

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 215 OF 2003

NARESH RATHOD DEFENDANT/APPELLANT

- Versus -

MOHAMED DAD MOHAMED PLAINTIFF/RESPONDENT

R U L I N G

This is an application for stay of execution pending the hearing of this appeal from the judgment of the Resident Magistrate in Mombasa CMCC No. 3162 of 2003. Admitting that execution had been levied and his client evicted from the suit premises and that his properties had been attached and sold, Mr. Suchak however argued that execution is not complete until the proceeds of sale are released to the decree holder. He argued that if stay is not granted his client will suffer and the appeal will be rendered nugatory. The appeal has a high probability of success, he said, and stay should therefore be granted. Mr. Kilonzo for the applicant opposed the application. He said there is nothing to stay as execution was completed. The Applicant has been evicted from the suit premises and the same has been let out to a third party. Furthermore the applicants properties have been sold and the proceeds thereof have been released to the Respondent. So execution is complete.

I agree with Mr. Suchak that execution is not complete until the proceeds of sale have been released to the decree holder. If the proceeds of sale are with the Court Broker or are deposited in court or with counsel for the decree holder, stay can be granted with an appropriate order that they be held until the appeal is disposed of or until further orders of the court. In this case the applicant has not provided any evidence to show that the sale proceeds have not been released to the respondent. It is not said who is holding them. The onus is on a party who alleges a fact to prove it. The Applicant has not proved that the proceeds of sale have not been released.

In the circumstances I have no option but to accept the respondent's assertion through counsel that the proceeds of sale have been released. Consequently there is no execution to be stayed in this matter. Granting an order of stay in such circumstances will be an exercise in futility. The court does not act in vain. The application is dismissed with costs.

DATED this 2nd day of March 2004.

D.K. Maraga

Ag. JUDGE