



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**CIVIL SUIT NO. 174 OF 2007**

**GEORGE LALLA ODUOR.....PLAINTIFF/APPLICANT**

**-VERSUS -**

**CANNON ASSURANCE (K) LIMITED.... DEFENDANT**

**RULING**

1. The application before me is for stay of execution of the judgement, Order or Decree arising out of the judgement dated 6<sup>th</sup> May 2016.
2. The applicant, GEORGE LALLA ODUOR, is desirous of appealing against the decision of the trial court.
3. However, it is significant to note that the applicant had not yet lodged his intended appeal.
4. Apparently, the applicant was not aware of the date when the judgement was delivered, before the court delivered its said judgement. Therefore, it was not until a month after the court had delivered the judgement that the applicant became aware of it.
5. And he became aware about the judgement in a dramatic way: some valuers visited the suit premises, which is where the applicant resides. The valuers went to the property, on the instructions of the defendant, CANNON ASSURANCE (K) LIMITED, who wished to have the suit property valued, for purposes of setting a reserve price, for an intended auction.
6. As the time for lodging an appeal had lapsed, the applicant's advocates advised him that he would need to seek the leave of the Court of Appeal, to be able to file his appeal.
7. Meanwhile, as he awaits developments at the Court of Appeal, the applicant is concerned that unless this court grants an order for stay of execution, the suit property was in imminent danger of being disposed of.
8. In answer to the application, the defendant submitted that the application was simply intended to deny access to it, a fact which would occasion prejudice to the defendant.
9. The defendant also submitted that the plaintiff had not demonstrated how a rejection of his application for stay of execution would cause him to suffer irreparable loss.

10. In my understanding, the loss of the subject matter of the intended appeal would result in serious consequences for the plaintiff. I say so because the suit premises is his family residence.
11. However, I am also alive to the fact that the plaintiff had consciously offered his said residence as a security for the facility which the defendant gave to him.
12. Therefore, the plaintiff must be deemed to have given the property as a security, with the full knowledge and intent that if he defaulted, the defendant would become entitled to realize the security.
13. In the circumstances, although the loss of the family residence would indeed lead to serious consequences, the plaintiff cannot complain because he had definitely anticipated such a possibility, at the time he made the decision to offer the property as a security.
14. The plaintiff submitted that the point of law which he intended to canvass before the Court of Appeal is arguable.
15. He pointed out that the defendant did not have a Licence under the Banking Act.
16. As the issuance of such Licences was said to be mandatory if the defendant was to qualify to undertake Mortgage Finance Business, the plaintiff believes that he will persuade the Court of Appeal, that the defendant had been engaged in a process which was a nullity *ab initio*.
17. It is the plaintiff's understanding that the defendant was operating illegally, when it engaged in Mortgage Finance Business without the requisite Licence.
18. That is a weighty issue. I do not think that it can be dismissed without proper consideration. In other words, it is the kind of issue which, if raised, ought to be given appropriate attention.
19. As the High Court has already given its judgement, it would now be the turn of the Court of Appeal to give consideration to the issue.
20. Of course, that means that the plaintiff must lodge an appeal before the Court of Appeal.
21. The first step in that process is the filing of a Notice of Appeal.
22. It would appear that the plaintiff missed the boat, so far. He did not file the Notice of Appeal within the time allowed.
23. Currently, the plaintiff is still pursuing his application for extension of time to file the Notice of Appeal and the Record of Appeal. It is not known whether or not the Court of Appeal will grant him the necessary extension of time.
24. If the appellate court rejects the request for an extension of time, that would be the end of the matter.
26. In the circumstances, if this court were to grant an order for stay of execution pending the hearing and determination of appeal, such an order may be speculative, as it is not known whether or not the appeal would be filed.
26. For that reason, the court is unable to grant an order of stay of execution pending the hearing of the plaintiff's appeal as there is no appeal which has been lodged.
27. Secondly, the steps which the defendant has started taking, with a view to selling-off the suit property, are not steps being undertaken to execute the decree.
28. The defendant is taking steps to realize the security. The power to realize the security stems from the instrument of Charge which was registered against the title of the suit property. Therefore, it is a power

which could be exercised without the chargee having to first come to court.

29. The plaintiff wishes to stop the sale of the suit property pending appeal. However, as the sale was not being undertaken as a part of the process of the execution of a Decree emanating from the judgement, the sale cannot be stopped through an order for stay of execution.

30. In the result, the court turns down the plaintiff's request for an order of stay of execution as the grant of such an order would be an act in futility. The court cannot act in vain.

31. Accordingly, the application dated 6<sup>th</sup> September 2016 is dismissed, with costs to the defendant.

**DATED, SIGNED and DELIVERED at NAIROBI this 22<sup>nd</sup> day of May 2017.**

**FRED A. OCHIENG**

**JUDGE**

**Ruling read in open court in the presence of**

*Musyoka for Ochanda for the Plaintiff/Applicant*

*Miss Ngonde for the Defendant/Respondent*

*Collins Odhiambo – Court clerk.*