

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

civ case 531 of 94

MBUVI KISAVI ::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

MAINGI MUTISYA NZIOKA ::::::::::::::::::::::: DEFENDANT

R U L I N G

By Notice of Motion dated 18.7.2003 the plaintiff seeks orders that the court do order that the defendant do deliver to the Land Registrar Makeni District the original of the Title Deed in respect of land parcel Number KITETA/NDITUHI/42 for the purposes of cancellation and/or deletion of the defendants name and its substitution with plaintiff's, Tabitha Mbuki Kisavi as per this courts judgement dated 17.1.2003.

The grounds upon which the application is brought are that the defendant has refused to deliver the original Title Deed of land parcel in issue, despite a demand having been made; that no appeal has been lodged against the court's judgement of 17.1.2003 to date and no order of stay of this court's judgement of 17.1.2003 and no application is pending in the court of appeal in respect of the court's judgement. The application was also supported by the affidavit of the applicant.

Grounds of opposition were filed to the effect that the application is misconceived bad in law because a notice of appeal was lodged on 23.1.2003 and served on 27.1.2003 and the same operates as a stay. The respondent annexed copy of the Notice of Appeal lodged, the letter to court asking for proceedings and a reminder and states that the delay in filing appeal is not the fault of the respondent but the court which has not supplied proceedings. It is the plaintiff's contention that the respondent's appeal is deemed to have been withdrawn under S.82 of Court of Appeal Rules because no appeal has been filed within 60 days of lodging of Notice of Appeal as required by R.81 of the said Rules. But to that Respondent counsel contend that the Notice of Appeal does operate as a stay as provided by Court of Appeal Rules 5(2)(b). "Rule 5(2)(b) provides that subject to Rule (1) the institution of an appeal shall not operate to suspend any sentence or to any execution, but the court may in any civil proceedings where a Notice of Appeal has been lodged in accordance with Rule 74, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the court may think just" Under this rule, it is upto the appellant to move Court of Appeal for an order of stay which the court makes on terms that the court deems just. One can not just file a notice of appeal and assume there is an automatic stay.

Under R. 82(a) of Civil Procedure Rules when the party who lodged the Notice of Appeal fails to institute an appeal within the appointed time which is 60 days (R81) he is deemed to have withdrawn the Notice of Appeal unless the court otherwise orders. In this present case the Notice of Appeal was filed on 23.1.2003. By 18.7.2003 when this application was filed, it was about 6 month down the line and no appeal has been filed but the Respondent has demonstrated that he wrote to the court to avail the proceedings and sent a reminder in June 2003 but no proceedings were availed.

In my view the Respondent can not be deemed to have withdrawn the appeal because he can still have the court enlarge time for filing appeal once proceedings are ready. Under R. 80 of Civil Appeal Rules if the applicant is affected by an appeal he can apply to have it struck out on grounds that some special proceedings had not been taken or it had not been taken within the prescribed time. As I have noted earlier, the Respondent did not move the court under R. 5 2(b) for a stay of execution pending the filing of appeal. It means that the applicant has a right to proceed with execution if he so desires.

It was therefore not necessary for the applicant to proceed under R 80 of Court of Appeal Rules because the applicant is not affected by that appeal. I think the word "affected" is very important. The appeal as

filed does not stop applicant from enjoying the fruits of her judgement. Since the Respondent has declined to have the land registered in plaintiff's name, the court does allow the applicant's application and it is hereby ordered that the defendant do deliver to the Land Registrar Makueni District the original title deed in respect of land parcel No. KITETA/NDITUHI/42 for purposes of cancellation of defendants names and substituting with plaintiff's names, Tabitha Mbuki Kisavi. Costs of the application to the Plaintiff/Applicant.

Dated, read and delivered at Machakos this 5th day of February, 2004.

R. V. WENDOH

JUDGE