



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

**CIVIL APPEAL NO. 13 OF 2012**

*(Being an application for Stay of execution of decree in Chief*

*Magistrate's Court at Kakamega in civil case No. 68 of 2010)*

BENARD WAWIRE MUTONG'WA .....APPELLANT/APPLICANT

VERSUS

PHILIP MAONGA NAWANIKHE ..... RESPONDENT

**R U L I N G**

Before me is a Notice of Motion dated 4th February 2014 filed by the appellant. It seeks stay of execution of decree in CMCC No. 68 of 2010 in Chief Magistrate's court at Kakamega. It also seeks that an order be made with regard to costs of this application.

The application has grounds on the face of the Notice of Motion. The grounds are that the appellant/applicant has already filed an appeal against the lower court judgment. That the respondent has already obtained a warrant of arrest in execution of the decree in the lower court. That the execution of the decree is unfair and illegal as the respondent has received cane proceeds from the land of the applicant which is LR. No. Bunyala/Namirama/1076, which is sufficient to offset the decretal amount now standing at Kshs.404,000/=. That the appellant is an old man aged 75 years and it would be imprudent to put him in civil jail. That should it be necessary, the appellant is ready to dispose of his parcel of land and deposit the decretal amount with the court pending appeal. That the respondent will not suffer prejudice since he continued to enjoy use of the appellant's parcel of land.

The application was filed with a supporting affidavit sworn on 4th February 2014 by the appellant. It was deponed inter alia, that the decretal amount was Kshs.120,000/= with interest. That the respondent had declined to quit his parcel of land which is Bunyala/Namirama/1076, is the subject matter of the case in the lower court. That if arrested, the appellant was likely to undergo untold suffering by being committed to civil jail.

The application is opposed. A replying affidavit sworn by the respondent on 8th February 2014 was filed. It was deponed that the appellant has not made any offer for security in performance of the decree. That the judgment had been pronounced on 6th January 2012, and bill of costs taxed on 27th April 2014. That the appellant had made an application on 6th December 2012 with respect to sugar cane on LR. No. Bunyala/Namirama/1076 which application had been dismissed with costs. That the appellant had been evading execution, and this application was only filed after he was arrested on 6th February 2014. That the appellant's appeal was filed in January 2012 and had since not been determined.

At the hearing of the application, Mr. Munyendo appeared for the applicant while Mr. Fwaya

appeared for the respondent. Mr. Munyendo submitted that the application was filed without delay. That if the orders sought were not granted, the appeal would be rendered nugatory. That the appellant was ready to deposit a title deed as security.

Mr. Fwaya for the respondent opposed the application. Counsel argued that the appeal had been filed in January 2012 and this current application filed on 6th February 2014 which was a period of over two years. This application was filed after inordinate delay, which was not explained. Secondly the decree is a money decree. The applicant has not indicated how he will suffer loss. Counsel also took issue with the fact that the application was made merely in response to the application for execution and after the applicant had already been arrested. Counsel argued that a casual offer to deposit title does not satisfy the requirements of the law. The appeal also had no merits.

In response, Mr. Munyendo submitted that the application had merits. Counsel argued that the offer of security made in court was not a casual one.

This is an application for stay of execution of decree pending appeal. Such applications are governed by the provisions of Order 42 of the Civil Procedure Rules. Order 42 rule 6 (2) of the Civil Procedure Rules provides as follows -

***“6 (2) No order for stay of execution shall be made under (1)***

***unless -***

- a. The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and***
- b. Such security as the court orders for due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”***

The appellant has stated that he is likely to suffer substantial loss if stay of execution is not granted. That he is an old man aged 75 years. That the respondent has been in wrongful occupation and use of the land in question. Though age is a factor to be taken into account, it cannot be a reason why execution cannot be effected. There is no age limit for a person to be put into civil jail.

The issue of use of the land was the subject of the main case as well as an application by the appellant, both of which were dismissed by the court. Therefore, it cannot be an issue to be brought in this application for stay of execution of decree and itemized as creating a situation of substantial loss to the appellant.

This application was filed more than two years after judgment was entered by the lower court. That was a long delay. The appellant has not made any attempt to explain or justify the delay in filing his application. The burden was on him to do so. His failure means that he has not satisfied one of the important requirements for the filing of such an application. The delay is certainly unreasonable and needed to be explained by the applicant to justify the same. He has not done so. The application will fail on that account.

As for security for due performance, the appellant appears to be relying on the land which is the subject matter of the dispute. It is not a free asset. It cannot therefore offered as security. I find that the appellant has not shown that he can provide security for the due performance of the decree. On that account also the application will fail.

To conclude, I find no merits in the application. Same is dismissed with costs to the respondent.

***Dated and delivered at Kakamega this 15<sup>th</sup> day of May, 2014.***

**George Dulu**

# **JUDGE**