



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA**

**AT ELDORET  
CIVIL APPEAL NO.124 OF 2003**

**SAMUEL K. CHEROP ..... APPELLANT**

**-VERSUSEUNICE**

**JELAGAT VAN DOORNE..... RESPONDENT**

**RULING**

This is an application brought by way of Notice of Motion seeking for stay of sale, charge, transfer or any dealing with land parcel No. **Eldoret Municipality Block No.7/171** pending determination of this application after inter-partes hearing and determination of an appeal filed by the applicant/appellant, Samuel K. Cherop. The application was brought under Section 3A of the Civil Procedure Act and Order XLI Rule 4 and O.L rule 1 of the Civil Procedure Rules. The application was dated 17th November, 2003 and was filed under a certificate of urgency.

The application is grounded on an affidavit sworn by the applicant Samuel K. Cherop dated 17th November, 2003. There is already an appeal filed before this court challenging the decision of the Chief Magistrate in dismissing the suit filed by the applicant in the Chief Magistrate's Court. Mr. Chemitei for the applicant submitted before this court that they have filed an appeal against the decision of the Chief Magistrate in dismissing the applicant's suit for want of jurisdiction. He submitted that they have a prima facie case in the appeal and that if no stay is granted, then the applicant will suffer irreparable loss as the respondent has already sold the plot to a third party and what remained was only effecting the transfer. He submitted that there was a sale agreement between the applicant and the respondent, but the respondent failed to pay the purchase price. He argued that the learned Chief Magistrate was wrong in deciding on jurisdiction on the basis of a valuation report commissioned by the respondent without the maker of that valuation report being cross-examined. He urges this court to allow the application and grant the orders requested for.

Mr. Murei for the respondent on the other hand strongly opposes this application. He submitted that this court has first of all to determine whether or not the Chief Magistrate had jurisdiction in the suit filed by the applicant. In his view once this court determines that the lower court did not have jurisdiction, then this application must fail. The lower court dismissed the case as it did not have jurisdiction and there is therefore no order or decree to be stayed. He also argued that the application was brought under provisions of the law dealing with injunctions rather than stay of execution, while the applicant is arguing on stay of execution. He further argued that the appeal has no merit, as the suit would still be statute barred as a period of 12 years had already elapsed. He further stated that the applicant had asked for monetary compensation and therefore the issue of saying that the appeal will be rendered nugatory should not arise.

I have considered the submissions of both counsel, the legal provisions and the cases referred to me. At this moment in time, I am not going into the merits of the appeal that has been filed in this court. However, I have to address myself to the issue whether there can be a stay retaining a status quo from a dismissal of a suit by a court and whether there are sufficient reasons in this particular case to warrant such a stay.

Reading through Order 41 of the Civil Procedure Rules it is apparent that a stay can be granted in the case of judgements generally, orders and decrees. In this particular case the judgement of the lower court was

that the court did not have jurisdiction and therefore the suit was dismissed. The applicant has appealed against that judgement of the lower court. The claim of the applicant in the suit in the lower court was that there was a sale agreement which the respondent did not honour, as she did not pay the purchase price. In my view, asking the court for an order that the respondent should not deal with the land, while the primary default is for payment of purchase price,

appears to be a punitive measure, rather than a protection of the appellant's claim. I find no justification in that. This is a case where even if the permanent injunction is not granted (and I am not deciding on that), payment of the agreed purchase price can be adequate compensation. Ultimately, this court sitting in the appeal will determine whether the appeal will succeed or fail. However, in this application, I see no persuasive reasons for granting the orders prayed for.

I therefore dismiss the application. Each party will bear their own costs of the application.

**Dated and Delivered at Eldoret this ..... Day of ..... 2004.**

**George Dulu,**

**Judge**

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**I certify this a true copy of the Original**

**DEPUTY REGISTRAR**