REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Civl Case 21 of 2001

ABRAHAM KIPSANG KIPTANUI……...………….PLAINTIFF

VERSUS

HILLARY KIPKORIR MWAITA……....….....1ST DEFENDANT

THE HON. ATTORNEY GENERAL…..…...2ND DEFENDANT

RULING

The first defendant filed an application by way of a notice of motion under **Order XLI rule 4(1)** and **(2)** of the **Civil Procedure Rules.** He prayed for an order of stay of execution of the decree of this court arising out of the judgment delivered on 21st June 2007 pending filing and determination of an intended appeal.

The application was premised on grounds that:

(a) The applicant stood to suffer substantial loss if stay was not granted.

(b) The intended appeal was not frivolous.

(c) The intended appeal will be rendered nugatory if the order sought is not granted.

In his affidavit in support of the application, the applicant deposed that a notice of appeal against this court's judgment was filed on 2nd July, 2007. He further stated that unless this court granted stay of execution of the said judgment he would suffer substantial loss and damage in the event that the plaintiff entered the suit land and evicted him. All his developments thereon including houses and tea bushes were likely to be destroyed, he added. He also believed that the appeal would be rendered nugatory unless stay of execution was granted.

The applicant deposed that he was prepared to provide security by depositing in court a certificate of lease for a property known as **Nakuru/Municipality Block 15/907** registered in his name which he said was valued at Kshs.5 million or thereabout. No valuation report for the said property was provided.

The respondent filed a replying affidavit and stated that the applicant had been granted stay of execution of the judgment for a period of 30 days from the date of delivery of the judgment. He further stated that he did not intend to alienate the suit property and therefore the property could be re-transferred to the applicant if he succeeded in his appeal. He added that he would continue to suffer loss if the applicant was allowed to continue occupying his land free of charge. He estimated such loss at Kshs.1 million a year, based on his income from other neighbouring properties. He further pointed out that the

applicant had been restrained by a court order issued in the year 2001 from developing and farming the suit land pending determination of the suit and if he disobeyed the order, he could not rely on his contemptuous acts to seek stay pending appeal. He urged the court not to allow the applicant occupy his land any further, having established that the applicant and his co-conspirators had illegally procured a title deed to his land, occupied it and thus deprived him of its use for more than seven years.

Lastly, he offered to give an undertaking as to damages in the event that he took back possession of the suit property and the appellant succeeded in his appeal.

Mr. Tengekyon for the applicant and Mr. Musangi for the respondent made brief submissions in support of their respective clients' arguments. I have considered those submissions.

The background of this application is that in 1987, the respondent purchased a parcel of land at Olenguruone. On 23rd February, 1995 he obtained a title deed for the same. It was registered as **Olenguruone/Kiptangich/184**, hereinafter referred to as "***the suit property***". The same measures 8.2 hectares or thereabout. The respondent fenced the suit property and undertook other developments thereon. Sometimes in May 2000, he learnt that the applicant had trespassed to his land. He investigated the matter and realized that the applicant had been issued with another title deed in respect of the same parcel of land. That subsequent title deed was issued on 29th May, 1997. The commissioner of lands had purportedly allocated the suit premises to the applicant.

The respondent moved to court and filed the present suit. He sought, ***inter alia***, a declaration that he was the rightful owner of the suit premises and cancellation of the applicant's title deed. He also filed together with his plaint, an application seeking an injunction to restrain the applicant from entering into and/or developing the property. That application was heard and on 23rd March, 2001 the court declined to issue a full injunction but ordered that the property be preserved as it was. Since the applicant had planted maize and tea bushes thereon, the court further ordered that after harvesting the maize, the applicant should not carry out any further developments thereon. He was, however, allowed to continue harvesting the tea which was occupying a portion measuring approximately five acres. These orders were to remain in force until the suit was heard and determined.

The hearing commenced on 8th April, 2004 and judgment was delivered on 21st June, 2007. The court found in favour of the respondent and ordered cancellation of the applicant's title deed. The applicant was dissatisfied with the said judgment and has filed a notice of appeal. When such a notice has been filed, an appeal to the Court of Appeal is deemed to have been filed.

Under **Order XLI rule 4(2),** the granting of a stay of execution is dependent on whether the court is convinced that substantial loss may result unless the stay sought is granted, whether the application was made without delay and whether the applicant has given or is prepared to give such security as may be ordered by the court; see ***MUKUMA VS ABUOGA [1988] KLR 645***. If an appeal is likely to be rendered nugatory unless stay is granted, the court will more often than not allow an application for stay of execution pending appeal.

As things stand now, the respondent is at liberty to enter the suit premises, remove the structures thereon, uproot the tea bushes and do whatever he wishes with the property, if it were not for the interim stay that has been granted pending determination of this application. If that were to happen, the applicant would suffer substantial loss.

On the other hand, the respondent has been kept out of his property for nearly seven years. He has been subjected to loss and damage. In his view, he would have been earning approximately Kshs.1,000,000/- per year from farming activities if the applicant had not unlawfully dispossessed him of his property. The said averment has not been denied by the applicant. The applicant is seeking to prevent the respondent from reaping the fruits of his judgment until the Court of Appeal decides whether this court was right or not in its judgment that was in favour of the respondent.

In determining the application before me, I have to bear in mind that my decision is not infallible, the

Court of Appeal has the final word on the matter. In ***ERINFORD PROPERTIES LTD VS CHESIRE COUNTY COUNCIL [1974] 2 ALL ER 448*** at page 454, Meggary J, held that:-

"***On the trial, the question is whether the plaintiff has sufficiently proved his case. On the other hand, where the application is for an injunction pending an appeal, the question is whether the judgment that has been given is one on which the successful party ought to be free to act despite the pendency of an appeal. One of the important factors in making such a decision, of course, is the possibility that the judgment may be reversed or varied. Judges must decide cases even if they are hesitant in their conclusions; and at the other extreme a judge may be very clear in his conclusions and yet on appeal be held to be wrong. No human being is infallible, and for none are there more public and authoritative explanations of their errors than for judges. A judge who feels no doubt in dismissing a claim to an interlocutory injunction may, perfectly consistently with his decision, recognize that his decision might be reversed, and that the comparative effects of granting or refusing an injunction pending an appeal are such that it would be right to preserve the status quo pending the appeal."***

The above principles are applicable in an application for stay of execution pending appeal. However, in applying the principles, I believe that the court has to balance the interests of the two parties and that is where the issue of security comes in.

The respondent expressed his dissatisfaction with the proposed security that was offered by the applicant, that is, deposit into court of his certificate of lease for **Nakuru/Municipality 15/907**. He said that he was not sure that the same was acquired properly. Its monetary value was also unclear since no valuation report had been availed. These fears, in my view, are not unfounded. Where a party is seeking a discretionary relief of stay of execution pending appeal, the security that is offered must be sufficient to adequately compensate the respondent for any loss that he may suffer in the interim period in the event that the appeal is unsuccessful. The onus of proving such sufficiency is on the applicant.

In this case, the suit property is a prime agricultural land measuring about 20 acres. The applicant is growing tea on a portion measuring 5 acres or thereabout. The rest of the land can be utilized for keeping of dairy cows or growing of maize. According to the respondent, he can earn Kshs.1,000,000/- per year out of the said parcel of land. The pending appeal may take two to three years to finalise.

Taking into account all the foregoing factors, I make the following orders:-

(a) I grant stay of execution of the judgment delivered on 21st June, 2007 pending hearing and determination of the applicant's appeal against the said judgment.

(b) The stay shall be on condition that the applicant provides to the respondent through his advocates an acceptable bank guarantee in the sum of Kshs.3,000,000/- within the next twenty one (21) days from the date hereof.

(c) The said guarantee shall remain in force until the appeal is heard and determined.

(d) Pending finalization of the appeal, the applicant shall not sell, charge or lease the suit property or carry out any further developments thereon.

(e) The applicant shall pay the taxed costs of this suit as well as the costs of this application.

It is so ordered.

DATED, SIGNED and DELIVERED at Nakuru this 20th day of December, 2007.

D. MUSINGA

JUDGE

Ruling delivered in open court in the presence of Mr. Tengekyon for the first defendant and Mr. Musangi for the plaintiff.

D. MUSINGA

JUDGE