



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Suit 14 of 2004

MALCOM BELL.....
.....PLAINTIFF

VERSUS

HON. DANIEL TOROITICH ARAP MOI.....1ST
DEFENDANT

THE BOARD OF GOVERNORS OF

MOI HIGH SCHOOL, KABARAK.....2ND
DEFENDANT

RULING

The application has been brought through Notice of Motion under **Order XLI Rule 4** of the Civil Procedure Rules and **Section 3A** of the Civil Procedure Act. The application seeks the following Order:

- ***That there be stay of execution of the Decree and other orders made herein on 31st October, 2005 pending the hearing and final determination of the appeal to the Court of Appeal against the findings of the Honourable Court.***
- ***That costs be provided for.***

The application has been supported by the affidavit of Malcolm Bell. During his submissions, Mr. Kahiga for the Applicant submitted that they had already filed an appeal against the decision of this Court and that they have already applied for proceedings and notified other parties. According to Mr. Kahiga, the Applicant has shown that he will suffer irreparable loss and damage if the prayers are **not** granted. He further added that the intended appeal will be defeated and ends of justice be compromised. Mr. Kahiga submitted that if the transfer of the land was effected before the appeal is determined, then the Applicant will have lost the substratum in the appeal – as he will **not** have control over how the respondents will deal in the land. Referring to the land laws, Mr. Kahiga submitted that the same empowered the registered owner to dispose or develop the same. Such dealings would be adverse to the Applicant. He was also of the view that **no** prejudice would be occasioned on the 2nd defendant if the registration is maintained. Mr. Kahiga submitted specifically that they were **not** seeking an injunction **nor** eviction order. He stated that they were praying that the *status quo* be maintained till the appeal is determined by the Court of Appeal.

Besides the above, he has also submitted that since the 2nd respondent has stayed **without** the Title documents for 22 years – then that means that he should **not** now be in a hurry to obtain the same. He also prayed for the order of the costs to be stayed. According to Mr. Kahiga, if the Applicant was subjected to costs before the appeal is heard, then that would amount to punishment and disorientation – such that his right to appeal would be compromised.

In addition to the above, Mr. Kahiga has complained that Ground No. 12 of opposition seeks that the Applicant should deposit a sum of Kshs.20 M for costs. Since the 1st defendant is seeking costs of Kshs.15,720,065.00 – they expect that the 2nd defendant will raise a similar bill. In support of his submissions, Mr. Kahiga quoted the case of **Majani Mingi Estate Vs Kenya Commercial Bank** in which the Court stated that the respondent's position was well secured.

Apart from the above, he also submitted that they can only tender security after the Court has ordered for the same. Besides the above, he also quoted the case of **New Stanley Ltd Vs Arcade Tobacconists Ltd.** in which the Court noted that there are situations when security may be dispensed with. He also quoted the case of **Evinford Properties Ltd. Vs Chesire County Council** in which the Court highlighted the need to preserve the *status quo* without burdening the Applicant.

In his reply, Mr. Kiplenge relied on the 13 grounds of opposition that they have filed. He submitted that the Court **cannot** stay an order for dismissal because the same will be in vain. He further submitted that what remained between the Applicant and the 1st respondent is the question of costs. Mr. Kiplenge has conceded that they have filed a preliminary bill of Kshs.15,720,065.00 and that they have yet to take a date for taxation. He was of the view that the Deputy Registrar, Nakuru may increase or reduce that amount. According to Mr. Kiplenge, if I ordered for a stay – then the same would prejudice the 1st respondent. He further added that the Applicant has **not** averred that if the costs are paid to the 1st respondent – then he would **not** be able to refund the same. In addition to the above, he urged me to refuse to order for stay of costs for the 1st respondent – since it was the Applicant who started the suit and he must have weighed and prepared for the consequences. He further submitted that the 1st respondent is entitled to the fruits of its judgment – and that he has already incurred legal costs. That apart he urged the Court to make an order for the Applicant to deposit Kshs.20 m to cover security of costs for the application and the appeal. Mr. Kiplenge was of the opinion that the authorities quoted do **not** apply to the case. Besides the above, Mr. Kiplenge quoted **Order 41 (4)** of the Civil Procedure Rules that states that no appeal shall operate as a stay. He further added that the payment of costs follow the event and that the loser in a suit always bear the same. On the issue of the Applicant getting confused and disoriented, Mr. Kiplenge submitted that the same had nothing to do with any grant of stay and that he should go and see a doctor. In conclusion, he urged me to dismiss the application with further costs.

On the other hand, Mr. Sunkuli submitted that the 2nd Respondent is opposed to the application since the prayers sought are discretionary in equity. He is of the view that he who seeks equity must come in good faith – but that the application lacks in *bona fides*. As far as the issue of acreage was concerned, Mr. Sunkuli submitted that the same was conclusively determined by the Court. Apart from the above, he urged the Court to expunge Paragraphs 10 and 14 of the Supporting Affidavit since the same is scandalous. In support of his submission, he quoted the case of **Bhatt Vs Rent Restriction Tribunal** which he termed as having captured the true rendition of the law. In addition to the above, he took issue with the fact that the Applicant has **not** cited any special grounds and that he only refers to inconvenience and substantial loss.

Mr. Sunkuli also referred the Court to the case of **New Stanley Hotel Vs Arcade Tobacconists** and stated that the real holding of the case is that the parties seeking a stay and alleging substantial loss must particularize the same. According to Mr. Sunkuli, the 2nd Respondent occupies 100 Acres of land and the signing of transfer documents will **not** be a substantial loss. He reminded the Court that on his own admission, the Applicant stated that he owns thousands of acres of land.

Further to the above, Mr. Sunkuli submitted that it is the practise of the law that costs follow the event – and hence the Applicant must meet the costs of the litigation. That apart, he submitted that stay for costs

is a novelty in law. He further added that the two Respondents are **not** men of straws and that if a stay was granted to the Applicant – then that will occasion hardship to the 2nd Respondent.

This Court has carefully perused the above submissions together with the quoted authorities. Though Mr. Kahiga submitted that his client – who is the Applicant will suffer irreparable loss in terms of losing the land he never proved the same. It is apparent from the evidence on record that the Applicant and his late father have never used the land for over 20 years. The evidence clearly show that it has been the school (*that is the 2nd Respondent*) which has been using the land for that period of time. Apart from asserting that the Applicant will suffer irreparable loss, Mr. Kahiga never even attempted to particularize the losses to be incurred by his client. That apart, though the Applicant expressed fears that the school will develop the land or use it in a manner detrimental to his interest – that is **not** borne out by the past conduct of the 2nd Respondent. For over 20 years, the school has been using the land for planting maize, fodder, beans, poultry and pigs. This Court does **not** expect the 2nd Respondent to embark on a grandiose multi million project overnight in response to my judgment. The 2nd Respondent must be aware that there is a pending appeal before the Court of Appeal which is the highest Court in the land. Apart from the above, should the 2nd Respondent sell or dispose the land, the Court of Appeal has a number of portions at its disposal. Besides the above, the land in issue has a known market value.

As far as the issue of the acreage of land is concerned, it is crystal-clear that it was the Applicant/Plaintiff who stated in his Amended Plaintiff that the school had encroached on a portion of land measuring 110 acres and which was later fenced off. However, after hearing the evidence of all the witnesses carefully, the Court made a finding that the school had fenced off 100 acres. That figure was not therefore plucked from the air but was based on the evidence on record. That means that the fear that has been expressed by the Applicant in his affidavit has **no** basis at all. The 2nd Respondent **cannot** therefore purport to take more than 100 acres during any sub-division.

Order XLI Rule 4 states as follows:

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”

Having heard all the submissions carefully, I decline to order a stay of my judgment and all the consequential orders.

On the question of costs, it is a general principle of law that the same follow the event. In this matter, the Court dismissed the Applicant’s case and ordered him to pay the costs. Needless to the state, the Applicant’s Counsel is aware that Bills of Costs are usually taxed by the Deputy Registrars or Taxing Masters. They are usually guided by broad principles which I do **not** wish to state since they are within knowledge of the officers. Consequently, any aggrieved party may require the Deputy Registrar to give written reasons for his decision. Subsequently, the matter may be referred to the High Court to determine whether the taxed costs are fair and reasonable. In this case, all those steps have **not** been complied with and hence I hereby decline to intervene on the issue of costs at this stage. The Advocates Act Cap. 16 is clear on all the above steps. Apart from the above, the Applicant conveniently and neatly avoided to state that if any costs are paid to the Respondents – then they would be unable to refund him. He never claimed that any of the Respondents are men of straw. That in itself speaks volumes about the financial position of the Respondents. Though Mr. Kiplenge advised that the Applicant should see a doctor due to any confusion or disorientation over costs, I respectfully decline to offer any guidance or advice on professional grounds.

In view of all the above reasons, I hereby dismiss the application since the same lacks any merit. Applicant to bear the costs of this application.

MUGA APONDI

JUDGE

Ruling read, signed and delivered in open Court in the presence of Mr. Karanja for Mr. Kahiga for Applicant.

Mr. Kiplenge for 1st Respondent.

Mr. Sunkuli for 2nd Respondent.

MUGA APONDI

JUDGE

20TH DECEMBER, 2005