



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU

Civil Appeal 65B of 2006

JOHNSON NJUGUNA NJOROGE.....APPELLANT

VERSUS

MILKA NGINA NJOROGE.....1ST RESPONDENT

FRANCIS MUCHIRI NJOROGE.....2ND RESPONDENT

RULING

The appellant file Notice of Motion under Order 41 Rule 4 seeking an order of Stay of Execution regarding orders issued on 3/8/2006 in Wang'uru Misc. Succession No.8 of 1991 pending determination of the appeal. The grounds stated are that the appeal has reasonable chances of success and there is threatened interference with the rice field and the planting season is ongoing and also that Manager Mwea Irrigation scheme is being pressurized to issue new tenant cards. The appellant is the lawful licensee of rice holding No. 1607 unit one (1) Mwea Section. He has exhibited card issued on 2/9/91 Tenant Identification card that he is the current tenant of the said rice holding. He has also exhibited the order of Wang'uru Resident Magistrate's Court allocating 2 acres to first Respondent and thus altering the licence held by appellant. The occupation of rice holdings under Irrigation Schemes is governed by the Irrigation Act and Rules and Regulations thereon. There is a tenancy given by the licensee and the terms thereof binds the tenant and the Irrigation Board.

Therefore in this case evidence must be tendered that the third parties are acceptable by Irrigation Board. I therefore find that in this appeal there are good chances of success.

However the conditions under which a stay pending appeal may be granted are spelt out under Order 41 Rule 4 (2)

- (a) the court must be satisfied that substantial loss may result to the applicant unless the order is made and that the application is made without unreasonable delay.
- (b) such security as the court orders has been given by the applicant.

Order 41 (4) (6) empowers the court (High Court) to grant temporary injunctions pending appeal.

This application is opposed. The respondents (first and second) say that orders appealed from have already been executed and certificate of vacant possession is exhibited dated 29/9/2006 on the same date

ex parte order was issued by this court. The other objection is that this application was filed before first seeking orders in the lower court. I do not see any evidence that such application was made however the appellate court has jurisdiction to entertain and make orders under this provision.

I have already made remarks above on the dealings with Irrigation Scheme Plots (rice holdings). It is quite clear that the Respondent are trying to steal a march against the Appellant hence their hurried manner in trying to execute the orders without complying procedure set out in Irrigation Act. It is also clear that the Respondent activities will cause substantial loss to the applicant by abruptly interfering with his rice growing for which he says he has spent sums of money in preparations.

Considering that parties are bound by their pleadings and that the court does not issue orders that are not prayed for, I find again there is great chances of success in the proposed appeal seeing that the Respondents are not likely to leave matters pending appeal. For the sake of good order and peace.

I exercise inherent powers of court and order temporary injunctions against the Respondents their servants agents or others pending this hearing and determination to desist entering the rice holdings No. 1607 or in any way interfering with the same. Further execution of the orders of the Resident Magistrate Wang'uru made on 3/8/2006 are suspended forthwith pending hearing and determination of the appeal filed.

The Respondents have raised the validity of the appeal but those are issues for the appellate court to determine.

Orders accordingly.

Dated this 25th October, 2006.

J. N. KHAMINWA

JUDGE

25/10/2006

Khaminwa - Judge

Njue - Clerk

Mrs Thungu for Applicant

Respondent present in person

Ruling read in their presence.

J. N. KHAMINWA

JUDGE