



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**OF KISII**  
**Civil Case 118 of 2009**

**WILLIAM O. OBONYO.....APPELLANT**

**-VERSUS-**

**JONATHAN ODERA.....RESPONDENT**

**R U L I N G**

On 2/4/2009 the plaintiff/applicant filed a suit against the defendant/respondent in the Resident Magistrate's court at Oyugis, claiming that the respondent had in March, 2009 wrongfully and unlawfully entered into his parcel of land no. East Kasipul/Kojwach Kamioro/1781 and erected a semi-permanent structure thereon and remained there. The applicant pleaded that the respondent had no claim or right over the land. He sought a permanent injunction against the respondent and all those acting under him. He also sought general damages for the trespass. An *ex parte* order of temporary injunction was granted. The respondent then filed application seeking that the injunction be discharged, varied, vacated or set aside on basis that, among other things, the claim being based on trespass or boundary dispute, the court lacked jurisdiction to entertain it. The court heard the respondent's application and made decision that it lacked jurisdiction to hear and determine the dispute. It found that the dispute was about trespass and that, by virtue of *section 3(1) and (9) of the Land Disputes Tribunals Act 1990(Act no. 18 of 1990)* the claim belonged to the relevant Land Disputes Tribunal. Costs of the suit were awarded to the respondent.

The applicant was aggrieved by the decision of the learned magistrate and preferred this appeal. It is in this appeal that he filed the present Notice of Motion under *section 3A and 63(e) of the Civil Procedure Act and Order XLI rule 4 (1) and (6) of the Civil Procedure Rules* seeking stay of execution pending the hearing and determination of the appeal. He also sought injunction pending the appeal.

An application for stay of execution under *Order XLI rule 4* should not be brought by summons and not by motion (See *Bavaria Hotel Management Ltd.V. SV Gidoomal and others, HCCC. no. 1736 of 1998 at Nairobi*). I agree with Mr Onyino for the respondent that the application is incompetent, having been brought by way of Notice of Motion. Secondly, the suit was dismissed by the subordinate court and therefore there is nothing to be stayed. There was no positive order made in favour of the applicant which is capable of execution and therefore the application is misconceived (See *Venture Capital And Credit Ltd .V. Consolidated Bank of Kenya Ltd.Civil application no. 349 of 2003 at Nairobi*).

I am aware that the conditions for grant of stay of execution pending appeal are that (a) the intended appeal is arguable, and that (b) in the event of the appeal succeeding, in the absence of stay, the appeal would be rendered nugatory (See *New Apostolic Trustees Registered.V.Maspa Enterprises, Civil Application no.168 of 1999 at Nairobi*). I am unable to find that the applicant has fulfilled either condition.

In short, I dismiss the application with costs.

Dated, signed and delivered at Kisii this 10<sup>th</sup> day of November, 2009

**A.O.MUCHELULE**

**JUDGE**

**10/11/2009**

Before A.O.Muchelule-J

Court clerk-Mongare

Mr. Leiteipa for Mr. Awino for appellant

**COURT:** ruling in open court.

**A.O.MUCHELULE**

**JUDGE**

**10/11/2009**