



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**CIVIL APPEAL NO. 27 OF 2013**

OLE NASESIA.....1<sup>ST</sup> APPLICANT

OLE NANDEYA.....2<sup>ND</sup> APPLICANT

**VERSUS**

REGINA MOGORI.....RESPONDENT

**RULING**

1. This application dated at Kisumu 13<sup>th</sup> March, 2014 is brought by the Appellant/Applicants, **Ole Nasesia** and **Ole Nandeya**. They both seek for orders:

- 1) *That they be a stay of execution or further executive of the judgment and decree in Kilgoris PMCC. NO. 5 of 2009, pending the hearing and determination of this application.*
- 2) *That the order of dismissal of the appellant's application for stay of execution of the judgment and decree in the subordinate court made on 24<sup>th</sup> January, 2014 at Kilgoris PMCC.NO.5 of 2009 be set aside.*
- 3) *That pending the hearing and determination of Kisii HCCC.NO. 27 of 2013 between the parties herein be a stay of execution or further executive in Kilgoris PMCC.NO. 5 of 2009.*
- 4) *That the costs of this application be provided for.*

2. The appellant/Applicant argue that if stay of execution is not granted, the object of this application and appeal will be defeated and rendered nugatory.

3. They further argue that unless this application is granted as prayed for, both at the interim and interparte hearing, the Respondent will levy execution against the appellants and that would or might entail irreparable loss to the applicants.

4. That finally the applicants are ready and willing to give LR.NO. TRANSMARA/KIMINTET "D"/1640 as a security pending the hearing and determination of the appeal, which property the 1<sup>st</sup> Appellant/Applicant is the registered owner.

5. This application will not occasion any prejudice to the Respondent as the applicants have offered security for the performance of the decree, but the applicants will be highly prejudiced if execution proceeds against them.

6. In their written submissions the Appellants argue that in the subordinate court, the respondent heavily relied on the report of Dr. David Rotich Towett dated 16.05.2012 which report was taken to be the valuation of livestock cattle belonging to the respondent, yet in his testimony Dr. David Towett testified and confirmed that he did not see the animals at all and could not tell their breed.

7. The first appellant produced as exhibit a document report of goats returned to him after having been stolen. There is, however, no mention of cows, heifers or even bulls. These contradictions is what has led the appellants to challenge the judgment of the lower court among other grounds on the basis for a judgment against the Respondent.

8. I am satisfied that this appeal is arguable with the probability of success. The judgment against the appellant was a return of cattle and in the alternative their value. It is therefore, essentially, not a money decree.

9. The 1<sup>st</sup> appellant has offered for security land whose value is in excess of kshs. 90,000,000.

10. The appellants have cited civil case No. 20 of 1998, in which the Judge therein allowed and ordered for a stay of execution of the court's decree until the appeal is heard and determine. The appellant was ordered to deposit title of land with Deputy Registrar as a security.

11. However, the Respondent are vehemently opposed to the application of stay of execution by the Appellants. They have given several grounds in their opposition. They have advanced three grounds under order 42 rule 6 of the Civil Procedure Rules, namely: which in her view stay ought not be allowed until the three principles set out by that order are fulfilled:

*i. That the applicant is likely to suffer substantial loss unless the stay is granted;*

*ii. That the application has been made without unreasonable delay; and*

*iii. Such surety for the due performance of such decree has been given by the applicant*

12. The Respondent is a woman of straw and may not refund the decretal sum. Besides, the decree to be stayed is money-decree and no such stay cannot be issued against money decree.

13. The second limb is the Respondent's greatest strength i.e. that the application was made after unreasonably a very long time. The judgment of 6<sup>th</sup> February, 2013, was appealed against in August 2013. This appeal was dismissed.

14. The ruling of dismissal of 24<sup>th</sup> January, 2014 did not come to their knowledge until 7<sup>th</sup> of March, 2014 when they lodged an appeal herein. The lodging of the appeal in the High Court appears took too long and smacks of indolence and deliberate ineptness. The Respondent has relied on two authorities:-

*a) Cause No. 203 of 2011, Eng. Francis N. Gachuri Case and*

*b) Civil Appeal No. 121 of 2000, Francis v. Maingi & Maingi Munyao case.*

In both case the respective courts held that inordinate delay would be inexcusable and the court would not permit stay if execution of judgment/decree.

15. I have weighed all arguments by the respective parties, the appellants and respondent respectively, and read their respective authorities each in support of each party.

16. However, guided by article 48 of the Constitution, i.e. access to justice for all persons, I am inclined to see merit in the appellants' application for stay of execution of judgment, in the first place.

17. Secondly, as long as the appeal is pending not giving a stay of execution will render the pending appeal nugatory, and the objective of the appeal would be defeated.

18. The appellant may appear indolent and may be accused of delaying tactics, however, they made the first attempt to seek a stay at the subordinate level, which application was dismissed. The appeal 7<sup>th</sup> March, 2013 is a second attempt at moving the legal process forward.

19. The appellant finally have offered a property LR.NO. TRANSMARA/KIMINTEL "D"/7 as a security.

20. I therefore order that the application for stay dated 13<sup>th</sup> March, 2014 is hereby allowed. The applicant to deposit title of LR.NO. TRANSMARA/KIMINTEL "D"/7 with the Deputy Registrar as a security. Costs of the application be in the cause.

21. It is so ordered.

Dated and delivered at KISII this 3<sup>rd</sup> day of November, 2014.

**C.B. NAGILLAH,**

**JUDGE.**

**In the presence of:-**

Mose holding brief for Gichana for the appellants

O.M. Otieno for the respondent

Edwin Court Clerk