REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL APPEAL 107 OF 2005

KANGOGO KIBETT……..……..APPELLANT

VERSUS

JAMES CHANGWONY KANGOGO……..…..RESPONDENT

RULING

This is an application for stay of execution pending the hearing and determination of an appeal filed by the applicant, who also told the court that the respondent was at liberty to cultivate 1.5 acres of **L.R. 119/102 Sabatia Settlement Scheme** (hereinafter referred to as ***"the suit premises***"). The respondent is an adopted son to the applicant and had filed ***Eldama Ravine Civil Case Number 7 of 2005*** as against the applicant.

In his affidavit in support of the said application the applicant deposed that he was the registered owner of the suit premises; having bought the same from the Settlement Fund Trustees. The applicant deposed that he thereafter gave to the respondent 1½ acres to cultivate but he was not satisfied with the same and the parties have had several cases at the local chief's office. The trial court held that the respondent was entitled to four acres of the said land but the applicant was dissatisfied with the said finding and filed an appeal against the same. The applicant further stated that he had given the respondent alternative land on which he could settle but he completely refused to move out of the suit premises. He further deposed that on 7th and 8th August, 2005 the respondent removed his fence and used his fencing posts to fence off the land which he claims to be his and even grazed his cows on the applicant's maize crops. The applicant stated that the respondent's aforesaid actions were causing him great pain and being an old man, 85 years, as alleged, he was suffering ill health. He therefore urged the court to stay execution of the lower court's judgment.

Mr. Onkoba for the respondent opposed the said application and stated that it had been brought under the wrong provisions of the law, ***Order XLI Rule 1*** instead of ***Order XLI Rule 4***. He further submitted that the applicant had not shown that he stood to suffer substantial loss unless the order of stay of execution was granted as sought by the applicant. He said that the land in question measured 49 acres and the respondent was occupying only 4 acres thereof, with most of the land being unutilised.

Counsel further submitted that the appeal was not likely to be rendered nugatory by denial of the stay order as sought. However, he conceded that the maize crop on the disputed parcel of land belonged to the applicant although it was standing on the portion of land that he claimed to be his client's.

It is not in dispute that the application herein should have been filed under ***Order XLI Rule 4*** and not ***Order XLI Rule 1*** of the Civil Procedure Rules. However, the application is not invalidated by the said mistake as it does not go to the root of the matter. It stated in ***BOYES VS GATHURE*** [1969] E.A. 385 that use of the wrong procedure did not invalidate the proceedings because it did not go to jurisdiction and no prejudice was caused to the appellant therein.

I will therefore overlook that minor procedural mistake and deal with the application as though it was rightly filed under ***Order XLI Rule 4*** of the Civil Procedure Rules. Having said that, I now have to consider whether the said application satisfies the requirements for grant of stay of execution as set out in the aforesaid ***Order XLI Rule 4.*** Firstly, an applicant has to demonstrate that he stands to suffer substantial loss unless the orders for stay of execution are granted. Secondly, he has to show that the application was made without unreasonable delay and lastly, such security as the court may order for the due performance of the orders sought given.

There is no denial that the applicant, since 13/12/1994 is the registered proprietor of the suit premises, having purchased the same from the Settlement Fund Trustees. This is therefore not an ancestral property. The trial court upheld the respondent's claim over the four acres of land that were in dispute and immediately thereafter the respondent embarked on destruction of the applicant's fence and his maize crop. The applicant has appealed against the judgment of the trial court. The appeal may be decided either way but in the meantime, the applicant's maize crop is being destroyed by the respondent. The respondent said that he had always occupied 4 acres of the suit premises whereas the applicant said that it was only 1½ acres. However, the land dispute proceedings before the District Officer, Eldama Ravine held on 5th May, 1993 showed that the respondent had been given only 1½ acres to cultivate.It is therefore clear that the respondent has encroached into the applicant's farm. The applicant's maize crop on the 2½ acres in dispute should not be interfered with by the respondent before the appeal is heard and determined. The applicant stands to suffer substantial loss unless the order of stay of execution of the lower court's judgment is granted.

I therefore grant the order of stay of execution as sought. The respondent will continue to occupy and cultivate on the 1½ acres as before until the appeal is heard and determined. The applicant should not subdivide, sell or transfer any part of the land known as **BARINGO/RAVINE 102/119** until the pending appeal is heard and determined. The title deed for the aforesaid parcel of land should be deposited in court.

Given the advanced age of the applicant, I direct the advocates for the parties herein to move with speed and obtain a hearing date for the appeal on priority basis. The costs of this application shall abide the outcome of the appeal.

DATED, SIGNED & DELIVERED this 8th day of September, 2005.

D. MUSINGA

JUDGE

8/9/2005

Ruling delivered in open court in the presence of Miss Njoroge for the applicant and Mr. Waiganjo holding brieffor Mr. Onkoba for the respondent.

D. MUSINGA
JUDGE
8/9/2005