REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Appeal 17 of 2006

IYE MOHAMED BAKARI …….…… APPELLANT

- Versus -

MAWENI ESTATES' LIMITED

RITHEMU AUCTIONEERS

KINYAMAL BUSEINEI MURGUYIAH ….……. RESPONDENTS

Coram: Before Hon. Mr. Justice L. Njagi

Mr. Kenga for Appellant/Applicant

Mr. Bryant for 1st and 2nd Respondent

Ms. Makyotto for 3rd Respondent

Court clerk - Kinyua

R U L I N G

This is an application for stay of execution pending appeal. It is brought by a notice of motion dated 9th February, 2006, and is stated to be made under order XLI rule 3(1) and order L rule 1 of the Civil Procedure Rules; sections 3A and 63 (e) of the Civil Procedure Act, and all enabling Acts and provisions of the law.

The main order sought by the applicant is that this Honourable Court be pleased to stay the ruling and/or order issued on 18th January, 2006, by the named Resident Magistrate in dismissing the appellant's entire application dated 23rd August, 2005, pending the hearing and final determination of the appeal. The applicant also prays that the costs of the application be provided for.

The application is supported by the annexed affidavit of the applicant, IYE MOHAMED BAKARI. It is also opposed on the basis of the replying affidavit of FRED SHANGO LUMUNYASI, the property manager of the first respondent. At the hearing of the application, Mr. Kenga appeared for the applicant while Mr. Bryant appeared for the first and second respondents. The third respondent was represented by Ms. Makyotto. After considering the application and the submissions of counsel, I am constrained to

observe that some of the arguments put forth by counsel go to the very root of the intended appeal. As we are concerned only with stay of execution pending appeal, I intend to steer clear of all such arguments. Otherwise any comments on them at this stage could easily embarrass the judge hearing the appeal.

As intimated at the beginning of this ruling, this is an application for stay pending appeal. It ought to be brought under order XLI rule 4(1) of the Civil Procedure Rules. I note, however, that the instant application is made under rule 3(1). This latter rule does not even involve any mode of stay and indeed, does not have any subrule. I take it that this was only a clerical error and that the applicant meant to write 4(1) but accidentally wrote 3(1). The counsel for the other parties did not raise the point. At any rate, the point does not prejudice their clients in any way. I therefore invoke the slip rule and amend reference to rule 3(1) to read 4(1) in exercise of the general power to amend under section 100 of the Civil Procedure Act.

The second interesting point relates to the relief sought. It is noteworthy that in the application against whose ruling an appeal is pending, the plaintiff/appellant/applicant had applied for two main orders;

(a) that a temporary injunction be issued against the defendants from evicting the applicant and her tenants from her house and/or portion of land where her house stands, and,

(b) that an injunction be granted against the defendants restraining them from collecting rent (s) from the suit premises.

Both orders were sought pending the hearing and determination of the suit. The learned resident magistrate who heard the application dismissed it with costs. It is against this dismissal, that the plaintiff/applicant has appealed and, pending the hearing and determination of the appeal has applied for a stay of the ruling and/or order issued by the resident magistrate.

Clearly, the magistrate did not make any order as such, apart from dismissing the application with costs. Strictly, therefore, there is nothing to be stayed. In circumstances such as these, the best course to take would be to apply for an injunction pending appeal. Such a course was sanctioned in ERINFORD PROPERTIES LTD. Vs CHESHIRE COUNTY COUNCIL, [1974]2 ALL ER 448 in which Megarry J. said at page 454 –

"**No human being is infallible … 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. I cannot see that a decision that no injunction should be granted pending the trial is inconsistent, either logically or otherwise, with holding that an injunction should be granted pending an appeal against the decision not to grant the injunction, or that by refusing an injunction pending the trial the judge become functus officio quad granting any injunction at all."**

Our own Civil Procedure Rules also contain an enabling provision. Order XLI rule 4(6) is in the following words –

"**Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with."**

This is the rule under which the applicant should have moved the court, and one under which a party whose application for an injunction is dismissed ought to move the court for a temporary injunction pending the hearing and determination of the appeal.

To come back to the application, I granted that the same was made under order XLI rule 4(1) of the

Civil Procedure Rules. The relevant words of this rule state as follows:-

"**No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order …"**

Unlike in the Court of Appeal whose rules require that an appellant should demonstrate that he has an arguable appeal in order to be entitled to a stay of execution, it is enough at this level for an applicant to show sufficient cause in order to be entitled to an order of stay. In addition to showing sufficient cause, it is also imperative that the applicant should satisfy the requirements of order XLI rule 4(2) which is in the following terms

"**No order for stay of execution shall be made under subrule (1) unless –**

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant."

The ruling against which this application is made was delivered on 18th January, 2006. This application is dated 9th February, 2006 and was filed in court on 10th February, 2006. The gap between the date of the ruling and the date of filing of the application was about twenty two days, inclusive of weekends. In my view, the application was made without unreasonable delay. The house which is the suit property is, according to the applicant, owned by the applicant herself. She is still in occupation of the house and has some tenants therein. If this house goes, there is no telling how much she would lose, especially in terms of future earnings, considering that house rents keep on rising. For this reason, I am satisfied that unless the order sought is made, substantial loss is likely to result to the applicant.

Finally, the property has been sold at a consideration which is about five times the amount of money which was allegedly owed to the first respondent. It is my considered opinion that this sum represents more than enough security.

For the foregoing reasons, I am satisfied that the applicant deserves a measure of protection pending appeal. I accordingly make the following orders –

1. The parties will observe and maintain the status quo [prevailing at the time of the filing of the application] pending the hearing and determination of the appeal.

2. The purchase money be kept in an interest earning account in a reputable bank in the joint names of the advocates

3. The appellant do expeditiously prosecute the appeal so that the same is heard within one year from today.

4. Costs of this application to abide the outcome of the appeal.

5. The parties be at liberty to apply.

Dated and delivered at Mombasa this 7th day of July, 2006.

L. NJAGI

JUDGE