



**IN THE COURT OF APPEAL**

**AT ELDORET**

**(CORAM: OKWENGU, J. MOHAMMED & KANTAL, J.J.A)**

**CIVIL APPLICATION NO. 69 OF 2019**

**BETWEEN**

**SAMUEL NYAKERI NYABIBA.....APPLICANT**

**AND**

**PETER OKIABERA OMWENGA.....RESPONDENT**

*(An application for stay of execution of the Judgment and Decree of the Court of Appeal judgment delivered on 1st March, 2018 (Githinji, Okwengu & J. Mohammed, J.J.A) dated 1st March, 2018*

in

**Eldoret Civil Appeal No. 45 of 2015)**

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**RULING OF THE COURT**

[1] By a notice of motion dated 29th May, 2019 lodged by **Samuel Nyakeri Nyabiba** (the applicant) under rule 5(2)(b) of the Court of Appeal Rules, the applicant seeks and order of injunction restraining **Peter Okiabera Omwenga** (the respondent) from evicting tenants or collecting rent from the entire land parcel No. Nzoia Sisal/Moi's Bridge/Block 1/3406 (the suit property) and a further order that the suit property be surveyed by an independent surveyor to confirm the respondent's share measuring 25 by 100 ft. as directed by the Court.

[2] According to the grounds stated on the face of the motion, and an affidavit sworn by the applicant, this Court delivered a judgment and allowed an appeal that was lodged by the respondent against the judgment of the Environment and Land Court (**Ombwayo, J**). The Court made orders that the applicant transfer the suit property to the respondent but suspended the order for 9 months within which period it gave the applicant the option of transferring to the respondent an alternative commercial property of the same size as the Matunda property. The applicant now wishes to surrender only part of the suit property because, according to him, the respondent is threatening to take a larger portion than what was decreed.

[3] The respondent has filed a replying affidavit in which he maintains that the order that was made in the judgment of this Court was for the suit property to be transferred to him and not subdivided and a portion transferred to him.

[4] We have considered this application, the affidavit in support and in reply, as well as the judgment that was delivered by this Court on 1st March, 2018. In the first instance, Rule 5(2)(b) of the Court of Appeal Rules under which the applicant's motion was brought, deals with application for stay of execution/proceedings or injunction pending appeal. This means that a Court can only be moved where a notice of appeal has been filed against the judgment of the lower court. In this case, this Court has already delivered a final judgment and the issue of a stay pending the hearing of the appeal cannot arise. The application is therefore defective and misconceived.

[5] That notwithstanding, it is apparent on the fact of this Court's judgment dated 1st March, 2018 that is annexed to the applicant's affidavit that the Court gave the applicant 9 months within which he had the option of transferring an alternative plot. That period has long since expired. Secondly, contrary to the applicant's contention, in its judgment, the Court ordered transfer of the suit property. The issue of the size of that plot does not therefore arise.

[6] For these reasons we find that the motion before us is not only defective, but also lacks merit. It is accordingly dismissed.

**Dated and delivered at Nairobi this 9th day of October, 2020.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*

**DEPUTY REGISTRAR**