

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL APPEAL NO. 14 OF 2006

**MOHAMED S.
ABDULAHI.....APPELLANT**

VERSUS

1. MANSUR SEIF

**2. MUSTAFA Y.
JIWAJI.....RESPONDENTS**

RULING

This is an application by the Appellant in this appeal seeking, under Order 41 Rule 4(1) and (2) of the Civil Procedure Rules and section 3A of the Civil Procedure Act, a stay of execution of the Senior Resident Magistrate's order of 17th January 2006 given in Mombasa CMCCNO. 3169 of 2005 pending the hearing and determination of this appeal. The order directed the demolition of a hoarding/scaffolding erected by the Appellant on his piece of land known as **Title No. Mombasa/Block XVII/1405** alleged by the respondents to be a road reserve. The hoarding/scaffolding is alleged to be an obstruction impeding free access to the Respondents' pieces of land.

Before the impugned order was issued the learned Senior Resident Magistrate had on the 15th November 2005 dismissed both parties' respective applications on the ground that the hoarding/scaffolding had, according to the Appellant's affidavit in support of his application, been demolished and ordered that the status quo be maintained. On 24th November 2005 the Respondents filed another application under Order 39 Rules 1,2 and 3 of the Civil Procedure Rules and section 3A of the Civil Procedure Act seeking an order directing the court Bailiff, with the assistance of police, to demolish the structure standing on the disputed piece of land which they maintained is a road reserve. The court granted the application provoking the filing of this appeal and this application for stay.

The Appellant has not exhibited in this application the plaint and or defence in the lower court. He has also not exhibited his applications which were dismissed on the 15th November 2005. I am therefore left in the dark as to what his claim in the lower court is and the position obtaining at the time of filing the suit. The first Respondent has in his replying affidavit sworn on 26th January 2006 stated that the hoarding/scaffolding was erected after the suit had been filed. The same averment is contained in his affidavit sworn and filed on 24th November 2005 in support of the application giving rise to the impugned order. The Appellant on the material placed before me, has not disputed that averment. He has also not denied the allegation that the hoarding/scaffolding is denying the Respondents' access to their plots though his advocate in his submissions before me said it is not. In the circumstances I accept the Respondents averment that the hoarding/scaffolding is obstructing the access to their pieces of land.

The Appellant has complied with Order 41 Rule 4(2) by filing this application without delay. He is also ready to comply with any order the court may make on security. What I am left to decide on is whether, as he says he will suffer substantial loss if stay is not granted. In deciding that I have of course to balance his loss, if any, against the Respondents' complaint that the hoarding/scaffolding is denying them access

to their plots.

The provisions of Order 41 Rule 4(2) of the Civil Procedure Rules are mandatory. If the application is not filed without unreasonable delay or if security is not given it will be dismissed. Similarly the application will be dismissed if the applicant does not satisfy the court that he will suffer substantial loss if stay is not granted. What amounts to “unreasonable delay” and or “substantial loss” depends on the facts and circumstances of each case. As I said the Appellant in this case has expeditiously filed this application and offered to comply with any order the court may deem fit to grant in respect of security and I am given the peculiar circumstances of this case, satisfied with that. I am however not satisfied that the Appellant has proved that he will suffer substantial loss if stay is not ordered. We are here talking about a hoarding/scaffolding, a fence, the value of which the Appellant has not given. A hoarding/scaffolding is the kind of thing that can be dismantled without much damage to the materials used. I have seen contractors doing that several times. The pictures of the one in this case show that it can also be dismantled with minimal damage. The Applicant has not therefore satisfied me that he will suffer substantial loss if stay is not granted. Even if he had I do not think I would protect a hoarding/scaffolding impeding free access to the Respondents’ premises. Consequently I dismiss this application with costs.

DATED and delivered this 9th day of February 2006.

D. K. MARAGA

JUDGE