

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 5224 OF 1990

PAULINE NJERI KARIUKI.....1ST PLAINTIFF

V E R S U S

MONICAH NJERI KARIUKI.....DEFENDANT

R U L I N G

This is a Notice of Motion dated 21st May 2003 made under Order XLI Rule 4(1) and (2) of the Civil Procedure Rules asking for stay of execution of the decree issued on 18.1.2002 pending hearing of the appeal against the same decree. The affidavit in support by Pauline Njeri Kariuki sworn on 21.5.2003 states that judgement was delivered on 17.10.2001 and she filed Notice of Appeal on 24.10.2001 but has not filed his memorandum of appeal due to constant disappearances of file from the Registry, but through Replying Affidavit of Monica Njeri Kariuki sworn on 6.6.2003 the Respondent opposes the application saying it is too delayed and not filed expeditiously and is meant merely to perpetuate the advantage the Applicant is enjoying. That the blame against the Registry is not true as on 15.8.2002, the Registrar had in fact informed the Applicants that the proceedings were ready yet they have not yet acted on the information.

The law governing the Courts' discretion in stay proceedings is now clear and is provided under Order 41 Rule 4. It requires Applicant to show sufficient cause and the Court has to be satisfied that Applicant may suffer substantial loss if stay is not granted and that the application is made expeditiously and the Applicant gives security.

Substantial loss is the basis upon which this jurisdiction is to be exercised and unless this is shown, there would be no basis on which the application can be granted. The overriding principle is that a decree holder ought not to be denied the fruit of his judgment. On the other hand, if appeal is preferred against a judgment, the appellant should not if successful in his appeal, have nothing to reap out of his appeal. In KENYA SHELL LTD. vs. BENJAMIN KARUGA & ANOTHER (1982-88) I KAR 1018 Hancox J.A. quoting COTTON L.J. in WILSON Vs. CHURCH (No.2) (1879) 12 C.H.D.454 :-

“I will state my pinion that when a party is appealing exercising his undoubted right of appeal, this Court ought to see that the appeal if successful is not nugatory.”

In the same case, Platt J.A. said -

“It is usually a good rule to see if Order 41 Rule 4 of Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case where appeal would be rendered nugatory by some other events.”

The Applicant here *has* merely stated that the land is of great sentimental value to her and that she will suffer irreparable damage unless stay is granted but the nature and extent of the apprehended damage is not shown. Furthermore, the delay is not adequately explained. This delay of over one year is inordinate and cannot be ignored.

I find it impossible in principle to grant the application which I dismiss with costs.

DELIVERED this 12th June 2003.

A.I. HAYANGA

JUDGE

Read to -

Mr. Gichachi for Respondent

Mr. Omwega for Applicant

A.I. HAYANGA

JUDGE

12.6.2003