



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL APPEAL NO. 131 OF 2003

GERVAS M. MUTISO.....APPELLANT

VERSUS

1. MAINGI MUIA

2. KAVUU MUIA

3. PAUL KAMULA MUIA

4. WANDII NDAVI

5. WAYUA KITETE.....RESPONDENTS

RULING

The application dated 16.3.2004 is brought pursuant to order 41 rule 4(1) of the Civil Procedure Rules. It seeks stay of judgement delivered on 21.11.2003 in RMCC 13/00. The applicant also prays that the status quo before the said judgement be maintained. The grounds upon which the application is brought are that the respondents have started trespassing on the suit premises and harassing the appellant while the appeal is pending and that the appeal has overwhelming chances of success. The applicant also swore an affidavit in support. An affidavit was sworn by the respondent opposing the application and denying their attempts to evict applicant from the land though judgement was given in their favour but that one acre was curved out of the land for the applicants because it is where his matter was buried.

In considering whether or not to grant an application for stay the court considers whether the application is brought without any delay. The judgement was delivered on 21.11.2003. This appeal was filed on 19.12.2003. However this application for stay was never made to the lower court and the application was made on 9.3.2004 over 3 months after the judgement was read. There has been no explanation why the delay.

Counsel for the Respondent submits that under order 41 rule 4(1) Civil Procedure Rule, it is mandatory that the applicant makes his application to the court that passed the judgement. Order 41 Rule 4(1) provides as follows:- “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”.

In my view the above rule provides that the applicant has a choice whether to seek orders of stay in the lower court where the order appealed against is made or go straight to the high court. Of course when one goes straight to the High court, they deny themselves a chance of appeal from the lower court to the High court. The counsel must have been referring to the old provisions of order 41 Rule 4(1) which were repealed by legal notice 36/2000 which provided that an application for stay had to be made to the court which made the order appealed from first before moving to the appellate court.

The second consideration before an order of stay can issue is whether the applicant will suffer substantial loss if the order is not granted. This is what was considered in the authority cited CENTRAL KENYA LTD VERSUS TRUST BANK HCCC 1597/91 where the court observed that the applicant should not merely allege loss but must identify the actual loss. In the present case the applicant claims that there are threats to evict him from the land and the land he cultivates might be taken away from him. In his affidavit he claims that the respondent is already grazing cattle on his land.

These allegations are denied by the respondent. The applicant would suffer loss of evicted from his home and the land which he cultivates is taken away.

The applicant has annexed to his application a letter from the law society of Kenya dated 23.1.2004 which indicates that Mr. Mwongela who had conduct of the case in the lower court on behalf of the respondent had no practicing certificate at the time of conducting the said case. That being the case the proceedings of the lower court would be rendered a nullity. On that ground I feel that there is an arguable appeal raised by the applicant.

Under order 41 R 4(2) (b) there is a requirement of security for due performance of the decree. The applicant has not made any offer.

In application for stay the court has a discretion which has to be exercised judiciously bearing in mind the principles considered above. Though filed late the court finds merit in the application and grants an order of stay on condition that the applicant do deposit Khs.50,000/= in the court as security for due performance of the decree. The deposit be made within 14 days from today's date failing which the order of stay vacates.

The second prayer for status quo to be maintained as before the judgement of the lower court can not be granted at this stage and should await the appeal.

Costs to be in the cause of the appeal.

Dated, read and delivered at Machakos this 18th day of May, 2004.

R. WENDOH

JUDGE