

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Appeal 173 of 2009

TOM MBOYA OGOLLOAPPELLANT

VERSUS

PETER OGOLLORESPONDENT

RULING

This is an application by the Appellant for an order for stay of execution of the Judgment and Decree issued by the Senior Resident Magistrate on 28th September 2009 pending hearing and determination of the appeal herein.

In the suit before the Learned Magistrate, the Appellant was awarded damages in the sum of Kshs.250,000/- being compensation for the house on the suit property. From the affidavits, it is clear that the property land on which the house stands belongs to the Respondent i.e. Plot No. 13/7/XII. It is referred to as Plot No. MSA/BLOCK XII/249 (original No. 7) in the valuation report of house without land submitted by the appellant.

The Appellant contends that the property is valued at Shs.850,000/- suggestive that the award of Shs.250,000/- is too low. In the suit before the trial court, the plaintiff sought a declaration that the said extension or building on the plot belonged to him. He must have proved this hence the compensation. However, the land belongs to the Respondent.

This court has not been told if there was a counter-claim for an eviction order and if such order was granted. What is clear is that the Appellant intends to enhance the award from Shs.250,000/- to shs.850,000/-.

This is therefore a monetary claim or dispute. The property is not and cannot be in dispute since an award has been given for compensation and unless demolished, a house without land goes with the land and does not vest permanent and indefeasible rights to land.

There is no proof that there is an executable decree against the Appellant which is capable of being executed. The court was not told of any judgment or decree based on any counterclaim. Any eviction will require some legal and lawful process.

However I do not see the decree that should be stayed as against the Appellant. The Appellant can easily pursue his appeal herein for enhancement. I think that to grant any stay herein would amount to the grant of an injunction pending appeal.

The court must be careful that such grant is justified and would not create hardship than it would avoid **(Madhupaper International Ltd -v- Kerr (1985) KLR 840)**. The appeal herein will not be rendered nugatory instead the grant of the injunction would deprive the Respondent of his proprietary rights in respect of his property.

I hereby dismiss the application with costs to the Respondent.

Dated and delivered at Mombasa this 15th day of December 2009.

M. K. IBRAHIM

J U D G E

Ruling read in the presence of Ms. Mutungi h/b Mr. Okemwa for respondent. No appearance for the Applicant.