



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

Civil Appeal 22 of 2005

MARK OKERE

GEORGE

ADONGO.....APPELLANTS

VS

PATRICK

KIDIAVAI.....RESPONDENT

RULING

By an application by way of Notice of Motion dated 22nd June, 2005, pursuant to the provisions of section 3A, 75 (1) (h), section 79 G of the Civil Procedure Act and Order XLI Rule 4(1) (2) (a) and (b), the appellant prays for orders:

- (1) *That this application be certified as urgent and to be heard ex-parte in the first instance.*
- (2) *That there be a temporary stay of execution pending the hearing of this application inter-partes.*
- (3) *That this Honourable court be pleased to grant an order for stay of execution in Busia RMCC No.334 of 1993 pending the hearing and determination of this appeal.*
- (4) *That the costs of this application be provided for.*

The application is based on the grounds:

- (1) *That the appellants' application dated 28th April, 2005 was dismissed on 17th May, 2005 for want of compliance with the subordinate court's order issued on 3rd May, 2005.*
- (2) *That the appellants are dissatisfied and aggrieved with the rulings of the Learned Senior Resident magistrate Hon. Nduriri J. R. delivered on 3rd May, 2005 and 17th May, 2005 and have appealed against them.*
- (3) *That substantial irreparable loss may result to the appellants and this appeal rendered merely nugatory and academic, unless the orders of stay of execution are granted herein.*
- (4) *That the appellants' appeal and application dated 28th April 2005 are meritorious and have high chances of success.*

- (5) *That the 1st appellant's goods have been proclaimed and are due for seizure.*
- (6) *That it is in the best interest of justice and fair play that this application be allowed.*

The application is predicated upon the annexed affidavit of Charles Lutta Kasamani advocate sworn on the 24th day of May, 2005.

The application is ex-parte. It seeks for interim stay of execution of the orders in Busia SRMCC No.334/93 pending the hearing and determination of this application inter-partes.

For the applicant, it was argued that the applicant is dissatisfied with the court order issued on 3rd May, 2005 and 7th May, 2005 respectively.

The applicant has appealed against the aforesaid orders. The Memorandum of Appeal is annexed as exhibit "CLK 29". It is the applicant's contention that he is likely to suffer irreparable loss in that the proclaimed properties are likely to be seized and sold. That the appeal is meritorious and has high chances of success.

Be that as it may, I have noted from the affidavit in support of the application at paragraphs 4, 5 and 6 thereof that the learned Magistrate's ordered for a deposit of the decretal amount being Sh.679,525/= as a condition for stay but the applicant could not raise the same within two weeks as ordered. No application for review of that order has been made so far.

I note in passing that this is an ex-parte application. The respondent is yet to urge its case at the inter-partes stage. However, on my part, I am not persuaded that there is any good reason advanced for granting the interim orders pending the hearing of the application inter-partes.

Accordingly, I dismiss the ex-parte application with costs to the respondent and advise that the applicant do fix the hearing of the application inter-partes.

DATED and DELIVERED at BUSIA this 31st day of July 2005.

N.R.O. OMBIJA

JUDGE

Mr. Ashioya for Kasamani for the applicant.