REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 5 of 2009

VINCENT KIMANI & OTHERS.....APPELLANT

VERSUS

MICHAEL NJOROGE "B" & OTHERS.....RESPONDENT

RULING

The application before the court is made by a Chamber Summons dated 18th May, 2009, and taken out under O. XLI rule 4 (1) of the Civil Procedure Rules; Section 3A of the Civil Procedure Act; and all other enabling provisions of the law. The applicants seek from the court orders –

1. THAT there be an order for stay of execution of the decree issued at Gatundu on the 21st day of January, 2008 pending the hearing and determination of the appeal filed herein.

2. THAT the costs of this application be provided for.

The application is supported by the annexed affidavit of the Applicants and is based on the grounds that –

(a) The decree issued on the 21st day of January, 2008 has disinherited some beneficiaries.

(b) The effect of the decree is that it has affected some twenty acres contrary to the proper decree issued in July, 1992.

(c) The decree of 21st January, 2008, is not as a result of any order of the court.

(d) There cannot be two decrees in the same suit.

In opposition to the application is the replying affidavit of Michael Njoroge "B" in which he avers, inter alia, that the other Appellants have not given authority to the Applicant to swear the supporting affidavit, and there is only one decree in force but not two decrees as alleged by the Applicant. At the hearing of the application, Mr. Kinga appeared for the Applicants while Mr. Kahuthu appeared for the Respondents. Each counsel submitted at length and in addition Mr. Kinga cited some authorities and, in so doing, they unfortunately touched upon some issues which properly belong to the arena of the appeal itself, e.g the issue as to whether there are two decrees or one decree on record, which is the subject of ground 3 of the appeal. I therefore wish to steer clear of any such matters and confine myself exclusively to stay pending appeal.

The law and procedure governing applications for stay of execution pending appeal are set out

in O. XLI subrule 1 of the Civil Procedure Rules. Under subrule 1, this court is clothed with jurisdiction to order a stay of a decree or order pending appeal "for sufficient cause." At the end of it all, the dispute between the parties touches upon land, and this court is alive to the fact that land matters, especially in this country, are very sensitive matters and evoke a lot of emotions. In my respectful view, a litigant who has a right of appeal in a land matter wields a sufficient cause for a stay of execution pending appeal under O. XLI subrule (1). – This cause is, however, subject to the safeguards spelt out in O. XLI subrule (2) which is couched in the following terms -

"***(2) 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 unreasonable delay; and

(b) Such security as the court orders for the due performance of such decree or may ultimately be binding on him has been given by the applicant."

For the purposes of this application, the Applicants have not spelt out what substantial loss may result unless the order is made. Going, however, by the earlier observation on the sensitivity of land matters in this country, it is more likely than not that the applicants may suffer some substantial loss if the stay is not granted, but the onus is upon them to bring forth to the court the evidence of that substantial loss instead of leaving it for implication by the court. Regrettably, they have not discharged that onus.

The second safeguard is that the applicants should come to court without unreasonable delay. I note from the record that the appeal herein was filed on 27th January, 2009, challenging an order which was made on 20th January, 2009. The appeal was therefore filed within one week of the order sought to be set aside, and that was commendable. One would have expected that the applicants would move with similar alacrity to seek an order of stay, but the application in respect thereof was not filed until 21st May, 2009 which was about 4 month's later. I am not able to say that that delay was reasonable.

Finally is the issue of security. It is regrettable that the applicants have not offered any security in this matter, yet this is obligatory under O. XLI subrule 2 (b). In sum, I therefore find that whereas the applicants have sufficient cause for an order of stay pending appeal, they have eroded that cause by their failure to comply with the mandatory dictates of O. XLI subrule (2) by failing to demonstrate what substantial loss they will suffer; coming to court after some unreasonable delay; and failing to offer any security.

For these reasons, the application must fail and it is hereby dismissed with costs. It is so ordered.

Dated and delivered at Nairobi this 16th day of September 2009.

L. NJAGI

JUDGE