

REPUBLIC OF KENYA

HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

Civil Appeal 26 of 2003

WAIGANJO NDAGUTHAAPPELLANT

V E R S U S

MARGARET WANJIRU NJORORESPONDENT

R U L I N G

The Appellant has sought by chamber summons dated 4th April, 2007 an order for stay of execution of the decree herein pending a second appeal to the Court of Appeal. Notice of appeal has been duly lodged. The decree of this court appealed against was passed on 22nd March, 2007. By it the first appeal to this court was allowed and the judgment of the lower court set aside. The judgment of the lower court had declared the Respondent (who was the plaintiff) to be the rightful owner of the subject parcel of land.

The effect of this court's decree which set aside the lower court judgment was to dismiss the plaintiff's suit. What is sought in this application, therefore, is in effect, an order to stay the dismissal of the plaintiff's suit.

I have read the two affidavits sworn in support of the application as well as the two affidavits sworn in reply. I have also given due consideration to the submissions of the learned counsels appearing. The application is brought under Order 41, rule 4 of the Civil Procedure Rules (the Rules). Under sub-rule (2) of that rule, the Appellant must demonstrate that he stands to suffer substantial loss unless the order of stay is granted; that the application for stay has been made without unreasonable delay; and that he is prepared to give such security as the court may order for the due performance of such decree or order as may ultimately be binding on him.

The Appellant has not demonstrated that she stands to suffer any substantial loss. Indeed, I doubt that a party will suffer substantial loss merely because his suit has been dismissed. But the court can, in appropriate circumstances, issue stay where dismissal of the suit has been ordered on appeal. In the present case the Appellant ought to have demonstrated that the decree of the lower court, which was in her favour (and which was set aside by the decree herein), had been duly executed; otherwise what is there to be stay? There is no evidence that the decree of the lower court had been duly executed. A stay of execution as sought would have the effect only of keeping alive the plaintiff's suit in the lower court, which suit has already been dismissed.

I will therefore refuse the present application. It is hereby dismissed with costs to the Respondent.

DATED AT NAIROBI THIS 23RD DAY OF JULY 2007

H. P. G. WAWERU

J U D G E

DELIVERED THIS 27TH DAY OF JULY 2007