



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI
CIVIL APPEAL NO 953 OF 2003

HUSSEIN HAJI ISSA APPELLANT

VERSUS

ANWARALI K. ISMAIL 1ST RESPONDENT

ABDUL AZIM ANWAR 2ND RESPONDENT

RULING

This is an application under Order XXXIX Rules 1, 2 and 3 (1) and Order XLI Rule 4 (1) of the Civil Procedure Rules (hereinafter referred to as “the Rules”) and Section 3 A of the Civil Procedure Act (Cap 21). In it the Appellant seeks the following orders:

- “2. That a stay of execution do issue against the orders given on 3rd December, 2003 in Narok SRMCC No 70 of 2003 (hereinafter referred to as “the original suit”), until the hearing and determination of the appeal.**
- 3. That an order of injunction do issue restraining the defendants by themselves, their agents and servants from collecting rent in plot number 11 Narok Township (hereinafter referred to as “the suit land”) or in any other way interfere with the tenant in the sa id plot, until determination of this appeal.”**

The matters leading to the application are not in dispute. The appellant is the proprietor of the suit land. He was involved in a dispute over the same

with the Respondents who were collecting rent in respect of stalls erected thereon. However, before his case could be tried, it was struck out on the grounds that the lower court in which it was filed had no pecuniary jurisdiction to hear it and that the verifying affidavit accompanying it was defective. The Appellant was aggrieved by the decision of the lower court and has appealed to this court seeking to have the decision of the lower court reversed. In the interim, he seeks the orders alluded to earlier.

It is obvious that the rights of the parties have not finally been determined. Although at this stage I am not entitled to decide the appeal on its merits, I think that the Appellant who is the registered proprietor of the suit land is entitled to the protection of this court to secure his property until the rights of the parties have been finally determined. The fact that the Respondents are in occupation does not diminish the Appellant's right to seek remedy from this court. I am more concerned by the fact that the dispute in the case involves members of the same family. Having considered these factors and the general case I am of the view that this is a special case which requires careful balance. In the circumstances, I direct that all income from the suit property shall be deposited in an interest earning account in the joint names of the Advocates on record for the parties in a reputable bank, pending the hearing and final determination of this Appeal. Those shall be the orders of this court. The costs of the application will abide the outcome of the appeal.

Dated and delivered at Nairobi this 26th day of April, 2004.

ALNASHIR VISRAM

JUDGE