



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT KERICHO**

**Civil Case 5 of 2003**

1. Civil Practice and Procedure
2. Subject of main suit:-
  - a) Land Law
  - b) Boundary dispute
  - c) Matter referred by consent of parties to the District Surveyor – Kericho to determine the boundary
  - d) Objection to report, withdrawn by defendant
  - e) Report made part of courts judgment
3. Application by defendant/applicant 5<sup>th</sup> March, 2009
  - a) Stay of execution
  - b) Defendant/applicant never offered opportunity to be heard.
  - c) Appeal preferred against decision.
  - d) Portion of the land, has defendant/applicant's the house where demolition may occur.
4. **Held.**
  - a) Objections raised to the surveyors report were withdrawn voluntarily
  - b) Parties voluntarily went to arbitration (29.5.07)
  - c) No irreparable loss shown.
5. **Case Law**
  - a) **Mukima v Aluoga (1988) KLR 645**
  - b) **Halai and Another v Thointor and Turpi (1963) Ltd**

c) **Nitin Properties Ltd v Kalsi & Anor.**

(1994-1998) 2 EA 257

d) **Mombasa Cashewnuts Processors and Another**

v

**Nyani Investment (1988) Ltd & Another**

(1998) CA. 235 of 2007

e) **Kenya Shell Ltd v Benjar Karuga (1982 088)**

(1982-88) IKAR 1022

6. **Advocates**

B.N. Kipkoech advocate instructed by M/S Odhiambo & Odhiambo

for the Applicant originally Defendant – present

N.O. Migiro advocate instructed by M/S Migiro & Co. advocates

for the Respondent originally Plaintiff - present

**ANYOKA ROGITA .....PLAINTIFF**

**VERSUS**

**ANDREW CHERUIYOT ..... DEFENDANT**

**RULING**

**Stay of execution**

**Notice of motion 5<sup>th</sup> March, 2009**

**I: Background**

1. The subject of this main suit was land. The Plaintiff/respondent and the defendant/applicant had a dispute over the boundary between their common boundaries of land. Both parties had voluntarily referred the case to arbitration to the District Surveyor, Kericho on 29<sup>th</sup> May, 2007 by way of a consent letter so filed.
2. An award was filed pointing out the correct boundary when the Plaintiff/Respondent applied to have the surveyors report made a judgment of the court 28<sup>th</sup> November, 2009, when the defendant /applicant belatedly applied for the award to be set aside through an objection raised by them in an application of 12<sup>th</sup> January, 2008.
3. G.B.M Kariuki J ordered on 8<sup>th</sup> October, 2008 that the defendant/applicant application be heard first. When the matter came before me on 12<sup>th</sup> November, 2008 the defendant/applicant withdraw his application leaving only the Plaintiff/Respondent application to make the award a judgment of this court. This was accordingly granted by this court in its ruling of 19<sup>th</sup> February, 2009.

4. The Defendant/Respondent now brings this application notice of motion 5<sup>th</sup> March, 2009 in which he seeks.

***“This Honourable Court ... to grant a temporary stay of execution of the judgment of this Honourable court dated 19<sup>th</sup> February, 2009”***

3....

4....

5. The applicant stated that they had appealed against the said orders of the court.

## **II: Application**

6. The grounds that they seek such orders of stay was that the defendant/applicant were ordered to pay Kshs. 7,000/= to the Kericho District Land Surveyor and give possession of their 35m square of land LR 631/1255 to the respondent. That they were never given an opportunity to be heard and that the orders of judgment was done in their absence.

7. The house constructed has and does fall on the Plaintiff land and as such stands to be demolished. Therefore being dissatisfied with the judgment they pray there be a stay of execution pending an appeal to the court of appeal.

8. In reply, the plaintiff /respondent stated that the application was in fact an abuse of the process of the court. There was no notice application for leave to appeal to the court of appeal. The court of appeal would not entertain an application for stay if there has been no notice of appeal filed. The case of **Proteins & Fruit Processors Ltd v Enkasut Flowers Grower CA 27/06** was referred to.

9. Further the defendants/applicants must show that they would have their appeal rendered nugatory if stay is not given **Mombasa Cashewnuts Processors and Another v Nyari Investment (1988) Ltd and another Nairobi 235/07**). Nor did they demonstrate that they would suffer substantial loss or irreparable harm.

10. It is true that the respondents are aware of the defendant/applicants application of 12.11.08 to expunge the surveyor's report from the record but they withdraw the application voluntarily. The parties by their consent letter, actually took this matter from the courts jurisdiction to determine the same.

## **III: Opinion**

11. The important aspect to note in this application is as stated by the plaintiff/respondent that the parties voluntarily filed a consent letter to refer the main dispute to the District Surveyor to determine. The said surveyor did so and filed his findings. (*Musinga J gave parties time to go through the report*). *The Defendant (applicant filed no objection to this report but when the plaintiff/respondent filed an application to adopt the award as judgment (November, 2007) of the court, the defendant/applicant herein filed their objection proceedings in January, 2008.*

12. The defendant/applicant withdrew the said objection proceeding of January, 2008 voluntarily. This court was left with the application to adopt the award. It did so and judgment was duly entered on 19<sup>th</sup> February, 2009.

13. A notice of appeal has been filed to the court of appeal. I doubt if there is a right of appeal. If there is no right then an application for stay of execution cannot be entertained.

14. If the parties arguments are that they were not present when the award was read before Musinga J, the Hon. Judge did give time to the parties to in effect read the award. The issue was one - namely where does the original boundary between the parties lie? The award determined this.

15. There has not been demonstrated that the defendant will suffer irreparable loss if stay is not granted.

16. I decline to grant the application of 5<sup>th</sup> March, 2009 seeking a stay of execution of this courts judgment. The application is dismissed with cost to the Plaintiff/Respondent.

**DATED** this 24<sup>th</sup> day of March, 2009 at **KERICHO**

**M.A. ANG'AWA**

**JUDGE**

**Advocates**

B.N. Kipkoech advocate instructed by M/S Odhiambo & Odhiambo for the Applicant originally Defendant – present

N.O. Migiro advocate instructed by M/S Migiro & Co. advocates for the Respondent originally Plaintiff - present