



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL APPEAL NO. 50 OF 2001

JAMES MWAI..... APPELLANT

VERSUS

WANGU NJAGIRESPONDENT

RULING

1. The Appeal herein was filed on 23.10.2002 by James Mwai against Wangu Njagi and the same has been fixed for hearing on 14.2.2005.
2. The Respondent has filed two Applications. In the first, dated 1.2.2004, she seeks various Orders but specifically;
 - (i) an Order that she be granted possession of title No. Inoi/Mbeti/731
 - (ii) an Order that the Appellant and other named persons be ordered to deliver vacant possession of that piece of land
 - (iii) a declaration that the conduct of the Appellant is scandalous
 - (iv) an Order that the Appeal be dismissed for want of prosecution.
3. In the second, dated 13.1.2005 she seeks Orders
 - (a) that the O.C.S. Kerugoya Police Station or District Officer, Ndia, do provide her with security to re-enter the suit premises.
 - (b) that a declaration be issued to the effect that the conduct of the Appellant and others named constitutes contempt of Court.
4. The genesis of the matter is that the Lower Court in PM SUCC. Cause No. 146/99 made certain Orders adverse to the Appellant and granted the Respondent and another, 1.5 acres jointly out of title No. Inoi/Mbeti/182
5. The Appellant, on 7/11/2001 obtained Orders of stay of execution of that Order until the Appeal is heard and determined (Mitei, J.).
6. The Respondent who argued her Application in person and passionately so, stated that all that she

wants is to use the land as the Appellant is doing. Further, that she had sent a surveyor to sub-divide the land in terms of the Lower Court's Order but the Appellant chased him away.

7. Mr. Njage opposed the Applications and stated that the Respondent wants to have possession inspite of a Stay Order and sub-divide the land inspite of an inhibition against the title. He argued that all the prayers were premature and would dispose of the Appeal if granted.

8. I have carefully read the record in this matter and sadly for the Respondent I would agree with Mr. Njage. The essence of the Order of Stay is that she would not have the 1.5 acres hived off to her and since she was not previously in possession, she would not now be in possession until the Appeal is heard and determined. To grant the Order of possession would defeat the Stay Order which she has not sought to vacate. The declaration she seeks cannot be granted on an interlocutory Application such as the one before me (**see Mureithi vs- A.G (NO. 2) [1986] KLR 772**)

9. I cannot also dismiss the appeal for want of prosecution because the Appeal has long been listed for hearing and therefore there is an intent of prosecution. Neither can the Orders sought for security be granted in the nature sought by the Respondent.

10. The answer to the Respondent's predicament lies in the finalisation of the Appeal herein.

11. In the event then, I have no basis for granting the Orders sought and shall dismiss the Application dated 1.12.2005 and 13.1.2005 with costs thereto payable to the Appellant.

Orders accordingly.

Read in open Court this 11th day of February 2005

I. LENAOLA

JUDGE

In the Presence of;

Appellant/Respondent

Respondent/Applicant

I. LENAOLA

JUDGE