



(Being an appeal from the Judgment of H.N. NDUNGU Senior Resident Magistrate Kerugoya in Civil Case No. 168 of 2008 dated 5/5/2011)

**SIMON GACHOKI MUNYI.....APPELLANT/APPLICANT**

**VERSUS**

**ALICE NYAWIRA MWANGI.....1<sup>ST</sup> RESPONDENT**

**PETER MWANGI KINYUA.....2<sup>ND</sup> RESPONDENT**

## **RULING**

This is the Notice of Motion dated 4/11/2011 filed under Order 42 Rule 6 (1) of the Civil Procedure Rules. It is for the following orders:-

- 1. That the Hon. Court be pleased to stay execution of the Order made on 5/5/2011 by the Senior Principal Magistrate Kerugoya in Civil Case No. 168/08 until the appeal herein is heard and determined.***
- 2. That the Hon. Court be please to issue such further order or relief as the Court may deem fit.***
- 3. Costs of the application be provided for.***

The gist of the application form the ground filed is that the Applicant has appealed against the Judgment in Senior Principal Magistrate's Court Kerugoya Civil Case No. 168/08. And that on 5/5/2011 the Respondent filed an application for execution of the decree to retransfer the land to him. He has also filed a supporting affidavit.

The 1<sup>st</sup> Respondent filed a replying affidavit. She says the Applicant has filed a similar application in the lower court case which application has not been prosecuted. And that even after filing the appeal has taken his sweet time to prepare the records. She further depones that even if the retransfer is done the Applicant will suffer no loss as the property will be registered in the names of the Respondents and their children.

The Applicant's counsel filed written submissions but the Respondent's counsel did not. He has submitted on the issue of delay and whether appeal will be rendered nugatory if it is successful. I have read through the affidavits, the annexures and the submissions filed by Mr. Magee for the Appellant/Applicant. This application is filed under Order 42 Rule 6 (1) of the Civil Procedure Rule which provides that it can be filed in the Court below or in the Appellate Court.

Order 42 Rule 6 (2) of the Civil Procedure Rules provides for the conditions under which stay may be granted.

***(a) There must be a demonstration that substantial loss may result to the Applicant unless the order is granted.***

***(b) The application must be made without unreasonable delay.***

***(c) There has to be security for due performance of such decree/order.***

The decree appealed from was made on 5/5/2011. The Appellant/Applicant filed his Appeal on 3/6/2011 and the same was admitted on 25/7/2011. To date he has not prepared the Record of appeal. What woke him up is the application filed by the Respondent in the lower court for execution of the decree on 21/7/2012.

The applicant and 1st Respondent appear to be in some marital relationship. They have children in common. That is what I pick from the replying affidavit. The suit land is registered in the name of the Applicant. The Court below decreed that the property be re-transferred to the 2 Respondents and their children. It is this retransfer that the Applicant is fighting. Apparently the Applicant was a buyer of the suit land and had the land registered in his name.

I have looked at the grounds of appeal which raise issues of law that must be addressed by this Court. I would therefore say the appeal is arguable. Would the Applicant suffer loss if the retransfer is done and he succeeds in the appeal? This is a land matter and transferring and retransferring is costly and involving to the parties. The Applicant herein promptly filed his appeal after the promptly filed his appeal after the pronouncement of the decree by the court below.

After considering all the circumstances of this case and the provisions of Order 42 Rule 6 (2) of the Civil Procedure Rules I do find that it would be less expensive and cumbersome for the parties if the suit land MWERU/GITAKU/832 remained in the names of the Applicant until the hearing and determination of the appeal. And this is with a rider that the Applicant should not dispose of the property to any 3<sup>rd</sup> party before the determination of the appeal.

The Applicant is further directed to deposit Shs.40,000/= in Court within 30 days as security for costs. Application is therefore allowed.

Costs to the Respondent.

**DELIVERED, SIGNED AND DATED AT EMBU THIS 4<sup>TH</sup> DAY OF JUNE 2012.**

**H.I. ONG'UDI  
JUDGE**

**In the presence of:-**