounds for the application are that:-

- (a) *On 9th November 2009 the Respondent obtained Judgment compelling the Appellant to hand over vacant possession of the suit property, rents wherefore comprise the Appellant's sole source of income, livelihood and sustenance.*
- (b) *The Respondent's Judgment was in a suit that had been irregularly filed out of time and before the Kadhi's Court which does not have jurisdiction over the matter of a purely civil nature such as land ownership.*
- (c) *The Appellant/applicant is a Senior Citizen and shall be rendered destitute unless the Respondent is prevented from taking over the suit premises wherefrom the Appellant/Applicant derives his sole sustenance.*
- (d) *The Respondent shall not suffer any prejudice by the grant of the stay sought herein.*

The Application is opposed by the Respondent who filed a Replying Affidavit sworn on 1st January 2010. Parties agreed to have the application be disposed of by written submissions which they duly filed.

I agree with the Respondent that the application herein is not the Appeal itself and therefore, this is not the right time to argue the merits or facts otherwise of the Appeal. However, it is the practice and

necessary that the court is told whether the Applicant/appellant has a plausible case or an arguable one besides considering the ingredients necessary for the grant of stay of execution as envisaged by Order XLI, Rule 4.

The Appellant has an undoubted right of appeal in this case. The questions to ask are:-

(i) *Whether the court is satisfied that substantial loss may result to the applicant unless the order is made, and*

(ii) *That the application has been made without undue delay; and*

(iii) *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.*

In the judgment, the Honourable Kadhi, in effect declared that the suit property belongs to the plaintiff and ordered that the defendant to deliver vacant possession of the suit to the plaintiff. This suit therefore involves a dispute on ownership of a house. Land and property matters are taken very seriously in Kenya. The subject matter is valuable and involves property rights. The right to private property is a Constitutional right. By enforcement of the judgment herein, the Applicant will be dispossessed. He will therefore certainly suffer loss. I hold that substantial loss will result if an order for stay is not granted.

The judgment was delivered on 9th November, 2009. The Appeal was filed within the prescribed period on 23rd November 2009. Application for stay was filed on 27th November 2009 i.e within a period of 17 days. This is record time and there was no delay.

The court will usually grant stay on condition that the Appellant provides security for the due performance of the decree.

The subject matter is a house which has rooms from which the Appellant collects rents for the premises. The amount is not discernible from the records. I find that the home itself is security for the Respondent as it will not disappear during the pendency of the appeal. However, the Respondent will be deprived of the income therefrom. The Appellant now collects all its rents from the 4 rooms and the extended rooms.

I therefore do hereby grant stay of execution of the judgment and decree herein pending appeal as prayed on condition that all the rents from the 4 bedrooms and makuti thatched house shall be paid into a joint account held by the parties' Advocates and in default into court with effect from 1st January 2011 until the appeal is determined. The Appellant shall continue to stay in any room/s that he occupies himself and shall not remit any rent into said joint account or court. The Appellant shall continue to collect rent and occupy the rooms that were granted to him in the judgment i.e. "other rooms improved upon the original house."

The costs of this application shall be in the appeal.

Dated and delivered at Mombasa this 3rd day of December 2010.

M. K. IBRAHIM

J U D G E

Coram:

Ibrahim, J

Court clerk – Kazungu

Mr. Kithi for the Appellant

No Appearance by the Respondent

Ruling delivered in their presence.

Ibrahim, J