

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT EMBU

Civil Appeal 35 of 2007

MAXION KIMANI MWANIKI.....APPELLANT

VERSUS

JAMES NYAMU.....RESPONDENT

RULING

Notice of Motion filed and dated 15/5/2007 seeks orders to set aside order made on 2/4/2007 and execution of decree passed on that dated be stayed. The said orders were made in the **Senior Principal Magistrates Court at Kerugoya in SPM C.NO.51 of 2007** against the Applicant being temporary injunction pending the hearing of the said suit. It is the said ruling and order that has given rise to this appeal. The appeal is pending. The prayer to set aside the order of another court already subject of Appeal is not possible. And that prayer is dismissed.

However, stay of execution of an order subject to appeal can be made. The same is provided for under order 41 Rule 4 CPC. The applicant must show sufficient cause to warrant a stay of execution which means the Respondent will be kept out of his fruits of his litigation. And the applicant must show that if order is not given he will suffer substantial loss. The applicant must also give security. This application is supported by affidavit of the applicant sworn on 16/5/2007. That application served on 11/5/2007 is admitted. The Respondent has filed a replying affidavit. It is not true that permanent injunction was granted only interim order granted pending hearing of suit. The Respondent commenced contempt proceedings saying the applicant has not stopped cultivating the land of Respondent.

Upon considering the arguments of parties it is clear to me that the dispute relates to use of land. The applicant would suffer substantial loss if he was to stop cultivating the land while he is challenging injunction on an appeal if stay was not granted. The application is not brought with unreasonable delay.

It is my finding that the stay should be granted. I am satisfied that the applicant has demonstrated sufficient cause of warrant granting the stay. He is already committed to civil jail and he has been let out to prosecute this application on bond. However I order that the applicant do deposit security in value of 20,000/= for payment of any order that may ultimately be found binding upon him as provided by law. Such deposit to be made with the next 21 days from today.

Costs shall be in the appeal.

It is so ordered.

Dated this 1st November, 2007.

J. N. KHAMINWA

JUDGE

1/11/2007

Khaminwa – Judge

Njue – Clerk

Maxion Kimani in court

N/A

Ruling read in open court.

J. N. KHAMINWA

JUDGE