



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
(MILIMANI LAW COURTS)

Civil Case 2463 of 1996

REUBEN INDIATSI NASIBI.....PLAINTIFF

VERSUS

ALFRED MACHAYO.....1ST DEFENDANT

HON. ATTORNEY GENERAL.....2ND DEFENDANT

RULING

This is an application for stay of execution of the Judgment and Orders of the Honourable Mr. Justice Ransley of 20th February 2006 pending the filing hearing and determination of intended appeal. The application is based on the grounds as stated on the body of the Notice of Motion herein dated 4th May 2006 and supported by an affidavit sworn by the applicant on 4th May 2006. The applicant has already filed Notice of Appeal in the Court of Appeal.

Mr. Ritho learned counsel for the applicant submitted that the suit involved a property in Nairobi being LR NO.NAIROBI/BLOCK 32/21. The premises are developed and the applicant has been in possession since 1974 to date.

Mr. Ritho cited the case of KENYA

RS LTD VS. TITUS MUIRURI DOGE – CIVIL APPLICATION NO. 64 OF 1990 where the Court of appeal said:

“This court has also held that appeals relating to disputes in land should finally be determined by this court.”

The application is opposed by Mr. Gachara learned counsel for the Respondent who submitted that there was an inordinate delay in bringing this application and there is no explanation offered for the delay of about 80 days.

Further he submitted that there is no evidence by affidavit indicating what loss will be occasioned if stay is not granted.

It is in the discretion of the court to grant or refused a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution.

It has been said that the court as a general rule ought to exercise its best discretion in away so as not to prevent the appeal if successful from being rendered nugatory per Brett LJ in **WILSON VS. CHURCH (NO.2) 12 CH. D(1879) 454** at page 459. In the same case Cotton LJ said at page 458:

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful is not rendered nugatory.”

In **ABOK V. KENYA POSTS & TELECOMMUNICATIONS CORPORATION CIVIL APPLICATION NO. 206 OF 1996**. The Court of Appeal held that there are two conditions which the applicant must satisfy before he is granted stay of execution Pending Appeal.

- (1) That the intended appeal is not frivolous, that it has an arguable ground to canvas during the intended appeal; and
- (2) That the appeal if it is successful would be rendered nugatory, if stay of the order is not granted.

Also in the case of **INDAR SINGH GILL LTD VS. NJOROGE GICHANA – HACC NO. 2411 OF 1990** Pall J (as he then was) said:

“In a discretionary matter like this the court should have taken into account all the circumstances including the merits of the intended appeal.

But I think a judge of the High Court whose order or decree is being appealed against on an order for stay of execution under Order 41 rule 4 so far as the High Court is comparative an unsuccessful party, has an undoubted right to appeal and Order 41 Rule 4 assumes that the decree holder must always recognize that its decree may be reversed.”

In the instant application the applicant had been in occupation of the suit premises since 1974. He has filed a Notice of Appeal. If stay is not granted and the suit premises is transferred to the plaintiff the appeal would be rendered nugatory if successful.

In view of the above reasons, I am persuaded to exercise my discretion in favour of the applicant and allow the application in terms of Prayers 3 and 4 of the Notice of Motion dated 4th May 2006.

But the rent collected henceforth should be deposited in an interest earning Bank Account to be

opened in joint names of counsel for the Plaintiff and the defendant.

Dated at Nairobi this 20th day of March, 2007.

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J.L.A. OSIEMO

JUDGE