



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITALE**

**CIVIL APPEAL NO. 42 OF 2013**

**THE TRUSTEES OF THE LEGIONS OF MARY**

**THE BISHOP OF THE LEGIONS OF MARY ..... APPLICANT**

**VERSUS**

**JOSEPH KEBO NGIMICHURUS ..... RESPONDENT**

**R U L I N G**

1. The applicant filed a notice of motion dated 17th December, 2013 in which it seeks orders of stay of execution of the decree in Lodwar Principal Magistrate's Court Civil Case No. 11 of 2007. The application is brought under the provisions of Order 42 Rule 6 of the Civil Procedure Rules.
2. The respondent in this application was a plaintiff in Lodwar Principal Magistrate's Court Civil Case No. 11 of 2007 whereas the applicant was the defendant in the suit. The respondent obtained Judgement in his favour on 8/9/2010. The applicants then filed an application in the High Court at Kitale vide Miscellaneous Application No. 34 of 2012, on 2/7/2012 in which they sought leave of the court to file an appeal out of time against the Judgement of the lower court. This application was heard and dismissed on 14/5/2013.
3. The applicants did not prefer any appeal against the ruling of the superior court delivered on 14/5/2013. The applicant instead moved to the lower Court and filed an application seeking among other orders that the court do expunge from the record the memorandum of appearance and defence filed by the firm of George Wambura Advocate and grant leave to the applicant to file a compliant memorandum of appearance and defence. The reason for this is that George Wambura who drafted the pleadings was not authorised to act as an Advocate for the years 2007 through to the time he signed the pleadings. The applicants also wanted the case to start denovo.
4. The applicant's application was heard and in a ruling delivered on 25/11/2013 the trial magistrate dismissed the same with costs to the respondent. This is what prompted the applicant to prefer an appeal to this court and hence the present application.
5. The counsel to the parties agreed to put in written submissions in respect of the notice of motion. The applicant contends that it is the one occupying the suit property and that if stay of execution is not granted, it will suffer substantial loss which will include disruption of church activities. The applicant undertakes to give security for the due performance of the decree.
6. The application is opposed by the respondent based on his replying affidavit sworn on 23/1/2014 in which he contends that the applicant will not suffer any substantial loss and that the applicant has not met the threshold required by Order 42 Rule 6 of the Civil Procedure Rules.

7. I have carefully considered the applicant's application as well as the opposition to the same by the respondent. Under Order 42 Rule 6 (2) the conditions for the grant of stay are set out. First the court must be satisfied that substantial loss may result to the applicant unless the order is made. Secondly, the application must be made without unreasonable delay. Thirdly there must be security for the due performance of the decree or order as may ultimately be binding on the applicant.
8. I will start with condition number two. The ruling which is appealed from was delivered on 25/11/2013. The application herein was filed on 17/12/2013. The application was therefore filed 22 days after the date of the ruling. I therefore do find that the application was filed within reasonable time.
9. On the issue as to whether the applicant will suffer substantial loss, I do not find that it will suffer any substantial loss if stay of execution is not granted. The applicant contends that its activities will be disrupted. I have gone through the Judgement of the trial magistrate as well as the ruling being appealed against. The ruling which is being appealed from dismissed the applicant's application which sought to nullify proceedings on the ground that the pleadings were signed by an advocate who was not qualified to do so. The Judgement of the court which is to be executed is clear that the trial magistrate visited the disputed land and found that the applicant had its own land to the South and the respondent's land was to the North. The applicant's contention that it is in occupation of the disputed parcel is therefore without basis and there can be no substantial loss which the applicant will suffer if no stay order is granted.
10. The way I understood the Judgement of the lower court is that the dispute between the applicant and the respondent is on where the boundary should be. The applicant is preventing the respondent from erecting a fence marking the boundary of his land. The applicant is not on the respondent's land. If it is a question of the respondent executing on costs, there was no demonstration by the applicant that if costs are paid to the respondent, he will be unable to refund the same if the applicant succeeds in its appeal. The respondent works with Kenya Defence Forces and there was no suggestion that he is impecunious and therefore unlikely to refund the costs.
11. I do not have to consider the condition on deposit of security in view of my finding that there is no demonstration that the applicant will suffer substantial loss if stay orders are not given. I find that the applicant's application has failed the threshold set out under order 42 Rule 6 (2) of the Civil Procedure Rules. The same is hereby dismissed with costs to the respondent.

It is so ordered.

Dated, signed and delivered at Kitale on this 9th day of July, 2014.

**E. OBAGA**

**JUDGE**

In the presence of Mr Cheptarus for the respondent.

Court Clerk – Kassachoon.

**E. OBAGA**

**JUDGE**

**9/7/2014**