REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO 561 OF 2003

KINYATI KIRAGU …….. APPELLANT

VERSUS

ATTORNEY GENERAL …… 1ST RESPONDENT

PAUL WANGONGA MACHARIA ……..……. 2ND RESPONDENT

RULING

On 28th November, 2000, the Appellant (Plaintiff in the lower court) filed a suit in the lower court in which the two main prayers were as follows:

> ***1. The District Land Registrar Murang'a be ordered to reinstate the caution lounged (sic) by the plaintiff on the 1st day of March, 1995 on parcel of Land LOC 19/NYAKIANGA/1626.***
>
> ***2. The District Land Registrar Murang'a order to (sic) cancel all a (sic) subsequent entries on the register from the 1st day of March, 1995 in respect to Land parcel LOC 19/NYAKIANGA/1626.***

Essentially, he wanted the caution previously registered against the suit property reinstated. The lower court refused to do so. He came to the High Court on appeal against that decision. Having heard the appeal on merit, and by a decision handed down on 16th February, 2005, this court agreed with the lower court, and dismissed the appeal. He has now appealed to the Court of Appeal, and in the meantime has filed this application for stay of execution of this Court's Judgment delivered on 16th February, 2005. His application is brought under Order 41 Rule 4 (1). In arguing this application, Mr Odede, Counsel for the Appellant, submitted that the purpose of the application was to preserve the subject-matter of dispute, in this case land, which could be disposed, and the appeal rendered nugatory, if the order for stay were not granted. He cited the case of ***Kenya Shell vs Benjamin Karuga & Another (1982 – 88) I KAR 1018*** where the Court held that where it is shown that execution or enforcement of an order would render a proposed appeal nugatory, the Court may grant stay to preserve the subject matter. Counsel agreed, however, that there were no orders made here or in the lower court capable of being "stayed", but argued that the subject matter here needed to be "preserved" pending determination of the appeal or the Court of Appeal.

Now, even if this Court granted "stay", how will that help the Appellant "preserve" the subject matter? As I recall, the Appellant filed a suit in the lower court to "reinstate" the "caution" that had been previously registered against the suit property, and subsequently removed by the Land Registrar. The lower Court refused to reinstate the same, as did this Court. So, assuming, I grant "stay", does the caution get

reinstated? Of course, not. This Court has no control over that. It is for the Land Registrar to file and remove cautions. A stay order here does not automatically reinstate the Caution.

So, is the Judgment of this Court, and the orders made pursuant to that Judgment, capable of being stayed?

In United Insurance Company vs Lawrence Musyoka Wambua (Nairobi HCCC No 1427 of 2000), I had the occasion to consider a similar matter when I said as follows**:**

> ***"Before answering that question, I would like to state that this Court is alive to the principle stated in Erinford Properties Ltd vs Cheshire County Council (1974) 2 ALL ER 488. That principle is that a judge who has dismissed an interlocutory application for injunction is entitled to grant the unsuccessful applicant an injunction pending appeal against the dismissal. [See also Madhupaper International Ltd vs Kerr & Others Nairobi Civil Application No Nairobi 116 of 1985, Kneller, Nyarangi, JJ A and Gachuhi, J A (as he then was) carried in the Law Reporter of June 1996 at page 17].***
>
> ***Going back to the primary question: Is this court's order contained in the Ruling delivered on 26th September, 2001 capable of being stayed? This court cannot exercise its powers in vain. It does not achieve any justice to grant orders that will not serve any practical purpose. To answer the question posed in this application, I can do no better than reproduce what my learned Brother Khamoni, J said in Bavaria Hotel Management Ltd vs S V Gidoomal & 2 Others Nairobi HCCC No 1736 of 1998 (unreported) at pages 4 ad 5 of his Ruling delivered on 26th February, 1999. He said as follows:***
>
> > ***"With regard to prayer (3) asked for a stay of execution, I rejected it on 27th January, 1999 after the ruling complained of. I did not reject it on the basis that I needed the Plaintiff to make a formal application but that rejection meant that it will have been the same even if I were answering to a formal application … I refused to grant the application for a stay on the basis that that application had no merits. I say so because there was nothing in my decision dated 27th January, 1999 to stay. I had been asked to grant an injunction, which was not there. In other words, the Plaintiff did not have an injunction. That was why he was asking for an injunction in his application dated 5th August, 1998. I refused to grant that injunction. The Plaintiff therefore continued to remain without an injunction. Logically, what do I stay in those circumstances? Mr Muli will reply that I stay my ruling. Supposing I agree and stay my ruling, which is merely a refusal to grant an injunction to the Plaintiff. The effect will be that I remove that refusal. What will the Plaintiff remain with? The answer is that the plaintiff will remain with the situation he had before he came to this court to ask for an injunction. Remember he came to this court to ask for an injunction because he had no injunction. That is the situation he has remained in when I refused to give him the injunction he had come to court for. It means that today the Plaintiff is in or is with the same situation he was in or with at the time he was coming to this court to ask for an injunction. A stay of my refusal to grant that injunction will not therefore be of any assistance to the Plaintiff and that is why I am saying the prayer for that stay has no merit and should add that that prayer is also misconceived, if not an abuse of the process of this court. With regard to prayer (4) (asks for maintenance of status quo) I adopt everything I have said in relation to prayer (3) above as there is no execution involved in or resultant from my refusal to grant the injunction the Plaintiff wanted.***

I agree with him fully. Those words can be said with equal force in respect to the application presently before the court.

Stay of execution can only be issued in respect of decrees and orders capable of execution. On this question, the former Court of Appeal for East Africa sitting at Nairobi said as follows in Western College of Arts and Applied Sciences vs Oranga & Others (1976) K L R 63 at page 66:

> ***"But what is there to be executed under the judgment, the subject of the intended appeal? The High Court has merely dismissed the suit with costs. Any execution can only be in respect of costs. In Wilson vs Church the High Court had ordered the trustees of a fund to make a payment out of that fund. In the instant case, the High Court has not ordered any of the parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court Judgment for this Court, in an application for stay, to enforce or to restrain by injunction."***

Based on what I said in the United Insurance case (supra), and the issue here being almost the same, I am of the considered view that there is nothing to stay here, and that the application before me is completely misplaced and must be refused.

I, therefore, dismiss the Appellant's application dated 22nd February, 2005 with costs to the Respondent.

Dated and delivered at Nairobi this 26th day of April, 2005.

ALNASHIR VISRAM

JUDGE