



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

**Civil Appeal 93 of 2006**

**MARTHA MWONJARU ..... APPELLANT**

**AND**

**M'RUNYARU M'KIRICHIA .....( DECEASED)**

**VERSUS**

**M'ATAYA M'AKWALU AKWALU ..... RESPONDENT**

**RULING**

The dispute in this matter arises out of a Land Dispute Tribunal case whose award was read and entered as judgment by Maua Court in LDT No.7 of 2005 in favour of the respondent in this application. One week after this the defendant in that dispute died and the respondent in this application brought an application dated 15<sup>th</sup> September, 2005 seeking to have the defendant's wife, the applicant herein, to be appointed a legal representative of the deceased. That application was allowed. Then this application was filed. It seeks, in the main two orders sought in an omnibus manner under one prayer as follows:-

“THAT there be a stay of execution of the award of the elders in Maua LDT No.7/05 which was read and confirmed in court and also stay lower court's orders of 15<sup>th</sup> December, 2005 and 15.3.2006 pending the hearing and determination of this application and the appeal herein”.

The application is premised on the grounds that the applicant was dissatisfied with the lower court's ruling dated 23<sup>rd</sup> August, 2006 and has appealed against it. That as a result of that ruling the respondent is poised to execute. That should execution proceed the appeal will be defeated and the applicant shall suffer irreparable loss and damage as she will lose 2 acres of land that she has occupied and fully developed during her whole marriage life.

But the respondent avers in his replying affidavit that this application has been overtaken by events as the surveyors have fixed the boundary of the land in dispute, following an order of the court extracted on 7<sup>th</sup> September, 2006.

In a further supporting affidavit (which ought to have been a supplementary affidavit) the applicant maintains that no surveyors have visited the disputed land to fix the boundary. She also states that the extract order of the subordinate court is a forgery.

I have considered most carefully these rival arguments. The appeal herein is in respect of the lower court's ruling dated 23<sup>rd</sup> August, 2006. That ruling was in respect of the applicant's application seeking,

according to the annexed ruling, the setting aside, varying, and vacating and/or staying the proceedings and orders of the lower court dated 15.12.2005 and 15.3.2006. That application was dismissed.

The order of 15.12.2005 appointed the applicant legal representative of the deceased. It is not clear what application gave rise to the order of 15.3.2006. Neither are the terms of the order clear from the record.

The application was not argued. Counsel simply informed the court that the application had been served and the court merely recorded that orders are granted as prayed.

However, as I have stated this application seeks to stay the ruling of 23<sup>rd</sup> August, 2006. That ruling dismissed an application for setting aside and stay. An order of stay of execution will be granted where execution is imminent from the order being challenged on appeal.

Put differently it is only an order capable of execution that can be stayed. Under Order 41 rule 4(1) of the Civil Procedure Rules there are only two types of orders allowed, namely;

- (i) An order for stay of execution, and
- (ii) An order for stay of proceedings

Similar situation as this present application where applications were brought to stay an order of dismissal were considered by the Court of Appeal in Western College of Arts and Applied Sciences V Oranga & Others(1976) KLR 66, Devani & 4 others V. Joseph Ngindari, Civil Application No.Nai.136/04, William Wambugu Wahome and the Registrar of Trade Unions & Others Civil Application No.Nai 308 of 2005(unreported) and the most recent, Mombasa Seaport Duty Free Ltd V Kenya Ports Authority, Civil Application No.Nai 242 of 2006. I will quote extracts from each of these decisions to demonstrate the point being made.

In the Western College Case (Supra) Law V.P, with whom the other members of the court concurred said:-

“But what is there to be executed under the judgment, the subject of the intended appeal? The High Court has merely dismissed the suit with costs. An execution can only be in respect of costs.....

In the instant case the High Court has not ordered any of the parties to do anything, or to restrain from doing anything or to pay any sum. There is nothing arising out of the High Court judgment for this court in an application for stay to enforce or to restrain by injunction.

In the Devani Case the court stated that;

”By dismissing the judicial review application the superior court did not thereby grant any positive order in favour of the respondents which is capable of execution. If the order sought is granted it will have the indirect effect of reviving the dismissed application. This court cannot undo at this stage what the superior court has done. It can only do so after hearing the appeal. It seems to us that the application for stay of execution of the dismissal order was not brought in error. It was designed to achieve that result which regrettably is impracticable”

Finally in William Wambugu(supra) the court said;

“The order of 19.9.2005 did not grant the respondents any relief other than costs which can be enforced through execution. On the contrary the order in fact denied the applicant a relief in the sense that it struck out the application for leave and for an order of stay and set aside the leave and stay granted earlier.

There is no judgment in favour of the respondents which is capable of enforcement by execution save for costs”

I say no more on this point. Can a stay be issued to stop execution of the award of the elders in Maua LDT No.7 of 2005? The respondent has argued that execution of Maua LDT No.7/2005 will serve no purpose as the Surveyor has fixed the boundary of the disputed parcel of land.

That averment is based on Order 3 of the extracted order which directed the District Land Surveyor, Meru North District to re-fix the actual boundary separating the 2 parcels of land in dispute.

The applicant maintains that no such re-fixing of boundary has been done. Annexed to her further affidavit is a Chief's letter to the effect that one party has refused/ignored the landmark. It is therefore a case of the respondent's word against the applicant's. It is the respondent who asserts that the boundary has been re-fixed and the burden is therefore on him to demonstrate this. He ought to have obtained and filed an affidavit from the surveyors to confirm this position. I come to the conclusion that if a stay is not granted then the applicant will suffer substantially as execution of the extracted order will adversely adjust her property. This application was brought only 13 days after the extracted orders were issued. There was no unreasonable delay.

I will therefore grant unconditionally stay of execution of LDT Case No.7 of 2005 pending the hearing and determination of this appeal. It is also noted that there has always been temporary stay since 3<sup>rd</sup> October, 2006.

Costs will be in the appeal.

DATED AND DELIVERED AT MERU THIS 22<sup>ND</sup> DAY OF JUNE, 2007

W. OUKO

JUDGE