



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISII

CIVIL CASE NO. 149 OF 2005

**DAVID OMWENGA.....PLAINTIFF/
RESPONDENT**

VERSUS

**JOHN TELEYIO OLE SAWOYO.....DEFENDANT/
APPLICANT**

RULING

The defendant's application dated 29th July, 2009, is for stay of execution of this court's judgment and decree dated 23rd July, 2009, pending hearing and determination of an appeal against the said decision. The application is supported by the defendant's affidavit wherein he deposes that being dissatisfied with the said judgment he preferred an appeal to the Court of Appeal. The same is registered as **Civil Appeal No. 297 of 2009**. In his view, the appeal raises salient points of law. If stay of execution is not granted, the suit land may be transferred to the plaintiff or 3rd parties, in which event the appeal will be rendered nugatory. He will thus suffer substantial loss which cannot be compensated in monetary damages. He therefore urged the court to grant him the orders sought.

In his replying affidavit, the plaintiff supports the judgment that was made in his favour and states that he has no intention to transfer the suit property to any person or at all. In his view, to allow the defendant's application is to perpetrate fraud on the part of the defendant. He further denies that the defendant will suffer substantial loss as alleged. To the contrary, he asserts that he has been subjected to untold suffering and loss by the defendant's fraudulent acts through which he deprived him of his land.

The advocates for the parties filed their respective written submissions which I have perused and taken into consideration. It is not in dispute that the defendant has filed an appeal against this court's decision as aforesaid. Although a copy of the memorandum of appeal was not annexed to the defendant's application, from a perusal of the contents of paragraph 10 of the defendant's affidavit which sets out the issues to be canvassed in the appeal, it is evident that the appeal is not a frivolous one. In **BUTT –VS- RENT RESTRICTION TRIBUNAL** [1982] KLR 417, the general principles in granting or refusing a stay pending appeal were laid out. The court held that if there is no overwhelming hindrance, a stay ought to be granted so that an appeal may not be rendered nugatory should the appellate court reverse the judge's discretion. In exercising its discretion, the court ought to consider the special circumstances of each case.

This is a land matter. This court ordered that the suit land be transferred to the plaintiff. If that is

done there will be nothing to prevent the plaintiff from dealing with his land in whichever manner he chooses. The registration of a person as the proprietor of land vests in him absolute ownership of the same together with all rights and privileges belonging or appurtenant thereto. See **sections 27 and 28** of the **Registered Land Act**. If the suit land is transferred to the plaintiff and he decides to sell and transfer the same to a third party the applicant's appeal, in the event that it is successful, would be rendered nugatory. The defendant will have suffered substantial loss. In such circumstances, it is only fair that the defendant be allowed to exercise his constitutional right of appeal. Consequently, I grant stay of execution of this court's judgment and decree pending hearing and determination of civil appeal **No. 297 of 2009**. This is however on condition that the defendant is not permitted to sell, transfer, lease and/or charge the suit land, that is, **Transmara/Osinoni/49** until the appeal is heard and determined or until further orders by either this court or the appellate court. The defendant shall bear the costs of this application.

DATED, SIGNED AND DELIVERED AT KISII THIS 10TH DAY OF SEPTEMBER, 2010.

D. MUSINGA

JUDGE.

10/9/2010

Before D. Musinga, J.

Mobisa – cc

Mr. Minda for Mr. Masese for the Respondent

Mr. Oguttu for the applicant

Court: Ruling delivered in open court on 10th September, 2010.

D. MUSINGA

JUDGE.