



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

Civil Appeal 5 of 2008

DANIEL KIMANI

JOEL MUTURI GITAU

JAMES NGIGU

PATRICK AYIGO.....APPELLANT.

VERSUS

CECILIA NABALAYO

EDWARD WANYONYIRESPONDENTS.

RULING.

By a Notice of Motion dated 21st April, 2008, pursuant to the provisions of sections 3 & 3A of the Civil Procedure Rules and order XLI Rule 4 of the Civil Procedure Rules, the applicant seeks orders:-

1. **THAT**, this application be certified as urgent and service thereof be dispensed with in the first instance.
2. **THAT**, this honourable court be pleased to stay the execution and or enforcement of the decree of 20/11/2007 in Kitale CMC Land Case No. 86 of 2007 while pending the hearing and determination of this application.
3. **THAT**, this honourable court be pleased to stay the execution and/or enforcement of the decree of 20/11/2007 in Kitale CMC Land case No. 86 of 2007 pending the hearing and determination of Kitale HCCC Appeal No. 5 of 2008, and also while pending the hearing and determination of appeal No. 126 of 2007, in the Rift Valley Provincial Appeals Committee.
4. **THAT**, the costs of this application be provided for.

The application is based on the grounds:-

1. **THAT**, the applicants herein preferred an appeal on 8/1/2008 to the Rift Valley Provincial Appeals Committee (Appeal No. 126 of 2007) against the decision of Kwanza Land Disputes Tribunal, which was read and adopted as a judgment of the court on 20/11/2007 vide Kitale CMC Land Case No. 86 of 2007.
2. **THAT**, the appeal to the Rift Valley Provincial Appeals Committee is pending hearing and determination.
3. **THAT**, an application to the Lower Court for stay of enforcement of the Tribunal award while pending the hearing of the appeal to the Rift Valley Provincial Appeals Committee has been refused, the lower court holding that it has no jurisdiction.
4. **THAT**, an appeal has been preferred to this court, vide HCCA No. 5 of 2008 against the refusal of stay.
5. **THAT**, the enforcement of the Tribunal award while the two appeals are pending will subject the appellants to substantial loss in that they will lose five (5) acres of land bought from the respondents and who still retain the consideration for the said land.
6. **THAT**, the appellants have no other land.
7. **THAT**, the applicants/appellants have moved to court for stay without delay.
8. **THAT**, the application is further supported by the annexed affidavit of **JAMES NGUKU**.

The application is predicated upon the annexed affidavit of James Nguku sworn on 21st April, 2008.

On behalf of the applicant, it was agreed that the applicants are joint purchasers of land measuring nine (9) acres within plot No. 454 Kipsoen Settlement Scheme and whose total acreage is 9 ½ acres.

That the applicants are in occupation of 9 acres. By an award of the Kwanza Land Disputes Tribunal it was decreed that five (5) acres out of the 9 acres of plot No. 454 Kipsoen Scheme be transferred to the first respondent. That would leave a balance of 4 ½ acres. This is despite of the fact the applicant have duly paid for nine (9) acres to the respondents who are mother and son respectively. Exhibited as "JN1", "JN2" and "JN3" are the tribunal's decision, the adoption order and the memo of appeal to the Rift Valley Province Appeal

Committee respectively.

That while the applicant's appeal to the Rift Valley Provincial Appeals Committee is pending hearing and determination, the lower court has dismissed the application for stay of execution. The said order is exhibited as "JN4".

That being aggrieved by the lower court's ruling, the applicant preferred appeal to the High Court vide Kitale H.C.C.A. No. 5/2008. The memorandum of appeal is exhibited as "JN5".

That unless this court grants a stay of execution, the applicant's appeal to this court and the Rift Valley Provincial Committee shall be rendered nugatory in the event the Tribunal's report is enforced. In that event the applicants shall suffer irreparable loss as none of them have alternative land.

The respondent failed to file grounds of opposition or replying affidavit. Nevertheless, I granted the respondents advocate leave to oppose the application merely on points of law.

On behalf of the respondent, it was argued that the applicant having been denied stay by the lower court ought to have come by way of Miscellaneous Application not by way of Civil Appeal.

That the lower court having refused stay, it was incumbent upon the applicant to seek leave to appeal to the High Court since stay is not one of the orders that lie as of right courtesy of order XLI Rule 2.

I am grateful to both counsel for their input in law. Order XLI of the Civil Procedure Rules provides:-

"No appeal or second appeal shall operate as

a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside."

To my mind, despite the fact that the lower court refused to grant stay of execution, this court to which an appeal has been preferred is at liberty, on application such as this, to consider application for stay and to make such orders thereon as it deems fit.

Having regard to the foregoing provision of the law and given the fact that there is in existence Kitale H.C.C. Appeal No. 5/2008, I hereby grant the application for stay pending the hearing of the appeal herein. By way of directions, the appeal should be first-tracked and heard within the next twelve (12) months. Costs shall be in the cause.

Dated and delivered at Kitale this 28th day of July, 2009.

N.R.O. OMBIJA.

JUDGE.

Mr. Kiarie for applicants.