



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU
Civil Case 78 of 2002

MICHAEL OKECH ADEGA 1ST PLAINTIFF
 BENARD OTIENO ADEGA 2ND PLAINTIFF
 VINCENT OMONDI ADEGA 3RD PLAINTIFF
 HELEMINA AMBUNYA 4TH PLAINTIFF

VERSUS

HENRY OMUSAMBAYI NANDWA 1ST DEFENDANT
 WILLIAM NAMUNGU OUNGU 2ND DEFENDANT

RULING

This suit was filed by the applicants against the respondents way back on the 6th March 2002. After several interlocutory applications the suit was finally set for hearing on the 15th November 2006, before Warsame - J. It was finalized on the 6th February 2007, when his Lordship delivered a judgment dismissing the suit with costs to the respondents.

The applicants being dissatisfied with the judgment lodged a Notice of Appeal on the 12th February 2007, and on the 14th November 2007, filed this application under Order 41 rule 4(1) (2) (3) and (6) of the Civil Procedure Rules and S. 3A of the Civil Procedure Act. They seek the main order that the court be pleased to grant stay of execution and stay of proceedings pending the determination of the appeal and that further prejudicial acts against themselves be restrained. The application is based on the grounds contained on the body of the appropriate Notice of Motion and is supported by the facts contained in a supporting affidavit deponed by the fourth applicant dated 14th November 2007, and a further affidavit dated 14th January 2008.

The respondents oppose the application on the basis of the facts contained in a replying affidavit deponed by the second respondents dated 13th December 2007:

"No appeal or second appeal shall operate as a stay of execution of proceeding under a decree or order appealed from except in so far as the court appealed from may order, but the court appealed from, may for sufficient cause order stay of execution or such decree or order"(Order 44 rule 4(1) CPR).

"No Order for stay of execution shall be made under sub-rule (1) Unless:-

- (a) 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 and
- (b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant."

(Order 41 rule 4(2) C.P.R.)

The applicants contend that their intended appeal has high chances of success and that they shall be occasioned substantial and irreparable loss if stay is not granted. They contend that the appeal will in the circumstances be rendered nugatory. They argued through their advocate, Mr. Oluoch that they will stand to lose that homestead situated on the suit land where they have always lived and know of no other.

On their part the respondent contend that the suit has dragged on in court sine 2002, due to the applicants numerous uncalled for applications. They further contend that the present application is intended to buy time and deny them the fruits of justice.

The power of the court to grant or refuse an application for stay of execution and/or proceedings is discretionary.

In **KENYA SHELL LTD VS. KIBIRU & ANOTHER [1986] KLR 410**, the court held (*inter alia*) that:-

"In applications for stay the court should balance two parallel propositions, first that a litigant if successful should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory."

How do we balance these propositions in this case?? The opinion of this court is that the balance may be achieved by first and foremost considering the applicants claim against the respondents and see whether or not it is tenable even on appeal.

In the further amended plaint filed on 11th July 2005, the applicant's principle prayers were the following:-

(a) A declaration that Land Parcel No. Kisumu/Kanyakwar "A"/941 belongs to the plaintiffs by virtue of being a ancestral land as well as by continuous adverse possession and occupation and that the 1st defendant is holding the same in trust for the plaintiffs.

(b) A declaration that the acquisition of registration of land Parcel No. Kisumu/Kanyakwar 'A'/941 by the defendant through succession and its consequential transfer to the 1st defendant was done through fraud, concealment of material facts and false registration hence null and void and should be ordered cancelled and it be registered in the joint names of the plaintiffs."

In the judgment of the 6th February 2007, the court adopted the final findings made in a Succession Cause No. 149/01, which had been filed prior to this suit and which involved the parties herein.

The subject matter in the succession cause was the same subject matter herein i.e. Land Parcel No. **Kisumu/Kanyakwar "A"/941** (*The suit land*) which previously belonged to the Late **Seruya Wasiaya Obanda** who passed away on the 10th February 1986 without having her own children.

After hearing the dispute the court ruled that the direct beneficiary of the Estate of the said Seruya Wasiaya Obanda was the second defendant who was the petitioner in the Succession case. The plaintiffs had raised objection to the grant of Letters of Administration of the Estate of the late Seruya Wasiaya Obanda to the second defendant on grounds of fraud and concealment of material facts.

With the failure of the objection, the benefit of the suit land was granted to the second defendant who transferred the title thereof into the name of his son thereby bringing into play the provisions of **S.93 of the Law of Succession Act (Cap 160 LOK)**.

The court in its judgment of the 6th February 2007, noted that the issue of the suit land was finally and fully determined by the decision in the Succession cause and that the plaintiffs institution of this suit was an attempt to have a second bite on the cherry.

This court cannot agree more with the said observation. Consequently, a strong indication emerges to the effect that the intended appeal is highly untenable and may not be rendered nugatory if stay is not granted.

With lack of proprietary interest in the suit land, the plaintiffs position is that of trespassers.

The respondents contention that this application is

intended to buy time and deprive them of the fruits of the court's judgment is sustainable.

The application is therefore dismissed with costs.

Read and Signed this 11th day of June 2008.

J. R. Karanja

JUDGE