

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 930 of 1985

BONIFACE KAMAU.....
....PLAINTIFF

VERSUS

JUSTUS MATHENGE.....
.....DEFENDANT

RULING

The defendant brought this Chamber Summons under Order XLI Rule 4 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeking orders that there be a stay of execution of the judgment and decree of this court delivered on 24th October 2005 until the hearing and determination of the Appeal.

The application is based on the ground that the applicant was dissatisfied with the said judgment and intends to appeal against the said decision. That a Notice of Appeal has already been filed and lodged in the Court of Appeal.

That the respondent has started making arrangements to execute the decree and the applicant is apprehensive that at any time he is likely to be evicted from the suit property by the respondent pursuant to the decree. That the intended appeal has merit and is an arguable one with high chances of success and that if the decree is executed the intended appeal will be rendered nugatory and ineffectual and the applicant will suffer irreparable loss and damage.

The application is supported by an affidavit sworn by the applicant in which he avers that the sale of the suit land was done while there was an order of injunction in force against Justus Nduhiu in HCCC NO. 252 OF 1984 in respect of the same suit premises which suit was consolidated with the instant suit.

The plaintiff filed a replying affidavit in which he avers that the suit the defendant filed against James Mucheru in HCCC NO. 252 OF 1984, the same had abated following the death of James Mucheru. That the sale to him of the suit property was lawful and he has obtained title to the same.

Counsel for the applicant in his submissions relied entirely on the grounds on the body of the Chamber Summons as well as the affidavit sworn by the applicant.

Counsel for the respondent in his submissions relied entirely on the replying affidavit sworn by the respondent. The defendant applies for stay of execution pending appeal since the plaintiff purchased the suit premises he has never taken possession because the defendant was in occupation. The applicant intends to appeal and he has in fact filed Notice of Appeal. In the event his appeal succeeds after execution has taken place the appeal would be rendered nugatory.

After considering the submissions by both counsel, I am satisfied that the applicants' application is meritorious and ought to succeed. Stay is granted until the intended appeal is heard and determined on the following conditions:

- (1) The applicant to pay to the respondent rent for the suit premises at market rate with effect from the date.
- (2) The said sum to be deposited in an interest earning Account to be opened in joint name of counsel.
- (3) Mesne profits assessed at Shs.264,000/= to be deposited in the same Account. In default execution to issue.

Costs be costs in the Appeal.

Dated and delivered at Nairobi this 15th day of June 2006.

J.L.A. OSIEMO

JUDGE