



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL 169 OF 2005

JOHN KIRUBI.....1ST APPELLANT

JOSEPH MWANGI KIMANI.....2ND APPELLANT

PAUL NDUNGU KIIRU.....3RD APPELLANT

VERSUS

FULL GOSPEL CHURCHES OF KENYA.....RESPONDENT

RULING

This is a notice of motion by the appellants made under **Order XLI Rule 4** and **Order L Rule 1** of the **Civil Procedure Rules** seeking an order of stay of execution of the subordinate's court's order issued on the 16th February 2005 together with all the consequential orders emanating therefrom. The grounds in support of the application are stated on the face of the application. The appellants' state that they had lodged an appeal against the said decision of the subordinate court and prayed that stay of execution be granted to preserve the substratum of the appeal. The appellants state that if stay is not granted, the suit land would be transferred to the respondent and thus render the entire appeal nugatory. The appellants contend that they have an arguable appeal. The application is supported by the annexed affidavit of Paul Ndungu Kiiru who narrated the events leading to the issuance of the said order by the subordinate court, which is sought to be stayed.

The application is opposed. John Githinji Mwangi, a pastor with the Full Gospel Churches of Kenya, Engashura has sworn a replying affidavit in opposition to the said application. He has, *inter alia*, deponed that the Bahati Land Disputes Tribunal had awarded the suit parcel of land *i.e. Bahati/Kabatini Block 1/1405* to the respondent after it had established that the appellants had fraudulently converted the suit land to their names. He deponed that after the award was made by the Bahati Land Disputes Tribunal, the same was adopted as the judgment of the court by the Nakuru Chief Magistrate's Court. He further deponed that the appellants filed an application for judicial review seeking to quash the said decision of the tribunal, but the same was dismissed by the High Court. He deponed that the present application was an abuse of the due process of the court and urged the court to dismiss the application with costs.

At the hearing of the application, Mr. Wambeyi, counsel for the appellants, reiterated the contents of the application and the supporting affidavit thereof. He submitted that the appellants were willing to abide by the terms that this court may impose when granting the said application for stay of execution of the subordinate court's order. He urged the court to allow the application. Mr. Kiburi for the respondent opposed the application. He submitted that the ruling which the appellants had sought to impeach was delivered on the 28th August, 2005. The present appeal was filed on the 30th October 2005. The said

appeal was therefore filed out of time. He submitted that an application had been filed by the appellants seeking an extension of time to file an appeal out of time to the said tribunal in February 2005 but the said application had not been prosecuted to date. He maintained that the current appeal was incompetent because it was filed after an order by the subordinate court adopting the award of the Land Disputes Tribunal. He submitted that there was no legal provision allowing a party to challenge the adoption of an award by the subordinate court. He urged the court to disallow the application.

I have carefully considered the rival arguments made by the parties to this application. I have also read the pleadings filed by the parties to this application, including the affidavits filed. The issue for determination by this court is whether the appellants have established that they are entitled to be granted stay of execution of the order of the subordinate court pending the hearing and determination of the appeal. The principles to be considered by this court when determining whether or not to grant stay of execution are well settled. As was held by Madan JA, in **Butt vs Rent Restriction Tribunal [1982] KLR 417** at page 419,

“It is in the discretion of the court to grant or refuse 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 a way so as not to prevent the appeal, if successful, from being rendered nugatory...”

In **Ridland Enterprises Ltd vs Premier Savings & Finance Ltd [2002] 2 KLR 139**, Khaminwa CA (As she was then) held at page 141 that;

“A successful litigant should not be kept out of the enjoyment of his fruits of his judgment indefinitely. In the case of Ports Maternity vs James Karanga Kabi HCA No.63 of 1997 (CIR) Hon. Justice Waki made a very apt comment and I quote (page 4 paragraph 2);

“That right of appeal must be balanced against an equally weighty right, that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be just cause for depriving him of that right.”

In the present application, the appellants have stated that their appeal would be rendered nugatory if stay of execution is not granted. What are the appellants seeking to stay? They are seeking to stay the adoption by the subordinate court of the award of the Bahati Land Disputes Tribunal. The appellants have stated that they have a pending application before the Rift Valley Provincial Appeals Tribunal seeking to extend time to file appeal out of time. I have read the entire **Land Disputes Tribunal Act**. There is no provision granting jurisdiction to the Provincial Appeals Tribunal to extend time for an aggrieved party to file an appeal before it. The jurisdiction of the Provincial Appeals Tribunal is restricted to hearing appeals as provided by **Section 8** of the said **Land Disputes Tribunal Act**. That section does not grant the Appeals tribunal power to hear applications for extension of time.

It is apparent that the appellants squandered their opportunity to challenge the decision of the Bahati Land Disputes Tribunal when they failed to prosecute their application for judicial review. The said application was dismissed for want of prosecution. The appellants are now attempting to forestal the inevitable; the giving effect to the decision of the Bahati Land Disputes Tribunal. It is clear from the foregoing that the appellants have not established that they have a competent appeal. This court has not been persuaded to exercise its discretion in favour of the appellants and grant them stay of execution of the order of the subordinate court pending the hearing and determination of the said Appeal. The respondent has been kept from enjoying the fruits of its judgment for over seven years. The appellants have not established sufficient reasons to enable this court exercise its discretion to grant them stay of execution. The legal path that the appellants have chosen to take in this appeal is one instance of legal experimentation. They are at liberty to pursue it in so far as the respondent is not prejudiced.

The application for stay of execution is refused. It is hereby dismissed with costs.

DATED at NAKURU this 26th day of OCTOBER, 2007

L. KIMARU

JUDGE