<u>REPUBLIC OF KENYA</u>
<u>IN THE HIGH COURT OF KENYA</u>
<u>AT MOMBASA</u>

CIVIL SUIT 283 OF 2001

MAIMUNA ALI MOHAMED SOOD....................PLAINTIFF

VERSUS

OMAR SAID MBARAK..................................DEFENDANT

oram: Before Hon. Justice Mwera
Gikandi for the Applicant/Defendant
Omondi for the Respondent/Respondent
Court clerk – Kazungu

<u>R U L I N G</u>

The defendant/applicant herein filed a notice of motion dated 18.5.05 under O. 41 r. 4(1), O. 50 r. 1 Civil Procedure Rules and S. 3A Civil Procedure Act for the main prayer that there be a stay of execution of this court's judgement (a ruling?) delivered on 4.5.05. That there also be a stay of all proceedings herein pending filing and eventual determination of an intended appeal. The court was told that the end result of the ruling in question is for the demolition of part of a staircase in the house of the defendant standing on that parcel of land known as PLOT NO. 129/XXX/M1. That this house abuts that of the plaintiff/respondent on Plot No.200.

Mr. Gikandi told the court that in case the demolition goes on, a costly affair by itself, the applicant will also be unable to access the upstairs rooms of his house which include a bedroom. That because the building of this house in 1984 was in strict compliance with the Municipal Council approved plan and permission, that council's Bylaws will be breached if the demolition goes ahead. That indeed the ruling in question was based on the provincial surveyor's report (on the boundary dispute between the two plot owners) which report though filed by consent of the parties, was never meant to be the basis of the court's ruling without the parties commenting on it.That the parties did not comment on that report dated 22-6-04 prior to the ruling, and had that been allowed, the applicant would have argued that it was prejudicial to it. Further that that report ought to have been backed by its maker's presence and evidence on oath before the court which was not done.

Mr. Gikandi further told the court that his client had filed a notice of appeal against the ruling of 4.5.2005, and the same was served. That a letter bespeaking the court proceedings had also been filed and served. That this application was timeously filed on 20/5/05 following the ruling on 4-5-05 and that any security to perform will be furnished as this court directs.

Mr. Omondi, who only filed grounds in opposition, and not a replying affidavit to rebut the facts deponed to by the applicant, argued that there was no valid appeal. He meant to say that the notice of appeal was not in accordance with due Rules but no arguments backed this. Thus the matter was not fully ventilated before this court to show whether a valid notice of appeal had not been filed or not. The counsel acknowledged service of the notice..The other ground that there were no grounds to show that an arguable appeal lay or with prospects of success, appeared a little out of the way because that is not a basis to grant/refuse a stay under O.41 r 4 Civil Procedure Rules. Mr. Omondi however posited that there was no order capable of being stayed because the ruling of 4.5.05 dismissed the applicant's application dated 9.8.2002 which itself had sought a stay of orders of 27-6-02. That a court cannot stay what has been dismissed. It was added that no substantial loss had been demonstrated and the applicant was introducing new matters that were not before the court which delivered the ruling in question.That only a portion of the staircase was to be demolished causing no substantial loss. And that the titles to the land would not be

affected at all, yet the encroachment should be seen as a prejudice to his client. Regarding the provincial surveyor's report, Mr. Omondi said that since both parties agreed by consent that it be filed, by implication it was to bind them and so the plea that the applicant was not heard on it before the ruling of 4-5-05 had no justification.

After hearing both sides, it is not in question that the litigants herein are feuding over a common boundary between them. The respondent holds the view that the applicant's staircase has encroached on his plot No. 200 and the offending part should be demolished.The applicant on the other hand seems to say that he built his house in 1984 according to approved plans while the respondent extended her old house in 1987. The court is further of the impression that the effect of the ruling on 4-5-05 dismissing his application is that his staircase, part or whatever, stands to be demolished thereby being a cost to him and depriving him access to the upper rooms of his house.

It sounds logical that an order of dismissal may actually offer nothing to be stayed, but because the one here may result in an action that must be effected – i.e. demolition of part of a house, may the applicant get the stay sought until his intended appeal is finally heard.Demolishing the staircase is an expense and here it will add inconvenience or actually lack of access to some part of the applicant's house. True, trespass on one's land (here the respondent) is actionable. It can also be an inconvenience or a nuisance but the respondent can bear with it for now. The two seem to have been living with the situation since the mid-eighties anyway. They can do so for a little more.

Accordingly the prayer is granted as to staying the demolition but costs go to the plaintiff/respondent. The court has not seen a need to order for security in the circumstances.

Orders delivered on 29th June, 2005.

J.W. MWERA

JUDGE