



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Civil Appeal 39 of 2008

JOSEPH CHEGE APPELLANT

VERSUS

GIKURI HEHO RESPONDENT

(Being an appeal from the judgment and order of his Honourable G.K. Mwaura Principal Magistrate in Murang'a's Civil Case NO. 53 of 1981 made on 28th February 2007 read on his behalf by Hon. T.W. Murigi SRM)

RULING

Principal Magistrate of Murang'a gave judgment for the plaintiff to the effect that the plaintiff was to get half share of Loc. 8/Kionjoine/23. The court ordered subdivision of that property into two equal parts. Half of it going to the plaintiff and the other half to the defendant. The defendant being aggrieved with that judgment filed this appeal. The defendant also sought stay at the lower court to stay its order of registration in favour of the plaintiff of the half portion. Further the defendant sought an inhibition of the title forbidding any other dealings until the disposal of High Court Civil Appeal 171 of 2007 Nairobi High Court. That case in Nairobi High Court was transferred to Nyeri High Court and was given the present number. The appellant filed a notice of motion dated 26th May 2008 which is the subject of this ruling. In that application the appellant seeks stay of execution of the decree and judgment of 28th February 2007 of Murang'a SPM's CC 53 of 1981. In his affidavit he stated that the order of subdivision of the property was unfair because it would interfere with the status quo on the land. He stated that on that land he had 3000 tea bushes, numerous trees and subsistence crops. That if the respondent was to get half of the property he would suffer substantial loss. He prayed that the court would order the provision of security to be provided. The appellant relied on the following cases:-

Tropical Commodities Supplies Ltd and others v International Credit Bank Ltd (in liquidation) [2004] EA. In this case it was held,

“A party must satisfy three conditions to obtain a stay of execution namely; that substantial loss may result unless the order of stay is made, the application has been made without unreasonable delay, and security for costs has been given by the applicants.

Substantial loss does not represent any particular size or amount but refers to any loss, great or small, that is of real worth or value as distinguished from a loss that is merely nominal. Application was allowed. Security for costs of Ushs.20 million ordered.”

“The court in exercising its powers under Order XLI rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

Ngotho Commercial Agencies Ltd v George Wanjuki Gethi Civil Appeal No. 182 of 2005. Honourable Justice L. Kimaru held as follows:-

“The appellant has established that he would suffer substantial loss. In the premises therefore I would allow the application for stay of execution pending the hearing and determination of the appeal filed herein. However to avoid hardship on the part of the respondent, I will grant the said stay on the following conditions on his part; if the respondent deposits in court or in an interest earning account in the joint names of the counsel for the appellant and the respondent the sum of Kshs.60,000/-, the attached goods may be released to him.”

Francis Muthee Maingi & Domina Kathure v Boniface Kiumiru (a minor suing through his father and next friend) & Stanley M’Ringera Nkuraru Civil Appeal No. Meru 32 of 2005. The Honorable Lady Justice Ruth Sitati stated as follows;

“From the above, the issues that the court should concern itself are whether the applicants herein have shown that they will suffer substantial loss if the order of stay is not granted and also whether the application herein has been made without unreasonable delay. The court is also concerned with the issue of what security this court should order for the due performance of the decree of the lower court.”

The respondent in opposition to the application stated that the same did not comply with the requirements of Order XLI rule 4 (2) of the Civil Procedure Rules. That the judgment was delivered by the lower court on 28th February 2007 and the application for stay was not filed in court until 9th May 2007. That the period of two months delay was inordinate and was without sufficient explanation. Order XL rule 4 (2) provides:-

“(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 that the application has been made without unreasonable delay; and

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

The appellant has stated that if stay of execution is not granted he will suffer substantial loss because of the crops he has on the ground. That argument has to be considered in the background of that the lower court case was filed in the year 1981. It was finally concluded in the lower court in the year 2007. The judgment of the court was in favour of the respondent. The respondent has an equal right to enjoy the fruits of his judgment. This application ought to however be considered bearing in mind that what was in the lower court was relating to land. The lower court ordered the property to be subdivided into two equal halves for the appellant and the respondent. If stay is not granted and the appellant was successful in his appeal the land would have to be retransferred back to him. In order to meet the interest of justice in this matter I grant the following orders:-

1. Stay is hereby granted of execution of judgment and decree issued on 28th February 2007 in Murang’a SPM’s CC No. 53 of 1981 only for three months from this date hereof.

2. At the reading of this ruling the court will give directions on the hearing of this appeal.

3. *Costs of the notice of motion dated 26th May 2008 shall abide with the outcome of this appeal.*

Dated and delivered at Nyeri this 15th day of October 2008.

MARY KASANGO

JUDGE