

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

Civil Case 21 of 1998

M'THAMBU MUTINDWA.....

.....PLAINTIFF

VERSUS

RICHARD BARUNI MUTINDWA.....1ST DEFENDANT

LINUS KABURU MUGENDI.....2ND DEFENDANT

RULING

Linus Kaburu Mugendi has filed the application dated 18/10/2008 through Duncan Muyodi & Co. Advocates. The same is brought under Order XLI Rule 4 of the Civil Procedure Rules. He seeks an order for stay of execution of the Decree in **Civil Case No. 21 of 1998** while pending the hearing and determination of **Civil Appeal No. 149 of 2008** pending before the Kenya Court of Appeal. He relies on 7 grounds on the face of the application and on his supporting affidavit dated 18/10/2008. I did not see the respondents replying affidavit in the file but the same was opposed by his counsel Mr. Kariithi who said that it was defective and that the applicant cannot seek to deposit the Title Deed for the same disputed plot as security in this case. The Applicant has nonetheless in paragraph 9 of his supporting affidavit offered to provide any other security as the court may direct. I have considered the application in question along with the oral address by both counsel in court. Both parties agree that the applicant herein holds the Title Deed to the property in question but it is the plaintiff/Respondent who is and has been in physical occupation all along. The applicant therefore contends that if stay is granted, the respondent will not be prejudiced as he will continue to live on the same land. The Applicant however fears that if the Judgment/decree is executed and the land is transferred to the respondent herein, he might transfer the same to other 3rd parties and his appeal will therefore be rendered nugatory. I have tried to balance these 2 positions. My finding is that the status quo should be maintained i.e the status quo pertaining as at now and as at the time the suit was filed. It will be important that the land in question is not transferred to a 3rd party in case the appeal succeeds. Since the respondent is not faced with eviction, he actually stands to suffer no prejudice whatsoever if the stay orders are granted. I nonetheless agree with Mr. Kariithi that the suit land cannot act as the security in this matter. While allowing the application for stay of execution, I order that the 2nd defendant/applicant deposits Ksh 60,000/- as security for costs within the next 30 days failing which the plaintiff/Respondent will be at liberty to execute this court's decree. Costs of this application will abide by the results of the appeal.

W. KARANJA

JUDGE

Delivered, signed and dated at Embu this 3rd day of June 2009.

In presence of Mr. Muchira for Mr. Kariithi for Mr. Okwaro for Applicant.

W. KARANJA

JUDGE