



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

Civil Suit 15 of 2006

DANIEL WALTER RASUGU suing thro' the

ATTORNEY BEATH ONSOMU RASUGU PLAINTIFF

VERSUS

1. JOHANA NYAKWOYO BUTI)

2. JOSEPH ONDIMU OENDO) RESPONDENTS

3. THE HON. ATTORNEY-GENERAL)

RULING

The first defendant filed an application pursuant to the provisions of **Order XL1 rule 4(1)** of the **Civil Procedure Rules** and sought an order of stay of further proceedings pending the hearing and determination of an appeal before the Court of Appeal. The application was supported by the applicant's affidavit. He deposed that this suit concerns the decision of Borabu Land Disputes Tribunal dated 9th May 2004 which was adopted by Nyamira Senior Resident Magistrate's Court on the 16th of February, 2005. Thereafter the plaintiff filed this suit seeking a declaration that the decision by the Borabu Land Disputes Tribunal was unlawful and/or improper. In that decision, the Tribunal purported to revoke a title to a parcel of land.

Subsequent to the filing of this suit, the first defendant filed a preliminary objection to the effect that this court had no jurisdiction to entertain the suit in terms of **section 8(9)** of the **Land Disputes Tribunal Act**. The preliminary objection was dismissed on 6th June, 2006 by Bauni J. The first defendant has preferred an appeal against that decision. The applicant stated that the appeal would be rendered nugatory if the order sought was not granted. He further deposed that the plaintiff was not going to suffer any prejudice if stay of proceedings was ordered.

Mr. Oguttu for the applicant submitted that if proceedings went on before this court and the Court of Appeal allows the appeal and thereby holds that this court has no jurisdiction, valuable judicial time will have been wasted. He cited, **inter alia**, **IN THE MATTER OF GLOBAL TOURS & TRAVEL LTD**, Winding up cause no.43 of 2000 at Nairobi (unreported).

Mr. Migiro for the plaintiff opposed the application and submitted that the appeal before the Court of Appeal was not an arguable one. He pointed out that the plaintiff was not a party to the proceedings that

were before the Borabu Land Disputes Tribunal. In any event, the plaintiff was the registered proprietor of the land in dispute. Counsel further argued that the applicant had not demonstrated that he stood to suffer substantial loss unless stay of proceedings was granted. He cited the case of **MACHIRA t/a MACHIRA & CO. ADVOCATES VS EAST AFRICAN STANDARD** (No.2) [2002]

2 KLR 63.

As to whether the plaintiff would suffer any prejudice if stay of proceedings was ordered, Mr. Migiro submitted that such stay would mean that the hearing of the suit is delayed and his client would suffer unnecessary anxiety.

Regarding the issue of this court's jurisdiction, it was argued that while the plaintiff was entitled to institute judicial review proceedings for an order of certiorari to quash the decision of the Borabu Land Disputes Tribunal, he was not prevented from seeking a declaration from this court as he had already done.

I have considered the submissions made by both counsel. I should start by pointing out that an application for stay of execution pending appeal is different from an application for stay of proceedings of an on going case pending hearing of an appeal. There are specific requirements of the law which must be shown to exist before stay of execution pending appeal is ordered. These are:

- (a) sufficient cause must be shown;
- (b) it must be shown that the applicant will suffer substantial loss,
- (c) the application should be made without unreasonable delay and
- (d) such security as the court may order must be provided.

Where the above requirements are not met, stay of execution pending appeal cannot be granted.

On the other hand, stay of proceedings pending appeal is purely a matter of judicial discretion that is exercised in the interests of justice depending on the facts of each case. Of course the discretion has to be exercised judicially and not whimsically. I do not agree with the submissions by Mr. Migiro that the applicant herein had to demonstrate that he stood to suffer substantial loss before stay of proceedings is granted.

IN THE MATTER OF GLOBAL TOURS & TRAVEL LTD (supra), the court held that:

“In deciding whether to order a stay [of proceedings]

the court should essentially weigh the pros and

cons of granting or not granting the order. And

in considering those matters it should bear in

mind such factors as the need for expeditious

disposal of cases, the prima facie merits of the

intended appeal, in the sense of not whether it will

probably succeed or not but whether it is an

arguable one, the scarcity and optimum utilization

of judicial time and whether the application has

been brought expeditiously.”

Applying the above considerations, I would say that the applicant’s appeal is not a frivolous one. It is one which is arguable. An arguable appeal is not one that, prima facie, has overwhelming chances of success; it is, in my view, one which raises contestable points of law.

In determining this application, the issue that I consider most important is optimum utilization of scarce judicial time.

If stay of proceedings is not granted, the plaintiff may proceed to prosecute his case within a short while. If sometime thereafter the appeal is heard and it succeeds, it will be held that this court had no jurisdiction and therefore any proceedings that may have gone on including any order that may have been issued will be a nullity. On the other hand, if stay of proceedings is allowed and the appeal is unsuccessful, the hearing of the plaintiff’s case will go on.

While I appreciate that pendency of litigation is a source of anxiety to parties and the plaintiff wishes to minimise his anxiety by proceeding with this suit expeditiously, I think the plaintiff would be more stressed by a scenario in which orders are made by this court, hopefully in his favour, only for the Court of Appeal to trash them for want of jurisdiction in the event that the appeal is allowed.

Being so persuaded, I exercise my discretion in favour of the applicant and order that these proceedings be and are hereby stayed pending hearing and determination of the appeal that is pending before the Court of Appeal. The costs of this application shall be in the cause.

DATED, SIGNED and DELIVERED at KISII this 28th day of July, 2008.

D. MUSINGA

JUDGE.

Delivered in open court in the presence of :

Mr. Migiro for the Plaintiff.

N/A for the Defendants

D. MUSINGA

JUDGE.