



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC CIV APPLI 1021 OF 2006

MZEE IDDI.....DEFENDANT/APPLICANT

VERSUS

SALHA SAID FARAJ.....PLAINTIFF/RESPONDENT

CORAM: BEFORE HON. JUSTICE D.K. MARAGA

NO APPEARANCE FOR APPLICANT

MWAKIRETI FOR RESPONDENT

COURT CLERK - MITOTO

R U L I N G

Mzee Iddi, the Applicant herein, seeks in his Notice of Motion dated 8th November 2006 and brought under Order 5 Rule 1, Order 41 Rule 4(1), and Order 49 Rule 5 of the Civil Procedure Rules as well as under Sections 3A, 79G and 95 of the Civil Procedure Act two man orders. The first one is for stay of proceedings in Mombasa CMCC number 5226 of 2003 until this application is heard and determined.

The second one is for enlargement of time within which to appeal against the ruling of the Resident Magistrate given in that case on the 18th September 2006.

The Application is based on the ground that Counsel for the Applicant misapprehended the right course of action to take and procrastinated in the matter. She said she thought that her client's application in that case having been dismissed on a technicality she would make a proper application to that court and embarked on doing that. In the course of doing so she decided against that course of action as she feared she might be caught up by the plea of *res judicata* hence this application.

The Respondent does not think that that is good enough reason to allow this application. His counsel Mr. Mwakireti submitted that this application fouls the provisions of Order 41 Rule 4 in that it has been brought after unreasonable delay and the Applicant has not offered security for the due performance of the decree in event the appeal is dismissed or shown that he will suffer substantial loss. He also submitted that even if this application and the appeal itself are allowed that will all be an exercise in futility and no useful purpose will be served at the end. This is because the applicant wants to raise a

claim for adverse possession which is the preserve of the High Court.

I have read the lower court ruling and considered these rival submissions. The ruling sought to be appealed against was given on the 18th September 2006 and this application was filed on the 9th November 2006. Having considered the reasons given for the delay I do not think that the Applicant can be said to have been indolent.

The ruling of the learned magistrate dismissed the Applicants application for leave to further amend his plaint. There is therefore no decree or order capable of execution the case having not been heard. The issue of security as contended by Mr. Mwakireti does not therefore arise. If the defendant is not allowed to plead his whole case and he loses on that score he will have suffered more than just substantial loss.

Miss Jadeed has been forthright on the reason for delay. She procrastinated on what to do during which the period allowed for appeal expired. That is counsel's mistake which should not be visited on his client.

I have perused the proposed amendment. The Applicant is not raising the issue of adverse possession as a sword but as a shield. Once he institutes the separate proceedings he refers to in the proposed amendment I suppose the case in the lower court will be transferred to the High Court and consolidated with those proceedings.

Taking all these factors into account I allow this application and order that the Applicant shall file and serve his memorandum of appeal within 15 days. Pending the hearing and determination of the appeal the proceedings in the lower court are stayed. That is what I think the Applicant intended to seek in paragraph 2 of the Application. It will make no sense if the proceedings in the lower court are allowed to proceed before the Applicant's appeal is heard and determined.

DATED and delivered this 30th day of November 2006.

D.K. MARAGA

JUDGE