



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CIVIL APPEAL CASE NO. 671 OF 2009**

**CHRISTINE WAMBUI KABECHA ..... APPELLANT**

**VERSUS**

**SIMON KIRIKA NJOROGE ..... RESPONDENT**

**RULING**

This is an application by way of Notice of Motion under Order XLI Rule 4 of the Civil Procedure Rules seeking an order that there be a stay of execution of the Orders issued in a ruling delivered on 27<sup>th</sup> November, 2009 in Kikuyu PMCC No. 57 of 2006 pending the hearing and final determination of the appeal.

The grounds upon which the said application are based are that the application has been made without delay and that if the orders of the lower court are executed the appellant will suffer substantial loss. The appellant is prepared to provide such security as this Court may deem just and fit to order. It is also the applicant's position that her piece of land, which is the subject of the suit, is threatened with being interfered with if orders are not stayed.

In any case, no prejudice will be occasioned to the respondent. The application is opposed by the respondent and a replying affidavit has been sworn to that effect alongside a preliminary objection on a point of law. Both learned counsel for the parties have filed their submissions which I have read.

The preliminary point of law is premised on the fact that the appellant did not obtain leave of the court as required under Oder III Rule 9(A) of the Civil Procedure Rules in respect of change of advocates. That objection must fail because, no judgment was on record as at the time the appellant sought that change.

I have gone through the record. The parties recorded a consent to the effect that the Land Registrar Kiambu should determine, indicate and fix the boundary between **LR No. Kikuyu/Kikuyu/Block 1/270** and **LR No. Kikuyu/Kikuyu/Block 1/297**.

These two parcels of land are owned by the appellant and the respondent respectively. The Land Registrar was to file his report in court within 30 days of visiting the suit premises, and each party was at liberty to avail their surveyor during the exercise. The surveyor complied with the said order and filed the report in court. Following the said filing, the learned trial magistrate made a ruling admitting that the report and observed that what is left is for the fixing of the boundary.

The appellant being aggrieved by the said order lodged an appeal hence this application for stay. In the

affidavit in support of the present application, and in particular paragraphs 10 to 13, the appellant states that the measurements of the two parcels of land contained in the report compiled by the District Surveyor do not tally on the ground nor on the maps or on the titles issued. It is her case that, the said report should therefore not have been relied upon or used by the court to make any orders as it did because, it was not conclusive nor did it shed any light in relation to the matters in dispute between the parties. If the order is executed the appellant says she is likely to lose a portion of her property yet the measurements in the title deeds and maps are different and the suit has not been heard. It is also her position that the District Surveyor should have been summoned to produce the report during the hearing and be subjected to cross-examination before the court could act on the said report.

No order for stay of execution shall be made under the cited provisions unless 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. There is also the provision that the court may order such security to be provided for due performance of any order that may be made binding the applicant.

The report relied upon by the learned trial magistrate could not lead to the determination of the dispute between the parties. It is not clear which measurements the surveyor was going to use, because in the said report and as rightly pointed out by the appellant, there are differences between what is contained in the survey plan and the title. Indeed, the district surveyor uses the words, "it is not clear".

The foregoing alone is persuasive enough that there should be a stay of execution until the appeal is heard and determined. This is because if the order is executed, the appellant is likely to lose a portion of her land. I also find that this is not an appropriate case to make an order the provision of security on the part of the appellant.

Accordingly I grant the stay sought pending the hearing and determination of the appeal. The costs shall be on the appeal.

Orders accordingly.

***Dated, signed and delivered at Nairobi this 1<sup>st</sup> day of March, 2011.***

**A. MBOGHOLI MSAGHA  
JUDGE**