



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT

MACHAKOS

Civil Case 228 of 1999

KALONDU MBUSYA PLAINTIFFS

VERSUS

MARTIN KIMWELI KIKOI DEFENDANT

RULING

Before me is an application by way of Notice of Motion dated 3/9/01 taken out under Order 41 Rule 4 (1) of the Civil Procedure Rules and Section 3A Civil Procedure Act seeking an order of stay of execution of the decree consequent upon the judgement delivered on 29/7/03 in this suit, until the intended appeal is heard and determined. The applicant also seeks costs of the application.

Under Order 41 rule 4 Civil Procedure Rules the onus is on the applicant to satisfy the court that there is sufficient cause for the issuance of an order of stay pending appeal. Even when such cause is shown the applicant has to further show that substantial loss may result if the order is not granted; that the application is made without delay; and that security for due performance of the decree or order is given. Mr Kilonzo for the applicant ably set out these requirements in his submissions.

The applicant filed grounds in support of the application, an affidavit, the judgement of the court and various other documents that relate to the dispute. The centre of the dispute between the parties is land plot No.16/70 which the court in its judgement, found to belong to the 1st defendant/Respondent; that the 1st defendant should not withdraw his offer of part of the plot to the applicant, that the Ambua clan do review their decision to return the applicant to her home and lastly, that the applicant was ordered to pay costs of the suit.

It is the applicant's contention that she has been in occupation of the land with her family since the 1970's; that she has no other land to move to; that she is likely to be evicted if the Respondent goes ahead with the execution; that the subject land is substantial and the defendants may dispose of it and if the appeal succeeds, it will be rendered nugatory. The applicant annexed a notice of appeal and it is her case that the appeal is arguable and has high chances of success and she is willing to avail security as the court orders.

In opposition to the application, the Respondent filed a replying affidavit and counsel for Respondent Mr Makundi. He submitted that there has been unreasonable delay in bringing this application because a notice of appeal was served on 31/7/03 and no appeal or draft appeal in which the applicant should have demonstrated that they have an arguable case has ever been filed. That since the judgement, the applicant has participated in the execution process and yet, never filed an application for stay for over a year.

Counsel further alleges that the applicant will not suffer any loss because he has alternative land to move to.

Lastly, it is argued that no notice of appeal has been filed to the appropriate registry as it should have been lodged at Machakos. In my view, the issue of whether the notice of appeal is properly filed is a matter for court of appeal. It is noteworthy that this matter was filed in Machakos High Court but heard and conducted in Milimani Commercial court and file sent back to Machakos.

I have considered the application, the submissions of both counsels and annexures. I do agree with the Respondent's counsel that there has been unreasonable delay in bringing of this application. The judgement was delivered at Milimani Commercial Courts on 27/7/03. This application was not made till 22/7/04 a year later. No explanation has been given as to the delay. It cannot be attributed to lack of proceedings because it could have been made without the typed proceedings. The applicant has taken part in execution proceedings in this file and yet took no steps to stay them.

A notice of appeal was filed on 31/7/03. There is no evidence that the appeal has been filed. It was Mr Kilonzo's contention that they did not have the proceedings and that is why none has been filed. The proceedings are now typed and ready and there should be no delay in filing the same. The court, however, notes with concern that even though the applicant urges that she has an arguable case with high chances of success yet there is no draft appeal annexed for this court to look at to appreciate the nature of the grounds raised.

That notwithstanding the above appeal, I will go ahead to consider whether the applicant will suffer loss and appeal rendered nugatory if stay is not granted.

Though the Respondent submitted that the applicant will not suffer any loss because she has another piece of land and though another piece of land was alluded to in the judgement, yet there had been no finding on that issue. Besides, the fact that there was another piece available does not mean that the applicant cannot suffer loss.

In his affidavit, the Respondent claims to have sold a piece of the disputed land. The applicant claims to have been on the land for over 20 years and it is my view that if stay is not granted the applicant will suffer substantial loss as she may be evicted from the land and it might be put beyond her reach by the time the appeal is determined. If the applicant is evicted and the suit land put beyond her reach would then render the appeal nugatory.

The applicant urged that they were ready to offer whatever security the court ordered. Stay is a discretionary remedy and this being a land matter that touches the heart of the Kenyan and considering the history of the land and the admitted fact that the applicant has been on the land for long and despite the delay in filing this application this court will exercise its discretion and grant a stay of execution on condition that the applicants deposits a sum of Ksh.150,000/= as security for the due performance of the decree. The said sum be deposited in court within 21 days of today's date in default the order of stay vacates.

To avoid any further delays, it is also ordered that the appeal be filed within the said 21 days or the order of stay vacates. The applicants will bear costs of the application.

Dated at Machakos this 25th day of January 2005.

Read and delivered in the presence of

R.V. WENDOH

JUDGE