



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL APPEAL NO. 105 OF 2010

ELISHAM WAKHU
APPELLANT/APPLICANT

VERSUS

FRIDAH KIMANANI MUKOLWE
RESPONDENT

R U L I N G

1. The Applicant herein, **Elisham Wakhu**, by his Chamber Summons dated 20.9.2010 and premised on the provisions of **Order XXI Rule 22** of the Civil Procedure Rules seeks orders that there be a stay of execution of certain orders issued in Kakamega CMCC Award No. 47 of 2007 pending the final determination of the Appeal herein.
2. In support of the Summons is a short Affidavit sworn on 20.9.2010 and in it, the only ground advanced is that the ***“appeal has high chances of success”***.
3. In response, a Replying Affidavit was sworn on 5.10.2010 by the Respondent who states that the Application is frivolous, and lacks substance as no prejudice has been shown to be caused if the orders are executed and that in any event, the Applicant is guilty of laches. Further that the Application is an afterthought and is calculated to stop the enjoyment of a judgment lawfully obtained. In any event, that there is another suit, HCCC 110/2009 filed by the Applicant in this court on the same subject matter as the Appeal and that suit is still pending before this court.
4. Advocates made no submissions and relied entirely on the contents of the Affidavits on record and I note as follows;

5. Firstly, the original proceeding between the parties was the one initiated at the Butere Land Disputes Tribunal and it was in respect of land parcels Nos. Marama/Shiraha/22, 120 and 121. The Tribunal rendered its decision on 25.1.2007 which was to the effect that the Applicant should “surrender twelve (12) acres from parcel No. Marama/Shiraha/121 to the son of Mukolwe by the name Micah Musungu Mukolwe, I/D No.21959374”.

6. By an Application dated 28.6.2007, the Respondent herein sought to have the award adopted as a decision of the court which matter was challenged by the Applicant. His protestations were dismissed and on 12.2.2009, the award was adopted.

7. The Appeal from what I can see is against the Ruling delivered on 6.8.2010 by the subordinate court. That Ruling was to the effect that the Executive Officer of that court be directed to sign transfer forms to enable the transfer of twelve (12) acres from title No. 121 aforesaid to Micah Musungu Mukolwe. The orders were issued as a consequence of the adoption of the award of the Tribunal.

8. Secondly, I wholly agree with the Respondent that the Summons before me is without merit because there is no challenge in the Appeal to the adoption of the award. Perhaps that is the substance of HCCC. 110/2009 but certainly in the Appeal, it is not, and I am at a loss as to what the purpose of the present Appeal is. Even if I were to allow it, where does that take the Applicant when the judgment is still intact and can be executed? I am not prejudging the Appeal but merely pointing out to the Applicant that he may need to rethink it. As regards the Application for stay of execution, orders cannot be made in vain and I completely see no purpose to be served if I granted the said orders.

9. Further, I do not understand that under Order XXI Rule 22 of the Rules, execution may be stayed without sufficient cause being shown. The Applicant’s only ground for seeking a stay is that the Appeal has high chances of success. He has not said why that may be so and I have said I have seen no such sign of success.

10. Lastly, the Application before me is less than serious, is bare and lacking in substance and is best dismissed with costs to the Respondent.

11. Orders accordingly.

Delivered, dated and signed at Kakamega this 2nd day of March, 2011.

ISAAC LENAOLA

J U D G E