**REPUBLIC OF KENYA**
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISC. APPL. NO. 1339 OF 2001**

**THE LAND ADJUDICATION ACT CHAPTER**
**284 LAWS OF KENYA …….....……. PLAINTIFF**

**VERSUS**

**THE PRINCIPAL LANDS ADJUDICATION**
**OFFICER NAROK AND ANOTHER …….…….....…. DEFENDANT**

**RULING**

On 03. 07. 2002 Rimita J. struck out the Judicial Review Application dated 30. 11. 2001 on a preliminary point of law raised by the affected party that it was incurably defective. The Applicant was dissatisfied with that Ruling and sought to Appeal in the Court of Appeal. The requisite Notice was filed on 10. 07. 2002 and there is now before me a Notice of Motion dated 9. 07. 2002 (filed on 11. 07. 2002) seeking an order for stay of execution pending such Appeal. Order 41 rule 4 (1) and (2) Civil Procedure Rules is invoked.

An order for stay may be granted under sub rule 1 for sufficient cause shown. Not so however if under sub rule 2 the court is not satisfied that substantial loss may result to the applicant if the order is not made. The application must also be filed without unreasonable delay and such security as may be required by the court shall be given. The onus all along is on the applicant to establish such matters.

Learned Counsel for the Applicant Mrs. Pareno adverted to the Affidavit in support of the application and submitted that the issue at had involved an intended alienation of some parcels of land which are not within a Land Adjudication Area. The Applicants will suffer irreversibly if the land is registered, as it is intended, under the Registered Land Act which confers indefeasible rights on a first Registration. That is substantial loss. The Appeal will also be rendered nugatory. Mrs. Pareno then went into extensive arguments on the merits of the Appeal and how the Rules of natural justice were not complied with by Rimita J. So did Learned Counsel Mr. Kinyanjui in response, arguing that a nullity cannot form the basis of a subsequent application and that Rimita J was right in striking out the

Application as it was indeed incurably defective, not merely lacking in form.

With respect I think both counsel delved into matters which only the Appellate Court can resolve. The cornerstone of the jurisdiction to grant or refuse an application for stay is “substantial loss” which the applicant must establish to the satisfaction of the Court. For there are two competing rights which are fundamental here: the right of the Appellant to proceed on appeal; and the right of the Respondent to enjoy without let or hindrance the fruits of the decision made in his favour.

In balancing those rights in this matter I am persuaded that there is a right of Appeal on a decision made in an Application under Order 53 Civil Procedure Rules even if such decision declared the Application a nullity. The central issue is one of land which it is alleged may be irreversibly lost to the

Applicants, whoever they are if the Respondents proceed, as they may well do, to register it in names of other persons, the affected parties, before the Appeal is heard and determined. I would be inclined to grant the Order sought.

I am conscious however that such an order gives an advantage to the Applicants who may go to sleep after obtaining it. In the invent I limit the life of the order to 90 days. The Applicants shall also file an undertaking in damages within seven (7) days. Costs will be in the cause.

Dated this 31st day of July, 2002.

**P. N. WAKI**

**JUDGE**

31. 07. 2002

Waki J.

Mrs. Pareno for Applicant

Sitima for Respondent

Kinyanjui for affected party.

CC Mulinge

Ruling delivered dated and signed in Chambers.

**P. N. WAKI**

**JUDGE**