



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KITALE**  
**Civil Appeal 17 of 2005**

**WANGECI KIBITHE =====APPELLANT**

**VERSUS**

**BENSON KAGO =====:=====RESPONDENT**

**RULING**

In a judgment delivered on 10/6/2005, the learned trial magistrate, Ms. L.M. Nafula RM dismissed the plaintiff's suit (which was for the eviction of the defendant), and then proceeded to grant an order in favour of the defendant, compelling the plaintiff to specifically perform the terms of the contract between the two parties herein.

In effect, the plaintiff was ordered to transfer to the defendant, the property **L.R NO. KITALE MUNICIPALITY BLOCK 1/LESSOS/609.**

Those orders were made in Kitale SPMCC NO.324 of 2004. Thereafter, the plaintiff instituted an appeal before the High Court. The said appeal was **Kitale HCCA. NO.17 of 2005.**

In a judgment delivered by the High Court on 18/6/2007, the appeal was dismissed with costs. That prompted the appellant, (who was the plaintiff in the original suit), to file a notice of appeal on 25/6/2007.

After filing his notice of appeal, the applicant brought an application for stay of execution and for stay of any further proceedings in Kitale SPMCC NO.324 of 2004. It is his plea that the orders of stay, if granted, should remain in force until his appeal is heard and determined by the Court of Appeal.

The applicant says that he is the registered proprietor of the suit property, which is an undeveloped piece of land. He fears that if the respondent acquired title to the suit property, the respondent may proceed to develop it. And, if that were to happen, the applicant believes that it would be expensive to demolish any structure which the respondent might have constructed, if ultimately the applicant's appeal was successful.

Finally, the applicant expressed his willingness to deposit security.

In answer to the application, the respondent submitted that the application was fatally defective because it had been brought pursuant to the wrong legal provisions.

It is said that as the applicant seeks to stay the execution of a decree issued by a subordinate court, whereas his appeal is in relation to an order issued by the High Court, this court had no jurisdiction to issue those orders under Order 41 rule 4 of the Civil Procedure Rules.

As far as the respondent was concerned, under Order 41 rule 4, this court could only stay execution of

its own judgment, if there is an appeal against such judgment.

It is the contention of the respondent that the relevant provisions for moving the court in a situation wherein there was a second appeal, would be Rule 2 of the Court of Appeal Rules.

Apart from the perceived defect in the application, the respondent submitted that the application had no merits. His view is that the application was only intended to delay execution of the judgment given by the magistrate's court. His reason for that contention was that the applicant had not shown what substantial loss she would suffer if stay was not granted.

The respondent also pointed out that even though the judgment herein was delivered on 18/6/2007, the applicant had only filed a notice of appeal, as at 3/11/2007. As far as the respondent was concerned, given the fact that the applicant's advocate did notify this court, on 18/9/2007, that he had got the certified proceedings from the High Court, the applicant should already have taken steps to prosecute the appeal. As no steps had been taken, the respondent felt that the application before me was an abuse of the court process.

In relation to that alleged inaction or delay on her part, the applicant pointed out that the procedure before the Court of Appeal was such that it was the court which invited parties to fix dates for the hearing of appeals or applications lodged before it. Therefore, if there were any delays, the applicant says that she cannot be held responsible for the same.

I do accept the applicant's position regarding the fixing of hearing dates before the Court of Appeal. I also find that if the applicant is found to be delaying in the prosecution of the appeal, this court would have no jurisdiction over the issue, as the appeal is before the Court of Appeal.

In other words, if the respondent strongly felt that the applicant was deliberately causing unwarranted delay in the prosecution of the appeal, the only recourse that I am aware of, would be for the respondent to move the Court of Appeal in such manner as he may deem appropriate.

As regards the application of Rule 2 or any other rules under the Court of Appeal Rules, I note that the said rules were promulgated pursuant to the provisions of section 5 of the Appellate Jurisdiction Act. That statute was enacted to confer on the Court of Appeal jurisdiction to hear appeals from the High Court and for purposes incidental thereto.

In the circumstances, I hold that the Court of Appeal Rules are inapplicable to matters which are before the High Court.

Next, I ask myself what would happen if the reliefs sought were not granted. Would the appeal be rendered nugatory, as suggested by the applicant? Or did the applicant fail to show what loss she would suffer even if there was no order for stay?

The property that is the subject matter of the application is a vacant plot. If the respondent were to execute the decree, the plot would be transferred from the applicant to the respondent.

In my considered opinion, once the title was transferred to the respondent, the property may be mortgaged or sold off. There would be no limitation as to what the respondent could do with the title or the property itself. Accordingly, the property may well end up being placed beyond the jurisdiction of the court.

The respondent says that this court ought not to issue an order for stay of execution because the decree which is to be executed was not issued by this court, but by the magistrate's court.

In my reading of the provisions of Order 41 rule 4 (1) of the Civil Procedure Rules, I find no limitation of the kind suggested by the respondent. As far as I am concerned, this being the court appealed from, it has jurisdiction to order stay of execution, if sufficient cause is shown.

I recognize that there is a possibility that the appeal could be allowed. If that were to happen after the property had been transferred to the respondent, the applicant may be unable to reclaim the property, in the event that the same had exchanged hands from the respondent. I therefore find that the applicant has shown sufficient cause to warrant the issuance of an order for the stay of execution in **Kitale SPMCC NO.17 of 2005**. I therefore hereby order that there shall issue forthwith an order for stay of execution, as prayed.

However, in the interests of justice, there shall also issue a further order directed at the applicant. The said order requires the applicant not to encumber or alienate the suit property until the appeal is heard and determined. The reason for this further order is that it will ensure that the property is preserved in its present state until the Court of Appeal will have adjudicated on the appeal.

Finally, the costs of the application shall abide the outcome of the appeal. In the event that the appeal succeeds, the costs of this application shall be awarded to the applicant herein. However, if the appeal should fail, the costs of this application shall be awarded to the respondent herein.

Dated and Delivered at Kitale, this 21<sup>st</sup> day of January, 2008.

**FRED A. OCHIENG**

JUDGE