



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

**CIVIL APPEAL NO. 6 OF 2003**

**MUKURU MUNGE & ANOR. ....APPELLANTS**

**VERSUS**

**AGRO DEVELOPMENT CO. & 2 OTHERS ..... RESPONDENTS**

**R U L I N G**

In a plaint dated 3<sup>rd</sup> January 2001 filed before the Taveta District Magistrate's Court, Mukuru Munge, the appellant herein sued Agro-Development Company Ltd. and Basil Criticos, the defendants herein in which he claimed for inter alia:

- (a) Specific performance to compel the defendants to transfer plot numbers 392, 515 and 516.
- (b) General and exemplary damages for frustration of contract and mental torture and anguish.
- (c) Costs of the suit.

Mr. G.M. Gogwe, the learned District Magistrate heard the suit and at the end of it all he saw no merit in it and proceeded to have it dismissed. Being aggrieved, the applicant preferred this appeal. At the time of filing the appeal the appellant contemponeously filed a Motion pursuant to the provisions of order XLI rule 4 of the Civil Procedure Rules in which he sought for an order of stay against execution of the said judgment pending the determination and hearing of the appeal. When the motion came up for hearing interpartes the same was heard exparte because the Respondents did not attend Court for the hearing. I have also not seen the response to the motion from the defendants.

Before making an order under Order XLI rule 4 of the

Civil Procedure rules this court must consider whether or not substantial loss may result to the applicant and that the application is made without unreasonable delay. It is also mandatory for this court to consider security for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant. The applicant has alleged that he may suffer substantial loss because he may be evicted from the suit premises i.e plot No. 392. The applicant has offered to make an undertaking not to sell or dispose of the land in dispute.

The case before the trial court is that the defendants (now respondents) offered pieces of land in Taita Taveta District for sale in 1996. Prospective purchasers of the pieces of land were given bank accounts to deposit the purchase money. The appellant tendered evidence before the trial court to the effect that he paid a sum of Kshs.10,000/- and Kshs.5000/- on the 22.11.2000 and 25.11.2000 respectively into the bank account of Basil Criticos. The trial court accepted this piece of evidence but indicated in the judgment that the appellant did not produce a sale agreement to prove the plot he intended to purchase. The appellant claimed before the trial court that he cultivated Plot No. 392 before he paid for the purchase price. The trial court concluded that the appellant did not prove that he bought plot no. 392 because the banking slips did not show which plot was being paid for.

Applying the principles laid out under order XLI rule 4 of the Civil Procedure rules, I am not convinced that the applicant will suffer substantial loss in the matter. It has not been alleged that the Respondent has commenced the eviction process of the appellant. It has not even been alleged that the appellant would find it difficult to recover possession of the land if any. It has not been stated that the appellant would be

unable to recover the amount paid if any from the Respondents.

The appellant has not offered any form of security as required by law. What he attempted to do is to make an undertaking not to dispose of the property in dispute. I am not prepared to accept that proposal because it is not the form of any securities we all know. Courts only accept professional undertakings of advocates but not those of their clients or litigants. Even if it were to be said that the appellant could competently give an undertaking in that this appeal, it is of no useful purpose here because the appellant does not possess any proprietary interest over the property in dispute known to law. Since the appellant has nothing to pass over to anybody then the proposed undertaking is a red herring which a court of law will not recognize.

It is the duty of the appellant to make sure that such applications are made without unreasonable delay. Judgment in this appeal was made on 4<sup>th</sup> December 2001. The motion dated 6<sup>th</sup> December 2005 was filed on the same date. No explanation was given as to why the motion was filed about five years after the judgment. The appellant is obviously guilty of laches. The delay to file the motion is clearly inordinate and unreasonable.

The upshot of the motion is that it has no merit. It is dismissed with no order as to costs.

**Dated and delivered this 24<sup>th</sup> day of February 2006.**

**J.K. SERGON**

**J U D G E**

In the presence of the Applicant

No appearance for Respondent.