

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO. 9 OF 2003

HAMISI SALIM MWAWIMO APPELLANT

- VERSUS -

JULIUS WAMBUGU RESPONDENT

R U L I N G

The application is brought under the provisions of order 41 rule 4 and Section 3A of the Civil Procedure Act and Rules. It seeks an order for stay of execution of the Court order of the 17.1.2003 by Kwale Senior Resident Magistrate's Court pending the hearing and determination of an appeal. The application is supported by an Affidavit by the applicant. He says the appeal will be rendered nugatory as the judgement is one of possessory and once he is evicted he will suffer substantial loss. He further says the issue of security does not arise as he has constructed a house on the land in dispute.

On his part, the Respondent says the applicant has not shown he has an appeal with chances of success. At this stage and point. I am not required to go into the merits of the appeal but to ensure the conditions as required by order 41 rule 4 are met. I will not reproduce the whole of the said order but it does set out the 2 conditions under sub-rule 2(a) and (b). It says = "No order for stay of execution shall be made under sub-rule (1) unless" the operative word is shall. The conditions to be satisfied are that substantial loss may result if application is not granted and such security as court orders. The provision therein does not give the Court any discretion. It is mandatory.

Has the applicant in this case satisfied the same? This being a judgement of taking possession of land execution means eviction. In the case of MBOGO -VS- MUGORA HCC 106/94 Shah, J. as he then was clearly said:

"It is settled law that in possession suits a stay ought to be granted as otherwise a successful appeal will be rendered nugatory".

In this case, the appellant has gone on to Construct a house on the said land which may lead to it's demolition if execution proceeds. As to security, the Respondent is in possession of the Title document and therefore the Applicant cannot transfer the same. However, I have noted that the issue of ownership was raised in the main trial.

After considering all the arguments, I will grant the application on condition that the Applicant maintains the land and buildings in their current state. There shall be no altering in any manner of the same until the appeal is heard. The appeal is also to be set down for hearing within a period of 8 months from the date hereof. Costs of the application is to the Respondent.

Dated and Delivered at Mombasa this 28th day of March, 2003.

P.M. TUTUI

COMMISSIONER OF ASSIZE