

REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL 107 OF 2003

PASKWALINA MURUGI ERNEST.....APPELLANT

VERSUS

EDWARD T. MWIRIGI.....1ST RESPONDENT

ERNEST K. JOSEPH RUKARIA.....2ND RESPONDENT

R U L I N G

The application before the Court is dated 22nd September, 2004. It seeks a stay of execution pending the hearing of the appeal filed on 3rd October, 2003. The appeal itself is against a suit filed in the lower Court in 1994.

Mr. Mwanzia for the applicant submitted that the appeal was arguable and not frivolous. He argued that if the stay is not granted, the land in dispute will be transferred to the Respondent and thus render the appeal nugatory.

On behalf of the Respondent however, Mr. C. Kariuki submitted that this application does not show that there will be a substantial loss if the intended transfer will in the meantime be effected. He also argued that orders appealed from were made on 4th September, 2003 and this application was filed on 22nd September, 2004, over a year later. He called this an inordinate delay in this kind of applications. He further argued that in this kind of applications, the applicant should offer security for due performance of his part if the appeal fails to succeed. He argued that the applicant having failed to offer such a security which he stated was a precondition to the granting of stay, this application must fail.

It was revealed during the arguments before the court that the Respondent had bought the piece of land known as No.Nkwene/Kithunguri/29 in a public auction arising from a public sale due to failure to observe a mortgage or charge terms and conditions. The Respondent is said to have bought the piece of land with consent of the applicant in order to save the land being sold to third parties unknown to the Applicant. The applicant would then refund the sums spent by the Respondent and the Respondent would release the property to the Applicant. It would then appear that the Applicant decided to break the two's agreement and filed case to recover the piece of land from those who bought the two pieces of land one of which is the one abovementioned.

I have carefully perused the proceedings and considered the material and arguments before me. It is trite law that an appellant should not be frustrated in his right to pursue the appeal. Thus the court is told to be cautious so as to give the appellant an opportunity to pursue his appeal until the end lest the appeal itself is rendered nugatory. It is said that even in cases where a judge feels no doubt on dismissing an application for stay or an injunction related thereto, he nevertheless needs to recognize that his such decision might be reversed and that the comparative effects of granting or refusing an injunction or stay pending an appeal are such that it would be preferable to preserve the status quo pending the appeal. However it is also trite law that there may be cases where it would be wrong not to grant an injunction or stay pending an appeal as in cases where an appeal would be frivolous or where failure to grant a stay would inflict greater hardship that it would avoid if a stay was to be granted. The above arguments are succinctly put this way – that an applicant for stay must show that his appeal or intended appeal is arguable or put another way, that it is not frivolous; and secondly, that he must show that an eventual success in the appeal will be rendered nugatory unless he is granted a stay or an injunction as the case may be.

In this case the Applicant and her husband appear to have influenced the Respondent to appear in the public Auction sale and offer to purchase the disputed land with a view that the applicant would later recover the piece of land from the Respondent. When the Respondent bought the land he did so as of right and as a third party for a reasonable value. Up to that point the title might have passed to the Respondent. To transfer the property to the applicant and her husband after this might be at the discretion of the Respondent and probably not at the independent right of the applicant except under a proper written contract between the two. It might therefore appear that the applicant was claiming for the declaration of right over the disputed piece of land under a contract which she appears to have herself breached by failing to refund to the Respondent the purchase price. Would she not appear to be in a very weak legal position? In my understanding the chances of her appeal's success are meagre.

On the second issue and relying on the facts before me, it is my view that failure to grant the applicant the stay will not really hurt her much. The Land title might appear to have passed to the Respondent on the purchase thereof in the public auction at the fall of the hammer. I would rather let it stay at that position. The applicant will not as she claims lose the title which will have already passed to the Respondent at the fall of the hammer.

Under the above circumstances it is the court's view that this application for stay shows no merit. It is dismissed with costs to the Respondent. The applicant should fix this appeal for hearing within 15 days. In default, the Respondent should do so within 15 days after the failure of the appellant to do so.

Orders accordingly.

Dated and delivered at Meru this 13th day of April, 2005

D. A. ONYANCHA

JUDGE